S. HRG. 106–971

PROPOSED RULE CHANGES TO THE TMDL AND NPDES PERMIT PROGRAMS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON FISHERIES, WILDLIFE, AND WATER

AND THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

TO CONSIDER S. 2417, WATER POLLUTION PROGRAM ENHANCEMENTS ACT OF 2000, AND TO OVERSEE WATER REGULATIONS PROPOSED BY THE ENVIRONMENTAL PROTECTION AGENCY CONCERNING TOTAL MAXIMUM DAILY LOAD (TMDL) LEVELS AND NPDES PERMITS

MARCH 1 AND 23, 2000
MAY 6, 2000—WHITEFIELD, NEW HAMPSHIRE
MAY 18, 2000
JUNE 12, 2000—HOT SPRINGS, ARKANSAS

Printed for the use of the Committee on Environment and Public Works

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ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

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PROPOSED RULE CHANGES TO THE TMDL AND NPDES PERMIT PROGRAMS

WEDNESDAY, MARCH 1, 2000

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON FISHERIES, WILDLIFE, AND DRINKING WATER
Washington, DC.

The subcommittee met, pursuant to notice, at 1:00 p.m., in room 406, Senate Dirksen Building, Hon. Michael D. Crapo (chairman of the subcommittee) presiding.

FEDERAL REVIEW OF TMDL REGULATIONS

Present: Senators Crapo, Thomas, Wyden, and Smith [ex officio].
Also present: Senator Baucus.

OPENING STATEMENT OF HON. MICHAEL D. CRAPO, U.S. SENATOR FROM THE STATE OF IDAHO

Senator CRAPO. The committee will come to order. This is the Senate Committee on Environment and Public Works Subcommittee on Fisheries, Wildlife and Water. The hearing is to consider proposed changes to the TMDL program and the costs and impacts to the States.

I would like to welcome everyone here today, and to tell you about the procedure that we are going to follow. We expect to have three stacked votes called at 2:00 p.m. Wherever we are at that point, we will go into a recess, which could be 45 minutes or so, depending on how long it takes to conduct those votes.

We have with us today as our first witness, Governor Racicot from Montana, who has a time parameter requiring that we move ahead expeditiously with his testimony. He needs to catch an airplane and get back home to his family. And I for one can certainly understand those concerns, Governor Racicot.

So, what I'm going to do is go immediately to you, Governor Racicot and then as other members of the committee arrive we will have them provide their opening statements.

Today the Subcommittee on Fisheries, Wildlife and Water will hear from witnesses on proposed changes to the Total Maximum Daily Load (TMDL) and NPDES programs under the Clean Water Act. This is the first in a series of hearings and we will focus today on the costs and impacts to the States.

We will be joined by a number of distinguished witnesses, including Governor Marc Racicot of Montana, and several top administra-

tors of State agencies and local governments, who will provide their perspectives on EPA's proposed rule, and what it means to States and communities. Cleaning up our Nation's water has long been a top priority of the Federal Government. Everyone supports that goal. I believe that we have made great strides toward this objective, but I believe that there's much left to be done.

This is a goal that can be accomplished only through collaborative efforts and partnerships at the Federal, State and local government level as well as with stakeholders. Similar sentiments were expressed in an EPA document called the October 1999 "Agenda of Regulatory and De-regulatory Actions and Regulatory Plan."

In fact, on the cover of that document is a quote that says, "EPA believes that if the people affected by rules take part in developing them, we will produce rules that are clear, less burdensome and more effective."

Inside the document next to a photograph of Administrator Browner is the quote, "We must inform and involve those who must live with the decisions we make, the communities, the industries, the people of this country."

I couldn't agree more with those two statements. Several years ago I read a book called, *The Community and the Politics of Place*, written by Dan Kemmis, who was I believe at that time, a professor at the University of Montana. I read his book to fit exactly with the perspective that I believe we should follow in pursuing collaborative and local decisionmaking. Policies, particularly those advanced by the Federal Government and those with regulatory implications are doomed to failure without the support of States, communities and stakeholders.

Federal, State and local partnerships are the only means by which we can be successful in carrying out the measures that will result in a healthy environment, whether it's cleaning up our Nation's waters, restoring salmon runs, or conserving America's other precious natural resources.

So I commend EPA for these very strong statements in favor of working together in partnerships that address environmental issues. That said, let me talk a little bit about how EPA's proposed rule changes impact on TMDLs.

Let examine how the words of the Agency and their actions compare.

In November 1996, the EPA convened a committee under the Federal Advisory Committee Act to look at possible TMDL rule changes. The committee was composed of the environmental community, State and local governments and the regulated community. The group met for 18 months and published its findings in July 1998, detailing recommendations on how to make the TMDL program work more effectively.

Since the rule was published last August, EPA has stated that the proposed changes, such as the proposed requirement that the States submit an implementation plan under section 303(d), are simply part of the recommendations of the FACA Committee. However, this very contentious provision in the rule was not resolved in the FACA committee's report. For EPA to cast this provision as

the product of collaborative decisionmaking is to put a selective interpretation on the recommendations.

To compound this problem under the proposed rule, the States Implementation Plan would be subject to EPA approval. It is extremely unlikely that section 303(d) of the Clean Water Act provides the EPA with the authority to require each implementation plans.

Although this may seem like a minor legal issue, in fact, it could potentially hold grave consequences for private landowners across the country. If, for example, the EPA were to reject an implementation plan based on inadequate riparian buffer widths, even if the buffers were State-approved best management practices, EPA would be free to rewrite the implementation plan under the loophole that the Agency has provided itself with the authority to do so by this proposed rule. I believe that this authority is outside of the statutory language provided by Congress in the Clean Water Act.

One of the most disturbing provisions of the proposed August rules is the significant change proposed by EPA to the National Pollution Discharge Elimination System, NPDES. EPA has proposed to change the definition of a non-point source. This change will have the effect of subjecting private land activities, such as traditional agricultural and forestry activities, to Federal NPDES permits.

It is my understanding that this change was never discussed during the FACA deliberations. In reading the proposed rule it doesn't require an economist to conclude that this rule would be very expensive to implement. However, given the universal belief that this proposed rule if implemented would be ruinously expensive to States, local governments and private industry, I'm astounded by this statement in the proposed rule from the Federal Register:

> The EPA has determined that today's proposed rule does not contain a Federal mandate that may result from the expenditures of $100 million or more for State, local and tribal governments in the aggregate or the private sector in any 1 year.

The costs for States, territories and tribes are not expected to exceed $25 million in any 1 year. And today's proposal does not impose any requirements on the private sector. Let me read that again. ''Today's proposal does not impose any requirements on the private sector.'' I believe we'll hear more about that from our witnesses today. I'm very concerned that this type of statement has come from an Agency that has promised, ''To produce rules that are clear, less burdensome and more effective.'' I'm concerned that this type of statement is designed to avoid the safeguards Congress built into the law and feed the growing cynicism toward their government.

When the rule was published in August of last year the EPA provided a 60-day comment period for receiving public input. Given the scope and complexity of the rule, the significance of the changes and the array of parties that would be affected, a 60-day comment period was wholly inadequate for providing meaningful input with respect to the proposal. It was hardly informing and involving those who must live with the decisions. After EPA denied requests to extend the comment period this committee through its

past chairman and ranking member was forced to intervene. The comment period was subsequently also extended legislatively.

By the close of the comment period on January 20, the EPA had received 30,000 comments. This hearing marks the fifth occasion that a committee or subcommittee has seen fit to examine the numerous and significant changes that this TMDL proposal subjects us to. In my 7 years in Congress I've never seen one proposal draw this level of attention and scrutiny by committees with different jurisdictions.

Let me just quickly recount this history. Provisions were included in the proposed rule that were not a part of the FACA committee's recommendations. Yet the EPA continues to claim that the rule is based on this group's report. States, communities and stakeholders have voiced their strong concerns about the cost of the proposed rule. Congress was forced to intervene and legislatively extend the comment period for an additional 90 days. Thirty thousand comments were received on the rule, many of which expressed concern from both technical and legal perspectives.

To date this is the fifth hearing to be held on the proposed rule in other committees. The mere fact that these hearings have been held suggest to me that there is significant concern in Congress about this proposed rule. Given these facts I understand that the EPA still intends to issue a final rule as early as June. I find this extremely disturbing. This suggests to me that this rule is being fast tracked in the face of overwhelming concern from States, communities and stakeholders. And even other departments within this administration. And ironically enough this is the same agency that says it wants to work with the people affected by the rules in order to produce clear, less burdensome and more affective rules.

I look forward to hearing from the EPA about how it truly intends to engage all parties affected by this rule, rather than paying lip service to a concept of collaboration. I look forward to hearing our other panelists address how these issues affect them and how we might move forward in finding a more workable rule that achieves the important goal of cleaning up our Nation's waters.

Senator Wyden, before you came in we noted that Governor Racicot needs to catch an airplane and I was wondering if the other members would hold on their opening statements and let the Governor go first or do you have a statement that you would like to make at this time?

Senator WYDEN. If you wouldn't mind Mr. Chairman, and I want to hear the Governor as well, if I could just have a couple of quick minutes because my schedule is jammed.

Senator CRAPO. Certainly. I suspected that might be the case. So, if you could just understand the Governor's time constraints we'd appreciate it.

OPENING STATEMENT OF HON. RON WYDEN, U.S. SENATOR FROM THE STATE OF OREGON

Senator WYDEN. I'm going to be brief. I appreciate your holding the hearing. I just want to outline very briefly my concerns with EPA's approach and then suggest a constructive alternative. I know the Governor has been interested as my Governor has as

well, John Kitzhaber, looking at some different kinds of approaches. And I'll be brief.

My problem with EPA's approach to TMDL is that essentially what EPA is saying is that marine water flowing through a forest or a farmer's field can't be monitored and it shouldn't be regulated the same way as point sources, as pollution from factories. Calling forestry activities, such as harvesting, a point source is like requiring every cow on a ranch to get a pollution permit. It's just not going to work. The States have taken a different approach. The best management practices approach provides guidelines to conduct forestry in an environmentally friendly manner. I like that it essentially gives us a chance, especially in the West, to come up with homegrown, locally driven approaches. You don't say what works in eastern Oregon is going to work in Kansas or that what works in one part of the country is going to work in the West.

The other problem I have in Oregon, is that many of the streams which would be subject to EPA's new TMDL rules are already struggling with the legal requirements from the Endangered Species Act. So, I'm also troubled by the fact that EPA doesn't take steps to coordinate these various requirements. I'd like to suggest, and I'd like your comment, Governor, a more workable framework from managing non-point pollution that would be scientifically and legally defensible and would provide the benefits for the Endangered Species Act while minimizing the burdens on landowners.

Here's what I'd like to see us look at as an alternative to what EPA is talking about.

First, we develop a one-stop-shopping approach for the landowners so that they could fulfil their Clean Water Act and Endangered Species obligations at the same time. I'd like to see the agencies collaborate so that a landowner can use the same land management plan to qualify for a Habitat Conservation Plan and TMDL. It just seems to me that if we can coordinate these two permits, time and money can be saved.

Second, I'd like to see increased funding for the BMP program to control non-point pollution. This is something we do at the State level.

Third, we're going to need some more flexibility in the TMDL plans so that scientist can look at how the best management practices actually work, in particular places where plans are being rewritten. Please comment on those ideas. I want you to know that we're very troubled at home about the way that TMDL approach is being used and we know that you and a number of Governors have looked at innovative approaches. If we were to do nothing, other than to develop a one-stop-shopping approach for the landowner so that they could fulfill their Clean Water Act and Endangered Species obligations at the same time, I think that would start us down the direction of a constructive alternative. I know your schedule is tight. I'm going to put my statement into the record and I would very much like to hear your thoughts on that. Thank you, Mr. Chairman.

[The prepared statement of Senator Wyden follows:]

STATEMENT OF HON. RON WYDEN, U.S. SENATOR FROM THE STATE OF OREGON

Rainwater flowing through a forest or farmer's field can't be monitored and shouldn't be regulated the same way as point sources—pollution from factories. Calling forestry activities like harvesting a point source is like requiring every cow on a ranch to get a pollution permit—it simply won't work.

That's why we use Best Management Practices—guidelines for how to conduct forestry in the most environmentally friendly manner possible. And these BMPs have to be worked out on a local level. The solutions that work for a watershed in western Oregon will not work for one in eastern Oregon, and certainly not for one in Kansas. Local people need to be involved, which happens best through state-run incentive-based programs rather than the kind of top-down Federal mandates implied in these proposed rules

In Oregon, many of the streams which would be subject to EPA's new TMDL rules contain endangered fish, and landowners are already struggling with the legal requirements of the Endangered Species Act, so doesn't it make sense that these requirements be coordinated?

I'd like to suggest a more workable framework for managing non-point pollution, one which will be more scientifically and legally defensible, and will provide environmental benefits for endangered species and water quality while minimizing the burden on landowners. My approach would involve: developing a one-stop shopping approach for landowners, so that they can fulfill their Clean Water Act and Endangered Species Act obligations at the same time. I'd like to see the agencies coordinate so that a landowner can use the same land management plan to qualify for a Habitat Conservation Plan and a TMDL plan; increased funding for the use of Best Management Practices to control non-point pollution; and allowing flexibility in TMDL plans, so that as scientists study how Best Management Practices are actually working in a particular place the plan can be rewritten.

Senator CRAPO. Thank you very much, Senator Wyden. We appreciate your brevity in the light of the Governor's time constraints. We now have the Senator from Montana here who would like to take a quick opportunity to introduce the Governor for his remarks, Senator Baucus.

OPENING STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Thank you, Mr. Chairman, it would be an honor to introduce our Governor. He's done a great job in our State. Governor when you speak on what Senator Wyden said, let me also say that the goals of the Clean Water Act are very important. In the 1972 Clean Water Act, the goals fishable and swimmable waters are stated. We've made a lot of progress in our country since the Act was passed. It's been with some difficulty, but we have a good bit left to do. I'd be interested in your general thoughts on how we get there. Passing technology standards is pretty easy. The hard part is getting some kind of ambient watershed plan put together that includes point and non-point sources. As we have for the air programs, we have State Implementation Plans, as you well know, for ambient air. I think it makes sense to do something similar for water. The question is how? It's pretty complicated; what do you think the States' role should be and whether the SIPs in the Clean Air Act are any guide or not. Is this just too different or is it similar?

We both agree that EPA's action with respect silviculture practices is off-base and you might want to comment a bit on that. And finally a question in my mind is the degree to which the State of Montana have pretty well worked out an agreement with EPA that the State can live with. They can abide by the provisions of the agreement worked out with EPA, but then occurred a court deci-

sion which said that they have got to be more comprehensive. The decision was arbitrary, and capricious.

So, how much did the court interpret the law? How much of it otherwise, concerning EPA's actions, made sense from the State of Montana's point of view prior to the court's decision. And given the court decision interpreting the law, they interpreted the 1972 Act, how do we get to there in a responsible way?

Thank you.

Senator CRAPO. Thank you, Senator. And, Governor, without any further ado we will turn to you for your testimony.

STATEMENT OF HON. MARC RACICOT, GOVERNOR, STATE OF MONTANA

Governor RACICOT. Thank you, Mr. Chairman. It's a privilege to be here in front of the committee, and particularly with Montana's senior Senator here today, I'm delighted to have the opportunity to testify.

Senator BAUCUS. I appreciate that. I feel pretty senior sometimes. I guess I'm a senior citizen.

Governor RACICOT. I said "Senior Senator."

Senator BAUCUS. It was my ears that heard senior citizen.

Governor RACICOT. If I misspoke I extend my deepest regrets.

Senator BAUCUS. You clearly did not misspeak. I misheard.

Governor RACICOT. For the record my name is Marc Racicot and I temporarily serve as the Governor of the State of Montana and I do appreciate the invitation to share my thoughts regarding the Clean Water Act and specifically the Total Maximum Daily Load issues. As you know I have submitted written testimony and I won't go over every word of that testimony. I'd like to highlight a couple of provisions and I know you want to have some dialog about this particular issue.

It is an issue that is of great importance to our State. Both to our people and of course to the resources that we jointly cherish in the State of Montana and all across the country. We're pleased that the committee is taking an active role in reviewing the Environmental Protection Agency proposed revisions to agencies to the water quality regulations found at 40 CFR 130. And published in the Federal Register on August 23, 1999. Before I begin I want to mention to the subcommittee members that I've also attached to my testimony the formal comments that I submitted on behalf of the State of Montana to EPA on the proposed rule.

Our State natural resource agencies all work together, that was their charge, to analyze the proposed rule and to develop consensus comments that are attached to my testimony. So they reflect different disciplinary perspectives from the Department of Environmental Quality, from the Department of Natural Resources and Conservation and the Department of Fish, Wildlife and Parks, and Department of Agriculture.

The State of Montana is very committed to achieving the clean water goals set forth in section 303 of the Clean Water Act. And this is especially demonstrated I believe through our 1997 passage of State legislation pertaining to Total Maximum Daily Load processes.

Our TMDL amendments to the Montana Water Quality Act that occurred in 1997 successfully addressed many of the same issues that we're now focusing upon as a result of the EPA's proposed rules. Our comprehensive State law establishes 303(d) listing methodologies and criteria. It specifies a public involvement in plan. It sets a 10-year schedule for statewide TMDL development. It address TMDL implementation and monitoring and it authorizes pollution offsets. As well our State TMDL program funding appropriation provides new State revenues for accelerated water and quality problem solving.

Indeed, we are currently achieving at the State level what EPA hopes to accomplish nationally with the proposed rules. EPA's presumptions that solutions to longstanding national TMDL issues must be prescribed within the context of new Federal regulations is at the core of Montana's concerns over the proposals. We fear that the program changes envisioned by EPA will add unnecessary and inappropriate specificity that will ultimately hinder the success of our current program.

The proposed changes could seriously compromise our State program goals and strategy, undermine recent intense implementation efforts and public trust and reduce our overall progress of achieving the water quality restoration goals of the Federal Clean Water Act.

Mr. Chairman, I'd like to mention briefly the process which led up to the enactment of our State law because I do believe that there are some lessons that are good to share with all who may be engaged in this process presently. And I must confess that we are very proud of what we have accomplished to date in the State of Montana.

We started a dialog late in 1996 between Montana natural resource agencies, businesses and industries and conservation groups to gauge interest in developing State TMDL legislation which would address the concerns that are addressed by the rule. A briefing paper was developed and distributed in a broad range of interests were invited to participate on a work group to draft legislation.

Over several weeks the group met regularly to revise drafts of the bill and to try to achieve consensus on bill content. While complete agreement was not achieved prior to the deadline for submitting the bill, remarkable progress was made in coming together on many of the issues and this effort paid off in strong support for passage of the bill in both houses of Montana's legislature and few amendments were ever offered during the legislative process. House bill 536 was the piece of legislation and it was passed into law in the State of Montana and it became immediately affective with my signature on May 5, 1997.

Funding totaled nearly $1.4 million for the biennium and that also was provided for by the Montana legislature. At the heart of our program is the TMDL advisory council. The council is made up of representatives from agriculture, industry, environmental groups, State and Federal agencies and recreationists. And the group provides input and advice to State decisionmakers and professional staff and helps insure that the development and implementation of measures to improve water quality are truly grassroots approaches.

We believe that those landowners and users who are asked to host and support on-the-ground measures should have a say in their development. Although EPA's standard objective in developing the proposed rules was to strengthening the efficiency and effectiveness of the Clean Water Acts TMDL program, the rule is too little to accomplish this objective. Instead, the new regulations would add unnecessary complexity to Montana's ability to develop TMDLs in a timely fashion. The new regulations appear to focus on listkeeping and technical reporting to EPA rather than effective assessment, implementation and resolution of water quality problems. The rules also create a regulatory framework that is inherently inconsistent with section 303(d) of the Clean Water Act.

Specifically, the rules create a presumption that a States entire TMDL program, including its process and methodology of identifying impaired waters, prioritizing those waters, developing TMDLs for those waters and addressing non-point sources in its TMDL process are all subject to EPA's approval.

In effect the rules provide EPA with a legal power over a States entire TMDL program. This is not a power, in my view, envisioned by Congress when it granted EPA a limited oversight role to review a State's submission of lists and TMDLs under section 303(d).

The State of Montana also objects to the imposition of regulations establishing regulatory requirements over every component of the States TMDL program when Congress has not sanctioned that approach.

One of the primary drawbacks of EPA's proposed regulations is that they impose numerous regulatory details to address prior inefficiencies in TMDL development that have already been addressed by many States. Montana has already accomplished what EPA is attempting to achieve through the proposed rules. Montana is already more than 2 years into the process of making comprehensive changes to its 303(d) listing methodology and creating a publicly supported approach to the development of TMDLs.

We have a TMDL development schedule, new listing methods and decision criteria, and a new publicly accessible data base to support listing decisions, a new TMDL prioritization process, and we've been working with local groups to ensure that TMDLs would be implemented over the long term with reasonable assurance.

Also, Montana's monitoring provisions require that after 5 years, TMDL plans will be evaluated to determine if the implementing organizations are making satisfactory process. And while we recognize the need for consistent guidance to States and the public regarding TMDLs, the new regulations do not give those States already implementing programs of their own, enough latitude to determine appropriate management measures, especially for land use related non-point source problems.

In its finalization of the rules, we believe the EPA has to acknowledge that Montana and many other States have already developed processes, methods and approaches to meet court, legislative or State ordered demands for the existing TMDL programs.

In many cases EPA's proposed new substantive rules might be disruptive and expensive to States that have already developed effective TMDL programs endorsed by stakeholders and elected offi-

cials. This issue is at the forefront of Montana's concerns with the rules as they're currently proposed.

The existing processes and approaches that meet court decrees and/or provide positive and beneficial results should not be compromised or superseded by these new rules. At the same time States should be encouraged to be innovative in developing new processes and approaches that achieve the results envisioned by those rules in a more efficient manner.

And with those things in mind, the State of Montana would encourage EPA to apply a functional equivalency test to State TMDL programs prior to imposition of any new program requirements. The test will provide a demonstration that a State process, method or approach achieves the same desired results intended to be achieved by the proposed rules.

Now numerous examples of these cases including how States prioritize their lists, incentives that States have built into their programs to achieve correction of impaired condition in lieu of a TMDL, and a recognition of various approaches to implementing TMDLs.

Frankly, Mr. Chairman, we strongly believe EPA must recognize that one-size-does-not-fit-all and that TMDL rules must remain open to alternative methods of doing business that achieve comparable results. We're also seriously concerned about the fiscal implications of the proposed changes. By all indications the proposed program and it's increased scientific rigor and reporting burden would cost substantially more to administer while achieving fewer water quality improvement results.

The State of Montana operates its current TMDL program on a limited budget, but achieves a high degree of efficiency through local leadership and volunteerism to be quite honest. And by minimizing administrative overhead cost, increasing program administrative cost would translate directly to less money available for local on the ground implementation of water quality improvement measures.

We are very concerned that the new TMDL rules would result in significant additional costs to States over the current law. According to EPA's water quality work load model, Montana currently has minimal resources to run a TMDL program under the rules as they now stand. Currently our Department of Environmental Quality has 13 full-time employees committed to water quality standards activities. Including monitoring, reporting and TMDL activities with a budget of about $1.35 million. EPA's water quality work load model, the draft module 2 when calibrated to Montana's perimeters suggested 58 full-time employees and a total budget of $4.9 million would be needed to implement TMDLs on a time-line under the rules as they now stand.

It follows then that the new and more complicated rules proposed by EPA would set back the staff and then slowly and unduly slow down the TMDL process unless additional resources were obtained. In addition to that the new rules undo much of the work and fiscal investments already put in to Montana's current TMDL program. By our most conservative estimate DEQ would need at least twice the current resources to comply with the proposed rules in a timely fashion.

Our best guess is that between 22 and 24 additional full-time employees, over the 13.5 currently employed, would be needed to comply with the new TMDL rules along with several tens of thousands of dollars in new equipment.

For the new rules to be successful in achieving national clean water goals they have to accommodate a degree of flexibility on the part of the States that are charged with primary responsibility to implement the program. They have to acknowledge that individual States are in the best position to formulate the most effective and efficient water quality improvement strategies for their regions.

We just believe, Mr. Chairman, that the top-down prescriptive complexion of the rules is contrary to the Clean Water Act and contrary to Montana's grassroots approach to TMDL development. Last, but no less important, EPA, we believe, has to remain sensitive to the need for additional State resources if national clean water goals are going to be further expanded. And so we have submitted to you along with our written testimony a number of recommendations concerning the proposed rule with the specific considerations that we hope that you will ultimately be able to recommend and ultimately that we hope to see implemented within the policy for TMDL enforcement across the United States of America.

Thank you, Mr. Chairman very much, and I stand ready to submit myself to cross examination.

Senator CRAPO. Thank you very much, Governor.

Before we begin let me clarify, is it going to fit with your schedule and time lines if we have you finished here by a quarter to 2?

Governor RACICOT. Yes, Sir.

Senator CRAPO. All right, that gives us 5 minutes each.

Governor RACICOT. Actually, Mr. Chairman, I'm probably OK if I'm out of here by 5 or 10 after. I'd probably be OK.

Senator CRAPO. OK. Well, you shouldn't have said that. Now you're going to get really cross-examined.

Governor, I just want to go over my understanding of your testimony and be sure that I understood you correctly. As I reviewed your testimony and listened to you I understood you to say that the proposed rule will, if implemented and if Montana is required to comply with it, will not increase the effectiveness of Montana's efforts to address water quality standards. Is that correct?

Governor RACICOT. Yes, Sir, that would be my testimony. We believe that—we started out trying to exercise some foresight and trying to demonstrate the kind of unique as well as a sincere effort to make certain that we live within the confines, the spirit and the letter of the law and so we set out in 1996 to do that. We don't invest money easily in the State of Montana. We don't have a lot of extra resources. So for our legislature to not only endorse our program, and this was a very conservative legislature, but we had the endorsement of conservation groups and stock growers and agency officials and all of those involved in the process, for them to endorse the legislation in the first place and then to fund it at a significant level, was a major accomplishment. And so we've been proceeding with diligence and good faith to try and make certain that we live within the expectations of the Clean Water Act.

And we don't believe that the imposition of a hierarchical structure that requires much more investment and time will lead to results beyond those that we can achieve. And as a guarantee of that, what we would suggest is that if the EPA doesn't find that our program is a functional equivalent, then they could clearly make those

observations and provide authority or a jurisdiction to proceed otherwise.

Senator CRAPO. If you are not able to find the additional resources that you describe that would be necessary to implement this rule, won't you then end up having to divert resources from the program that you have in place to the implementation of the rule?

Governor RACICOT. There's unquestionably no doubt about that.

Senator CRAPO. And if that were to happen, would that not actually detract from your ability to have on-the-ground effective water quality programs?

Governor RACICOT. We believe it would impede and delay our process substantially.

Senator CRAPO. In other words unless Montana is able to come up with 22 to 24 FTE's and I assume the dollars that go along with that which is going to be $3 to $5 million, if I understand your numbers right—am I in the ballpark there?

Governor RACICOT. Yes, sir.

Senator CRAPO. Unless you're able to come up with those extra dollars, this proposed rule could actually drain resources that would reduce the ability to address water quality in Montana?

Governor RACICOT. We believe that to be the case.

Senator CRAPO. Let's get into those numbers just a little bit more specifically. I know in your testimony you indicated I think 58 FTE's and $4.9 million, but did that include what you were already doing in the State efforts?

Governor Racicot. No. No, our extrapolation is that if we were to calibrate the EPA proposed rule to our requirements in the State of Montana, recognizing of course how large it is, and with all the new complexities that would be associated with rule enforcement, that, in fact, we would have to have that much additional investment.

Senator CRAPO. And you indicated and you have very well explained the effort that Montana has gone through to modernize and update its approach to TMDLs and to address the Clean Water Act standards. Do you know whether other States have undergone this same process or whether Montana is in a unique situation and the other 49 States need the EPA to come in and do this?

Governor RACICOT. I know that there are other States, Mr. Chairman, but I could not list those for you. But I know that there are other States in the same posture that the State of Montana is in.

Senator CRAPO. All right, thank you very much. I'm going to forgo any further questions at this point and turn next to Senator Wyden.

Senator WYDEN. Thank you.

I think you've given excellent testimony. Governor, it seems to me you essentially made most of the points that I'd like to see in a three-part approach: one-stop shopping for landowners so they can fulfil their Clean Water Act and Endangered Species obligation at the same time; increased funding for the practice used by the States; and best management practices for non-point pollution. And more flexibility in TMDL plans.

If I push as a member of this committee with my friends Max Baucus and Mike Crapo, on a bipartisan basis, to offer these three points as an alternative to the way EPA's doing business, is that something that you think you could support?

Governor RACICOT. Yes, Sir. I do, Senator Wyden.

Senator WYDEN. I probably ought to quit while I'm ahead, Mr. Chairman. I think the Governor's given excellent testimony.

Governor, as you know, in the West we particularly look to you and our Governor John Kitzhaber for leadership in this area. What we have seen—and the three of us were involved in the effort on ESA—is that we've got to have a system that gets away from this "one-size-fits-all" approach. What we're trying to do with the Oregon Coho salmon plan, what you're trying to do with ESA, alternatives, is to say, "We're going to get one of these decisions out of the Beltway and take them 3,000 miles from Washington, DC or 2,500, as it is I guess for you and Max and maybe another few hundred for us and come up with homegrown, locally driven solutions. So I really appreciate the work that you're doing. I really see you and Governor Kitzhaber of our State as the bipartisan innovators in this area and I'm going to try to get together with Mike and Max and really offer this three-part approach as an alternative to what EPA is talking about in terms of TMDL, and we would just like your input. And I thank you just for excellent testimony and for all the leadership that you offer.

Thank you, Mr. Chairman.

Senator CRAPO. Thank you, Senator.

Senator Baucus.

Senator BAUCUS. Thank you, Mr. Chairman.

Marc, first of all I want to thank you for your work on the Endangered Species Act. I've been trumpeting reform for a long time. And as you know this committee passed the reform bill not long ago addressed by the Western Governors. I think you were part of it then. Didn't make it to the floor, but we're still trying.

Second, thank you for your work on the Good Samaritan legislation that Senator Campbell and I are pushing. I think that's going to make a dent too, it will help. Back to the issue at hand, though.

This committee needs some guidance, frankly, as to what to do about TMDLs. As you know various courts around the country—I think 17 courts in all—have ruled that States work with EPA in developing TMDLs does not pass muster under the Clean Water Act.

And the same thing happened in our State. Judge Malloy said that the State of Montana's 1977 statute in effect just didn't pass muster. And so clearly States are trying to figure out what to do. The EPA is trying to figure out what to do. The EPA passed regulations, I think they issued them August of last year, about the time of Judge Malloy's decision. There's a certain sense, kind of two ships passed in the middle of the night there. I appreciate our States' concerns, but the fact is there is a Federal statute and courts have unanimously interpreted the Federal statute about the same way, namely, State efforts in conjunction with EPA on this issue have been inadequate. So we're faced with a challenge here on how we're going to deal with all this.

So I'm asking for some help. Your people have read Judge Malloy's decision. I grant you I've looked at some of the relevant parts; there's not a lot of guidance there as to what passes muster in that court and what won't. And clearly the EPA is trying to read these decisions to come up with its own. And that's probably why EPA came up with its August 1999 proposed rules. They're trying to do the best they can, as all States are.

So, what more do you think States have to do to meet Judge Malloy's decision in Montana? Is that about right, or do you think the courts are too stringent and we have to change the law? I just want to see some guidance as to what to do here. I can also then talk to EPA if the law doesn't have to be changed then I need some guidance in talking to EPA as to what the proper rule should be.

Governor RACICOT. Well, Senator Baucus, I would agree with you that there is a substantial challenge to interpreting the courts' decisions with absolute precision and to understand precisely the directions they have been given because I don't think that there were precise directions given on how to go about accomplishing the objective. We believe, of course, that if there was a substantial equivalency test that were applied to the law or the rule, that said that any State's program is the equivalent of the EPA rule would not have to engage in the processes that are specified by EPA. In other words, if you have primacy in relationship to this particular issue and your program is substantially equivalent to the EPA rule in terms of achieving the required results, just as long as you get to those results and not necessarily through the same precise formula, that EPA might specify with its rules, that that would be a great benefit and assistance.

In addition to that, we believe within the Western Governors Association that through a discussion between the Congress and the Western Governors we could craft the kind of counsel and recommendation to this committee that would be of assistance to the committee in crafting a final legislative proposal if in fact you chose to move in that direction.

Senator BAUCUS. But presumably "substantially equivalent" would be stronger than Montana law because the judge overruled the Montana law. He said the Montana law did not comply with the Clean Water Act. EPA is also looking at other court decisions and trying to figure out what to do. You're suggesting that whatever it is, States should be able to enact something that is substantially equivalent. That means that it would have to be stronger than current Montana law.

Governor RACICOT. In some respects. We believe it's obviously a great deal more specific in terms of desired and required results. And we believe that we can comply with those required results as long as we don't end up in a process that is so expensive and so time-consuming that we lose the ability to marshall all of those assets that we've had in the process from the beginning.

Senator BAUCUS. It's a question we're going to have to explore with the EPA when they come up as later witnesses. But to me this is the crux of the matter.

Governor RACICOT. I would agree. I think that's right.

Senator BAUCUS. Thank you.

Senator CRAPO. Thank you, Senator.

Governor, just another couple of quick questions.

EPA's budget includes $95 million for addressing non-point source pollution, including establishing and implementing this TMDL rule and dealing with BMPs and CAFOs and that amounts to about $2 million per State. My question to you is, if you have an opinion on that, is that sufficient for the States to carry out all of these programs?

Governor RACICOT. No. This is a massive new assignment for the States and that is not going to be sufficient for all of the States to undertake all the requirements that are specified.

Senator CRAPO. Thank you. And just one other question. I believe in your testimony you also indicated that you had concern with what appears to be the presumption behind the proposed TMDL rule, that the EPA has the ability to subject the States to its approval for their implementation and basically establish oversight over the States in their implementation of the TMDL requirements in the Clean Water Act. Could you elaborate on that a little bit?

Governor RACICOT. Well, it's just my belief that in the Clean Water Act, Congress hasn't authorized that kind of role to be played; and if that's the case, it needs to be specifically and precisely accomplished by Congress.

Senator CRAPO. Thank you very much.

Senator BAUCUS. One question.

Senator CRAPO. Senator Baucus.

Senator BAUCUS. Comment, please, on the Administration's proposal to appeal the current exclusion for silviculture activities which potentially treat many forestry practices as point sources rather than non-point sources, what effect is that going to have?

Governor RACICOT. Senator, I'm not familiar with that. I'm not certain that I can address that.

Senator BAUCUS. I think it's not a good idea what EPA did.

Governor RACICOT. I'll accept that as my work assignment and report back to you.

Senator BAUCUS. Good, thanks.

Senator CRAPO. Senator Wyden, do you have anything further?

Senator WYDEN. No, I just think that what the three of us are saying on a bipartisan basis is that we're not just going to say EPA is wrong, but we're going to work with Governors and innovators like you to come up with an alternative and that's why I wanted to suggest this three-part approach. And I think our colleagues may have other ideas and we're going to get after it. I mean, it's one thing to say you disagree with something, it's another in effect to put up an alternative.

Governor RACICOT. We would agree. We did not believe the EPA is just flat wrong in every respect either. That's why we assumed the responsibility before they even issued the order.

Senator CRAPO. Thank you very much, and Governor, we are very pleased with your testimony. In addition to identifying the concerns you have proposed solutions and we appreciate that very much. I echo the comments that have already been made with regard to your work on the Endangered Species Act. As you know, we've talked and we're going to be continuing that effort to try to bring some common sense into this process of trying to address environmental concerns in a way that helps us move forward rather

than to engage in conflict. And with that we're not going to take you up on your gracious offer to keep you here all the way until 2 o'clock or a little later and we will excuse you, you can get on your way back to your home.

Governor RACICOT. Thank you, Mr. Chairman, very much.

Senator CRAPO. Thank you.

Our next panel will be Mr. Chuck Fox, the Assistant Administrator for Water at the Environmental Protection Agency.

Mr. Fox.

STATEMENT OF J. CHARLES FOX, ASSISTANT ADMINISTRATOR FOR WATER, ENVIRONMENTAL PROTECTION AGENCY

Mr. FOX. Mr. Chairman, it's a pleasure to be here and I see that my presence has brought two other distinguished Senators. It's a pleasure that they joined us here.

Senator CRAPO. Bringing in the big guns I guess.

Mr. FOX. Well, I do look forward to briefly summarizing my written statement. You raised a number of issues in your opening statement that I'd be happy to talk some more about in the questions and answers. I think we all know that we have made tremendous progress since the Clean Water Act was first passed by Congress in 1972, and by this committee, I would add.

Our water is much cleaner today thanks to a team effort by Federal, State and local governments working with industries, and individual stewards of the land, such as farmers, ranchers and forest managers.

But that does not mean that all the problems have been solved. An overwhelming majority of Americans—218 million—still live within 10 miles of a polluted water body. Over 20,000 water bodies do not meet water quality standards. We still have major work to do. And as you know the Clean Water Act provides us with a cooperative intergovernmental process for identifying and solving remaining water pollution problems, called the TMDL program or the Total Maximum Daily Load. A TMDL is a pollution budget for a specific river, lake or stream. It is a quantitative estimate of what it takes to achieve water quality goals. It is a program that is led by the States and communities because they're in the best position to make cost-effective common sense decisions about how to best achieve their water quality goals.

Recent history suggests that the quantitative approach to defining a problem and the bottoms up approach involving local decisionmaking will, in fact, achieve significant results. In the late 1970's the Great Lakes were in tremendous danger. In response the United States and Canada developed quantitative pollution targets just like the TMDL program.

These numeric targets were included in the Great Lakes Water Quality agreement that was signed by the United States and Canada in the 1970's. That agreement laid the foundation for the restoration of Lake Erie and all of the Great Lakes. Similar efforts form the foundation of the Chesapeake Bay and Long Island Sound restoration efforts. In fact, the three Chesapeake Bay States are having tremendous success using numeric targets to guide a host of voluntary and regulatory pollution control programs.

The existing TMDL program regulations were first developed during the Reagan administration and they lay out the basic process for implementing the TMDL program. As you know EPA has proposed revisions to the existing program requirements. EPA's new proposal was many years in development. Three years ago we convened an advisory committee to take an overall look at the program and to recommend needed changes. It was a diverse group. They didn't agree on everything, but their recommendations formed the basis for many of the changes to the program proposed by EPA this summer.

The public comment period recently closed and we are now in the process of reviewing comments and finalizing the rule. You can trust that we will do our best to incorporate many of the ideas that we have heard, including some of those we've heard today so that we can produce a program that best serves the interests of the American public.

I look forward to discussing with you and members of the committee these changes in more detail. But let me say this, the proposal was intended to honor and reflect what makes this program so affective to begin with. Namely, it is one led by States and communities from the ground up to solve water quality programs in common sense ways. If we did not succeed in achieving that goal with our proposal then we need to change it as we finalize it.

Let me tell you briefly what the proposal does not do because I know this has been the attention of a good deal of criticism. The proposal does not require a Clean Water Act permit for non-point sources of pollution. It does not require Clean Water Act permit for the vast majority of silvicultural discharges. It does not create a program out of Washington, DC.

Indeed, the program allows States to set their own water quality goals and develop their own strategies to meet them.

On the issue of funding, which was a subject of good deal discussion before me in our fiscal year 2001 budget, the Administration has provided significant new funds to help the States meet these new challenges. We have increased the States grants by $45 million for TMDL development. We've also increased non-point source grants by $50 million. This compliments additional funds that have been provided by other Federal agencies, such as the Department of Agriculture.

In closing, Mr. Chairman, the Clean Water Act set an ambitious goal of fishable and swimmable waters for all Americans. Some thought it impossible, but now it is within our reach. Together we've accomplished so much. We have the resources. We know what works, now let's finish the job.

Thank you very much.

Senator CRAPO. Thank you very much, Mr. Fox.

I'm going to turn to the chairman of the committee for the first round of questions.

OPENING STATEMENT OF HON. BOB SMITH, U.S. SENATOR FROM THE STATE OF NEW HAMPSHIRE

Senator SMITH. Thank you, Mr. Chairman.

[The prepared statement of Senator Smith follows:]

STATEMENT OF HON. BOB SMITH, U.S. SENATOR FROM THE STATE OF NEW HAMPSHIRE

Good afternoon. I would like to thank Senator Crapo for his leadership on this issue and for holding today's hearing on the proposed rulemaking by the Environmental Protection Agency on Total Maximum Daily Loads (TMDLs).

I believe that I'm not overstating it when I say that this may be one of the most significant environmental regulations that this committee will address in the next decade. It is certainly an issue of vital importance to New Hampshire.

New Hampshire is referred to by many as the "Mother of Rivers," because five of the great streams of New England originate in its granite hills. We have 1300 lakes and 40,000 miles of rivers and streams that provide year-round fishing and recreation in scenic surroundings, as well as power for the State's many industries. New Hampshire also has about 1,600 certified tree farms covering approximately 850,000 acres of land.

It is very important to me as a Senator of New Hampshire and Chairman of this committee that we make sure we protect both our natural resources for future generations and our businesses with sound scientifically based environmental programs.

The Clean Water Act has been one of our most successful environmental statutes. Over the last 28 years, we have successfully identified and cleaned up many of the waters across the United States. We have achieved that partially through Federal regulations and permits, but also through State programs and partnerships with industries and private land owners. We've made a lot of progress, but that doesn't mean that we can't do more, particularly in the area of nonpoint source pollution. I believe, however, that we achieve better results if we work with the States and landowners, instead of against them, as EPA has done.

There are three main concerns that I have with this proposal.

First, we have seen great success with State and voluntary programs. We need to make sure that this proposal will in no way impede on their progress or create any unnecessary duplication.

Second, we must make sure that any TMDL program is based on sound science. The GAO recently released a summary of a report that demonstrates that States don't have the data they need to implement TMDLs. In fact, only 6 of 50 States said they have a majority of the data needed to fully assess their waters. Without quality data we cannot implement this program.

Third, everyone other than EPA, predicts this proposal will have a massive financial and resource impact on the States and private sector. We need to have a firm understanding of the cost of this proposal prior to implementation.

And finally, a procedural point. EPA received over 30,000 public comments on its proposed rule. In addition, several House and Senate committees are holding hearings on this issue to better understand the proposal. It is my hope that EPA will consider seriously the written comments of all stakeholders and the concerns of the various individuals who are testifying at these hearings before it finalizes any rule. This is too important an issue to rush to finalize a rule for no reason.

I look forward to hearing from all the witnesses and hopefully we can shed some light on what many feel to be a very confusing and troublesome proposed rule.

Senator SMITH. Mr. Fox, your comments in your opening remarks regarding TMDLs were very consistent with what Administrator Browner said a few days ago sitting in the same chair, that EPA would give credit to those States that have developed best management practices for activities such as logging. Now, my concern though is that notwithstanding your statements and Administrator Browner's statement, there is a conflicting message out there in the field and I pointed that out to Administrator Browner as well. Let me give you an example of that. A quote from Marie Eri, the former Chief of Northern California section of EPA's Region IX:

> We do expect implementation of non-point source TMDLs. Our regulations require the California Water Quality Control Board at some point to take that Federal TMDL and incorporate it into your basin plan. Now, what we do to get you to do that through all sorts of nasty little tricks with grants and such, I don't know. But it's not a place I want to go and I'm sure it's not a place you want to go.

My question is: What's the policy? [Indicating document] Is it this policy, or is it what you're saying here at the table? And this

is a real problem with me, because my credibility as the chairman of the full committee I speak for myself, but you can't operate in good faith with that kind of inconsistency. I mean the reality is that people, the foresters and the farmers, and those people who deal with non-point source point pollution as well as the States, when they hear that—and that's what they are hearing—it's pretty difficult to understand just what is going on. That's the source of the problem.

Mr. FOX. Well, Senator, I don't know that individual, never met that individual. I can tell you——

Senator SMITH. It doesn't matter if you know them or not.

Mr. FOX. But my point is what's in the proposal. I will stand by my testimony today and that of the Administrator. This is a proposal that does not include any new regulations for non-point source pollution. It is a program that we have designed to be led by State and local governments so that they can decide how to best solve these problems.

Is it true that non-point source pollution is a problem in this country, that we need to do a better job of controlling it? Absolutely.

Senator SMITH. Sure, I agree with you.

Mr. FOX. But the intent of our proposal is to give deference to State and local governments and their proposals to solve this.

Senator SMITH. But let me ask you specifically, does EPA intend to require States to incorporate TMDLs into their plans and apply them to forestry activities, yes or no?

Mr. FOX. We expect that the States will include in their TMDLs programs to combat non-point source pollution.

Senator SMITH. Well, are you going to require them to incorporate TMDLs into their plans and apply them to forestry activities?

Mr. FOX. We won't require anything of that specific nature in a TMDL, although we will ask ultimate approval to do this TMDL and the implementation plan achieve the water quality goals. If the State wants to do this all from point sources, they want to do it from agricultural sources, if they want to do it from silviculture sources, that's up to the State and the community. Our fundamental test is, will this achieve the water quality goals? We tried not to prescribe in any way, shape or form how they achieve that.

Senator SMITH. I find myself agreeing with what you're saying, but it's inconsistent with what's happening in the field. The States make——

Mr. FOX. It is certainly inconsistent with a lot of the rhetoric I've heard and some of the fact sheets I've seen going around Capitol Hill, but it is not inconsistent with what's in our proposal, sir.

Senator SMITH. Thank you, Mr. Chairman.

Senator CRAPO. Thank you.

Senator Baucus.

Senator BAUCUS. Mr. Fox, could you comment on the issue I raised with Governor Racicot? Am I correct in believing that courts generally—I think I'm told 17—ruled that States have not complied with the Water Act with respect to TMDLs? Then the EPA issued regulations the end of last year. What do you think it takes to comply with the Act according to the courts' interpretation of the Act?

Mr. FOX. This is actually the source of a lot of confusion and I appreciate the chance to clarify this. And it gets into some of the cost issues that have been raised. The TMDL provision was created in 1972. Our regulations are simply revising the existing regulations. The base regulations, in fact, came out of the Reagan administration. It was the Bush administration that revised those even more. There is a base TMDL program that is the law of the land. The courts are currently interpreting the existing regulations. The States are facing very significant resource implications even implementing the existing regulations, much less some of the additional issues in our proposal that we can talk some more about.

The courts are typically finding that the States' TMDL efforts to date are inadequate based on the 1972 Clean Water Act. In general this is the challenge we face in water quality today. For so many of our waters in this country, we've done a good job of controlling the obvious sources of pollution, but we're not going to solve the remaining problems until we start looking at these less obvious sources—until we start making pollution budgets on a watershed-by-watershed basis. It's going to take a lot of time. Our proposal allows up to 15 years for TMDL development. These won't be solved overnight. But it's really, I think, a commonsense way of starting to solve this problem for the future.

Senator BAUCUS. Now, is EPA asking for a reconsideration of at least the decision by the Federal District Court Judge in Montana on this issue?

Mr. FOX. I'm not aware of that. I will check into that. Generally, these are typically schedule decisions where the court finds that EPA and the States have failed to develop TMDLs on a certain schedule and we get a court-ordered schedule that we have to develop a certain number of TMDLs in a certain time. Frankly, in most cases it's fairly obvious that the State hasn't met its obligation and we all have to just get together and figure out how to do this in a relatively quick period of time.

Senator BAUCUS. Right. But you heard Governor Racicot's testimony and the comments, certainly, of Senator Wyden, so how do you solve this?

Mr. FOX. Resources are, I think, a very key part of the equation. And I would be the first to admit that this is a fairly new investment that's going to be required in State programs and in Federal programs, which is why we included a fairly sizable increase in our budget for the TMDL program. I should say that the State-based Federal grant program is only $115 million. We increased this by an additional $45 million specifically for implementing TMDLs and I think that's a reflection of our understanding that the States are going to have to spend more money to do this.

We've also provided more flexibility in the section 319 program so that States can use some of those dollars to help with TMDLs. I can put together the overall figures, I don't have them here, but overall we are clearly making available a sizable new amount of money, more than was suggested earlier, available to States to solve this problem.

Is it going to be enough? Well, the best analysis we have right now suggests it's going to put a good dent in the program.

Senator BAUCUS. Besides the budget resource issue though, are we going to mesh the gears here?

Mr. FOX. I think that some of the issues that you face now out West with the merging of the Endangered Species Act and the TMDL program are going to be very difficult. I couldn't agree more that the goal that Senator Wyden articulated is exactly the goal we want to have. That's simply good government, that these two programs work well together and that we can give landowners the kind of certainty that the decisions they are making are good for TMDLs and good for endangered species.

Senator BAUCUS. I think we've gotten the goal, but how do we get there?

Mr. FOX. That's very difficult on the endangered species. They are——

Senator BAUCUS. I'm talking here on the TMDL right now. How do we get to conformance with the Clean Water Act?

Mr. FOX. My hope is that we will be able to go through many of the public comments that we've heard, resolve some of the inconsistencies in places where people think things need to be clarified, make some changes where that's warranted and produce a product that is, in fact, in the best interest of the American public and it is reflective of many of the comments that we've heard over the past few years.

Senator BAUCUS. Could you address the silviculture issue? It seems to me that EPA—I question EPA's legal authority to repeal that exclusion.

Mr. FOX. First, I would like to say that forestry activities in general can be very good for water quality if they are properly done. It is also fair to say that poor forest management practices can, in fact, create very significant water quality problems.

What we tried to do with our proposal was in our opinion, obviously, consistent with the law and I understand that there's a staff draft of materials from this committee that suggests or raises questions about that. We will continue to work with you and your staff to explain why we think we have the authority to do what we are doing.

I hope we can convince you. We may or may not succeed in that. But basically in the 1987 amendments to the Clean Water Act this committee articulated a very clear position on storm water from activities like silviculture that create water quality problems. That's the part of the law that we are using to give us that authority.

Senator BAUCUS. Yes, that's pretty weak, storm water. I mean, silviculture practices are a lot different from storm water. And that's the basis of—that's the main problem with that analysis, that it is based on 1987 storm water example.

Mr. FOX. That's correct.

Senator BAUCUS. I frankly believe that's pretty weak. Have you visited any of these sites?

Mr. FOX. Sure. Well not in Montana, but I have in other States, yes.

Senator BAUCUS. What's your impression?

Mr. FOX. That a very well-operated silviculture operation can, in fact, have very beneficial effects on water quality. If it's not, I'll tell you, I've seen streams destroyed because of it.

Senator BAUCUS. I'm not addressing that issue. I think we all agree with that. I'm just asking whether it's a point source or non-point source of activity, that's the question here. We have to solve this problem, I grant you, but I mean, to treat silviculture practices under the TMDLs is, I think, wrong.

One final question. What lessons are there with the budget concept on the Clean Air Act and SIPs? Is that a fair analogy or not?

Mr. FOX. In some ways it is a fair analogy. What the TMDL is at its core is trying to access the overall amount of pollution that a watershed can sustain. And can we then allocate those pollution loads, not unlike the way it is done in an air context of looking at mobile sources, stationary sources, and trying to figure out what is our ultimate environmental and public health endpoint.

Hopefully you can make those decisions cost-effective. And you know that taking a pound of pollution from a point source might be more expensive than getting it from a non-point source and you can have local governments making those kinds of decisions.

Senator BAUCUS. I urge you very strongly to try to find solutions here that do kind of take things more to a local level. Times have changed. The quality of personnel in States is much better than what it may have been in some States 30 or 40 years ago, huge difference.

Second, they know all the problems. And they know the solutions. And people living in all our States want to do what's right. They live there. They want clean water. They want clean air. And in fact, it's more important as years go by; and beyond that, it's going to have credibility if it's a local solution. Beyond that, the more we have top-down management, the more nothing happens in a certain sense because the national groups have ostracized it, in some respects to increase their membership to have something to talk about and shout about and so forth. Most people locally are less concerned about the shouting; they're more concerned about the solutions. They do want solutions. So I strongly urge you to think harder about finding ways to enable people locally to find ways to abide by the Clean Water Act, whether it's TMDLs or point, non-point or whatnot.

If they're not doing it right someplace, then modern communications technology should be used so people get to know about it. And they're going to exert some pressure if the people are locally upset about what's going on. But the new paradigm is to rely more on local decisions.

Mr. FOX. Well, I would say unequivocally that if this program is run by EPA, if EPA is doing TMDLs, we are failing. And it's that simple. I couldn't agree with you more. This has to be done by State and local governments if it's going to work.

Senator BAUCUS. Let's just get out there and I know I'm taking too much time. Just one very small example here to give you real credit.

In Montana, unfortunately, we've found a lot of people who recently worked in mines who had asbestosis or mesothelioma-related diseases. It's a nightmare, an absolute nightmare. And I've asked EPA to send some personnel, and EPA has. And also out of Atlanta, the group that's affiliated—Cliff Clean Up. And let me tell you the people in Libby, Montana are very happy with what EPA

is doing. You've got a guy there named Paul Perinoy, something like that. One hell of a guy. People think he's the greatest thing and it's because he's working so hard to help the people of Libby find out where the hot spots are, if there are any—air, water and ground—of asbestosis, and it's a local solution. He's working with people to find out how they can get—and it's wonderful, it's working. And I urge you to give him a promotion.

Mr. FOX. Or maybe get him to talk to Senator Smith's employees.

Senator BAUCUS. Send him to New Hampshire or something, but I tell you, you've got to clone this guy. He's doing one heck of a job.

Mr. FOX. OK, thank you.

Senator BAUCUS. It's an approach that is working, and it's local.

Mr. FOX. Thank you.

Senator CRAPO. Thank you very much.

I notice the vote was just called; however, Senator Thomas has been patiently waiting.

Senator Thomas.

Senator BAUCUS. I apologize.

Senator CRAPO. We'll give you some time to ask your questions before we break.

OPENING STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM THE STATE OF WYOMING

Senator THOMAS. I'll be brief. We've been through this several times. This is not the first time Administrator Browner was here. I was over to the Agriculture Committee last week on the same thing, on this rule, on TMDLs. When she was there she admitted the proposed rule is very complex and caused much confusion. She further indicated the Agency had not adequately explained the proposal. But she went on to say that they're unwilling to pull it back and do anything different about it.

How do you explain that?

Mr. FOX. This proposal has been literally many, many years in the making. We can all question whether or not there's been adequate public involvement. I respectfully think we have done a pretty darn good job on that. And I think frankly the Administrator expressed the view, which I obviously feel, that the time has come to finalize this. It's going to mean great benefits to the people of this country and I don't think that's something——

Senator THOMAS. Well, that's not shared by everyone.

Mr. FOX. I understand that.

Senator THOMAS. If you understand. And other people do have the opportunity to have input into what we do in this government, I hope.

Mr. FOX. Absolutely, Sir.

Senator THOMAS. Are you going recognize the functionality equivalent if the States are allowed to utilize a system that has produced results?

Mr. FOX. This program, I would argue, is based on the concept of functional equivalency. We said clearly throughout this proposal that if a State has a better way of getting to that end point, that is absolutely OK. Our whole goal with this proposal has been to let the State and local governments determine how to achieve their

water quality standards. I don't know how to get more functionally equivalent than that.

Senator THOMAS. Why do the State administrators then talk about the amount of money they're going to have to spend in order to meet your requirements?

Mr. FOX. I think that's a very real issue. And I think it's going to require new investments from the States as well as from us at the Federal level. We have provided some more funds in our budget for the States. We have provided more funds in our budget for us. We can have a debate whether that's adequate or not. We are looking, I should add, Senator, at a 15-year timeframe. We don't have to do all these TMDLs next year. This really is a schedule over the next 15 years.

Senator THOMAS. Wyoming has implemented a 5-year comprehensive monitoring plan. Are they going to be allowed to continue to do that?

Mr. FOX. There's nothing in this proposal to my knowledge that would in any way reject a State monitoring program. I don't know about EPA's approval of your State, but I can look into that and get back to you.

Senator THOMAS. OK, I'd appreciate that. Well, I guess you need to understand that we keep hearing these things. We hear from you how it's going to be up to the States to do it, all we do is measure the results. But that isn't what people think is happening on the ground. And I don't know how long we can have a different story here than we hear at home.

Mr. FOX. One of the areas that I think is the source of this disagreement, if I might—and it's always hard to speak for somebody else—but we have laid this out and as I was telling Senator Baucus to have it be led by State and local governments. However, the statute is very clear that if for whatever reason the State and local governments fail to do X, Y or Z, then EPA has an obligation under the law passed by this Congress in 1972 to do a TMDL for a State. We have included in this proposal what we consider last resort backstop type proposals so that EPA would have to take some action in the case of a State failure.

Senator THOMAS. You're talking about a statute that lays out the rules for a non-point source?

Mr. FOX. No, I'm talking about the statute that lays out the rules for TMDLs. It was included in, as I said in that 1972 Act.

Senator THOMAS. Is there great dispute over whether you even have statutory authority to deal with non-point source?

Mr. FOX. I think that's a separate question and I would be the first to say that the Agency has no authority to issue permits for non-point sources.

Senator THOMAS. That's what TMDLs are all about, isn't it?

Mr. FOX. I would respectfully disagree. A TMDL is about establishing a load allocation for any watershed.

Senator THOMAS. I understand. But if you have point source and you've been able to deal with that in another way, when you have non-point source that's really what puts it into effect, isn't it? You haven't been using them for 15 years, since 1972, why are you just starting now if you didn't think it was a different, new approach?

Mr. FOX. Well, again we're not starting anything here, Senator, this has been going on for some time. It was the Reagan administration that had the first regulations on this.

Senator THOMAS. Well, I don't agree with you, but go ahead. We'll have to somehow see if we can't get together on how people perceive what's going on here. You guys keep coming up here and talking about how the States are free to do what they want to; come with us to the States. They don't think so. Come with us to the conservation district that filed suit on this.

Mr. FOX. Yes, we have received a lawsuit, not on this subject, but on another subject from the Wyoming conservation district, that is true.

Senator THOMAS. I know you have. Why do you suppose that is? If what you're saying is true, why would they file suit?

Mr. FOX. They filed a lawsuit on the Clean Water Action plan from the President, that—and I don't remember all their allegations, but I think it was basically that the Clean Water Action plan did not comply with NEPA. We have, as I've told you, Senator, been able to get grants from the Clean Water Action plan to 49 States in this country. There's one State where we haven't been able to do that and I'm going to continue to pledge to work with you to try and find a way to get it in Wyoming. I don't have a good answer for why it's happened.

Senator THOMAS. You can get it if we do exactly what you tell us to do.

Mr. FOX. We found ways in 49 States to implement this consistently.

Senator THOMAS. I hope you understand that what you say is nice and fine, but everyone doesn't accept that as being what's doing on the ground.

Mr. FOX. OK.

Senator THOMAS. Thank you, Mr. Chairman.

Senator CRAPO. Thank you very much, we are getting to the point where all of us are going to have to go vote now and ordinarily we would try to stagger this, but we're going to have three votes in a row, and so I apologize that this is going to take at least a half hour and possibly 45 minutes for us to get these three votes finished. So Mr. Fox, but we're not finished with you yet. I want to come back and ask my questions, so I would recess the committee at this time. Thank you.

[Recess.]

Senator CRAPO [resuming the chair]. The third vote was a voice vote and so we were able to get back here a little more quickly than we thought. I don't know how many of the other Senators will make it back or for how long because there are a lot of other things going on this afternoon, but then that just gives me more time to ask my questions so it's all right with me.

Mr. Fox, one of the issues that I wanted to go into with you relates to this question of jurisdiction over TMDLs, excuse me, over non-point sources with regard to TMDL management. Now, I know that you've been saying that the Agency is not asserting jurisdiction over non-point sources. In fact, I think that what you said was that Clean Water Act permits for non-point source activities are not required. And that may or may not be the same as saying that

the Agency is not asserting jurisdiction over non-point source pollution. Can you address that question for me? Is the Agency in any way asserting jurisdiction over non-point source pollution under the Clean Water Act, other than section 319?

Mr. FOX. By jurisdiction I'm assuming you mean in the very broadest context.

Senator CRAPO. I do.

Mr. FOX. In that context I think it is fair to say that we expect that a TMDL submitted by the States would include allocations for non-point sources where the State determines that appropriate, that a State needs to identify waters that are impaired by non-point sources as part of its submissions. But what I was saying before is that nothing in the Clean Water Act and nothing in our TMDL rule would require a State to issue a permit, take an enforcement action or do anything like that over non-point sources. Yes, we would require that States submit lists of waters that are impaired by non-point source pollution.

Senator CRAPO. Well, that was going to be my next question, because if the Agency is not requiring the States to issue permits or to take any specific action with regard to non-point source pollution, why would the Agency require the States to list bodies of water that are only now reaching non-attainment because of non-point source pollution?

Mr. FOX. Two quick answers to that. First, we believe that's what the law requires and second we believe that it's only common sense that if we are going to try and achieve our water quality goals in this country, that we need to take into account point sources as well as non-point sources.

Senator CRAPO. Well, let me go through both of those reasons. Let me take them in reverse order. If one were to agree—and I don't disagree with you that it's good policy to try to address the quality of the waters from all perspectives, that's a very valid policy objective—but frankly it's not the prerogative of the Agency to determine policy. That's the prerogative of Congress and the President. And if Congress and the President have not given the Agency the authority to make those policy decisions, where does the Agency come off assuming that authority and saying, ''Well, it's a good thing to do, so therefore we ought to do it?''

Mr. FOX. Again, sir, I wouldn't disagree with your characterization, you are correct. We certainly cannot do things that aren't authorized by statute, but I spent a good deal of time on this with our General Counsel and I firmly believe that the statute does give us the authority to list waters that are impaired by non-point source pollution.

I know that there are some out there that disagree with that; this is the subject of some litigation. But the Government has filed very clear positions on this in various court cases that obviously are supported by the Department of Justice as well.

Senator CRAPO. Well, that was your first point so could you clarify that to me, because I think your first point was that the statute does give the Agency the authority to require at least a listing of non-point source water pollution. What is that statutory authority?

Mr. FOX. It's under section 303(d) of the Clean Water Act and I could certainly have our General Counsel submit for you more in-

formation on that. The Government did file a brief on this very point in a case in California recently that probably articulates it in very exhaustive arguments.

Senator CRAPO. I would appreciate that. And not only that brief, but any other material you have that specifically identifies the statutory authority to require States to list non-point sources. And again I don't know that it's necessarily because it's bad policy, it's just a question of whether the Agency has the authority to assert that jurisdiction.

Mr. FOX. OK.

Senator CRAPO. Assuming that you are correct there, and I don't agree with that, but assuming that you are correct, do I understand you to be saying that although the Agency has authority to require States to list non-point source pollution waters, that the EPA does not have any authority under the Act to require the States to do anything about it?

Mr. FOX. I would say that slightly differently. The Act is very clear that the States need to develop TMDLs to achieve water quality standards. And the States need to implement programs to achieve water quality standards. And where the States fail to do that, EPA must do that. Obviously, if a State does it under State law, they're going to have perhaps a wider variety of tools to solve that problem than the Federal Government would if the Federal Government was forced to implement the program.

Senator CRAPO. You mentioned earlier in response to a question from either Senator Smith or Senator Thomas that there was a sort of a backstop in the proposed rule that may be causing some of the consternation, the backstop being what will the EPA do if the States don't? Now if the EPA is saying that non-point source pollution has to be listed, that the States have to achieve in those listed waters the standards, and if the States don't achieve those standards in those listed waters then the EPA will step in and achieve those standards. Then haven't you essentially through a somewhat circuitous, but nevertheless a very direct fashion asserted EPA jurisdiction over non-point source pollution?

Mr. FOX. I would respectfully suggest no, because first off if we ever got to that point, as I said before to Senator Baucus, that is an absolute failure of the system and we're not doing our job right. Because the Federal Government should not be in the position of actually implementing these TMDLs, only as a last resort. If that happens, if we are in that very remote situation where we have to do it, we will not have the authority to obviously require any permit conditions for non-point sources.

We have grant programs that we can use to encourage further reductions of non-point source pollution. We have programs through the Department of Agriculture we might want to work with to solve some of these problems. And we'd have to cobble together some way of trying to solve some of these problems to achieve the goals without regulating—in a permit context—non-point sources of pollution.

But, again this would be the worst-case scenario, if you will, something that we don't want to see ever happen because that is a failure of the system if we end up in that position.

Senator CRAPO. Well let me explore this from just a little bit different perspective. Senator Thomas asked a series of questions, and the frustration that he has was evident with regard to the feeling that he's seeing that the EPA is asserting in an overreaching way authority over the States and local communities. Your response as has been as Administrator Browner's response consistently was that this proposed rule does not operate as a top-down rule and the States and local communities have the ability to find specific solutions.

I had an opportunity several months back to deal with this in a site-specific situation in Coeur d'Alene, which you may be familiar with, Coeur d'Alene, Idaho. And not just Coeur d'Alene, but the entire basin, water basin there. And the question was, the standards by which the determination was being missed or whether the water satisfied the water quality standards and we got into the Gold Book Standards, issues which I'm sure you're familiar with.

And in a hearing that our entire congressional delegation held in Coeur d'Alene, we had EPA officials with us and we had local city officials with us who were being required to do certain things with their water quality standards. And we had the Idaho Department of Environmental Quality officials with us. So we had everybody in the room and at different times at the table. And I got the same answer from the EPA that day that I got from you today and from Administrator Carol Browner last week, which is, the State has the ability to do this. When the State was sitting at the table I said to the EPA—I'm paraphrasing here, but I said, "The EPA has just told us that you are the ones who decided to do this to us, to us people here in Idaho." And we've just had witnesses from cities and from local communities and counties saying what kinds of cost impacts all this was going to have on them.

And I said, "If it's you that is doing it to us instead of the EPA, then I want to know why." And you know what their answer was?

Mr. FOX. "The EPA made me do it."

Senator CRAPO. "The EPA made me do it." I said, "Now wait a minute, you are doing it" and they said, "Yes, we are doing it." And I said, "But if you don't do it then what will happen? If we don't do it the EPA has informed us that they will take it away from us and they will do it. And so either we will do what they tell us to do or they will do what they tell us to do."

Now, it seems to me that that is not exactly the kind of situation where you have the local authorities operating in a free system with a non-top-down driven solution being forced. In fact, the State officials in that circumstance said, "If we could do what we wanted, we would not do this and we would do this other alternative which would keep the water clean and make it satisfactory and avoid all of these other onerous costs that are being imposed on us by what we have to do."

And frankly to me what I saw that day was a very rigid "one-size-fits-all" solution being driven from a book, a Gold Book I guess they call it, that was forcing community after community in Idaho to do something that the State officials and the local officials said did not need to be done for the water quality and was going to drive up the costs dramatically to their communities. And at the same time that was happening the EPA was telling us that it was

not a State—it wasn't a rigid "one-size-fits-all" top-down bureaucratically driven decision.

Now, can you comment on that? It seems to me that I can see the point that you're making because it is the State and local officials that are making these decisions, but I am also not convinced that the decisions that are being made are not driven from a top-down bureaucracy.

Mr. FOX. Well, I've been to Coeur d'Alene, I'm not as familiar with the specific issues that you're speaking of here. I can tell you that I think the tension comes from what I think frankly is a very appropriate Federal/State structure that we've established in this country over the last 30 years. Whether it's the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, the Federal Government tends to establish under Federal law some basic performance, environmental performance standards that we as a Nation feel are appropriate.

And then the EPA, our job is to work with the States to try and figure out ways to get to those ultimate Federal and environmental performance standards. We ultimately want to assure that the States get there, but we try to give them a fair amount of flexibility in how they get there. But you're right, there is a bottom line, if you will, that we do need to meet some basic environmental and public health standards; and in this case the Gold Book is, in fact, one of the articulations. And I'm not going to say that there aren't States that vary from it, but it is some of the best science we have as to what, in fact, levels of different contaminants are safe for public health and the environment.

Senator CRAPO. Well, I understand what you're saying and frankly it's a very good answer from the perspective of the EPA, but it doesn't change the fact that the Gold Book is a very—whoever wrote the Gold Book has never set foot in the Coeur d'Alene Basin I would be willing to bet, or if he did the Gold Book standard would be different for the Coeur d'Alene Basin.

My point being, we had witness after witness of qualified people who work with water quality issues in the area, who testified to the fact that the standards being imposed through the Gold Book were so rigid that they could not be met, could not be achieved no matter how much money we threw at it because of the unique circumstances in the region. And if they were somehow met it would require the kind of resource expenditure that is beyond the ability of the communities.

Mr. FOX. What I just wanted to check here with staff is the way the water quality standards program runs. In fact, in many of the Federal programs there is a "Gold Book," if you will, of minimum Federal standards. And we developed this because the States have asked us to use Federal resources and science to get some good national base-line. The Clean Water Act actually has a number of provisions that allow the States to depart from these based onsite-specific considerations.

I know for example in my home State of Maryland, in an estuary environment, copper and cadmium act very differently and they don't have the same end point. And a number of States ask to——

Senator CRAPO. A good example.

Mr. FOX [continuing]. Get variances from the Gold Book based on some site-specific considerations and we then approve those, assuming they are scientifically justified. There are also bacteriological standards. For example, if you are in the Anacostia River, right here near Washington, DC. where there's not a lot of swimming going on, the ultimate bacteriological standard might be very different than if you were at a beach in Ocean City, MD. And those are some of the flexibilities that States are allowed to move off the Gold Book numbers—with justification, I would add.

Senator CRAPO. And I understand that and, in fact, that information was also presented at the hearing by our EPA officials, but there's always a wrinkle. And here's the problem and the reason I'm tediously going through this with you, to help you understand, if you will, at your administrator level why it is that you can say the things you're saying and you understand all these flexibilities that exist, but they don't exist in the real world—or at least they are not being allowed to, because I'll tell you what we've just dealt with.

We were told the Gold Book has the ability to be deviated from and there can be exceptions made. And the witnesses at this hearing that we held basically said, "All of the justification and the data is in place for us to be off the Gold list and let us do a site specific standard for this area that we could achieve," which is what our local officials were saying is what we would like to do, and frankly, I recall that the EPA officials who were there were not really disagreeing that that would be an acceptable outcome. But I don't know that hearing has been 6, 8 months ago now. We're still on the Gold Book and we can't get off it. And this process, this so called flexible process to allow for variations, is certainly not flexible. I can assure you of that because my office has been working very aggressively for months now to try to just get through the administrative morass that would allow us to get this permission from the Agency to move to some different standard.

Now, I do understand and I have to give credit here that we have succeeded in getting this issue to the higher and higher levels at the EPA and I understand that if what we are being told is correct, that it is now going to be made possible for the State of Idaho to put together a site-specific standard in this region and not be limited to the Gold Book standard.

And I'm going to be very excited when that day comes. I wanted to go through this with you to let you know that in this particular case it has taken very aggressive attention from at least one U.S. Senator, from the entire Idaho delegation, holding hearings in the State of Idaho, as well as local communities pushing to try to get this flexibility to actually exist. I want you to know first of all that when you testify to us that it isn't really a top-down driven system, and when we say we don't believe you, that's why, because we've had experiences like this.

Mr. FOX. I see.

Senator CRAPO. That goes on and on and on. And so if anything can be done from your level to assure that the procedures are commonsense procedures that are not there in name only, but are in reality, the flexibilities that do give State and local officials the ability to make the commonsense decisions, then perhaps we can

find the common ground to move forward. I think that's exactly what Governor Racicot was talking about here at a larger level of the State's program versus what they perceive is going to be imposed on them through the TMDL rules.

So anyway, if you'd like to comment further?

Mr. FOX. Let me just say that I've learned a lot here today and I think the issue you raise is a very real one, particularly with the example that Senator Smith gave about an EPA employee. As we implement this and we haven't made any decisions yet and we are going to continue to have input, but we probably need to be very clear with all of our employees about the different flexibilities that are available and make sure that they understand our position on this so that we don't have, in fact, these situations where some employees are suggesting that we don't have quite the flexibility that we intended.

Senator CRAPO. Well, I understand that and appreciate that. And I don't want you to understand from my comments here today that I felt that the local EPA officials were doing anything like that. In fact, in their testimony they were being very honest and direct about the statutory authorities and what would happen and wouldn't happen if certain things developed. But I'm not even sure that your local EPA officials have the ability to break this system into the flexibility that it needs to have. So there has to be a fix here, and I'm not sure just exactly where or how.

One of the key problems that I see is along the whole chain is that this circumstance that you described exists. And this is, if the State or the local community doesn't jump through the right hoop in the right way, doesn't set the standard in the right way, doesn't put the implementation plan together in a way that the EPA agrees will work, there's always that gun to the head, that the EPA is there to do it for you if you don't do it the way they tell you to do it.

And that core structural part of the process is antithetical to local decisionmaking. I have to tell you, if the EPA wants to truly address creating a system in which we stop being a top-down driven system and let States and local communities resolve these issues, then they've got to be willing to let the States and local communities resolve the issues.

Now, I understand that there may need to be standards set and then see if the States and local communities can meet those standards. The experience I had with the Gold Book standards tells me that even just that process can eliminate all flexibility if it's too rigid.

So again I'm sorry for being so thorough with this, but I wanted you to just understand one experience that I've had with this that causes me to be somewhat suspect when I hear that we've got a flexible State and local community-driven system in place.

Mr. FOX. Well, I won't say anything that will certainly contradict your experience here, but I would say that the situation in Coeur d'Alene is somewhat unique, apart from what we face nationwide, and we can hope that we don't have those all over the country.

Senator CRAPO. I hope not.

Let me go on for a moment. The EPA has proposed to include waters that are threatened that are in the TMDL program. And

these are waters that are currently meeting the water quality standards but for which readily available data demonstrates a trend that would indicate that the standards might be exceeded in the future.

And the FACA group recommended that these waters be put on a separate, different list. There are a few concerns that some of us have with listing these waters for TMDLs, and Congress has expressly authorized the EPA to require this only for impaired waters because the other waters are already meeting current standards.

How does the EPA get the jurisdiction to list threatened waters?

Mr. FOX. First I would say that the current regulations in place that predate this Administration included threatened waters and this is an area that we are taking comment on and as a result of comment, the public comment period, we may or may not make a decision to include threatened waters.

And the logic behind it, if you will, was simply that there are going to be some water bodies that very soon might be needing a TMDL and we need to keep track of these just so that we don't lose them in the system. If we can solve a problem today, that's a better deal than trying to solve it tomorrow when it might be much more expensive and difficult to solve.

Senator CRAPO. Well, again, that might make sense in common sense approach. And the fact that the previous regulations covered it doesn't necessarily mean that they legally covered it. Can you give me any legal justification for asserting jurisdiction over threatened waters?

Mr. FOX. Let me get my General Counsel to get back to you on that one.

Senator CRAPO. OK. I'd like to see that.

Mr. FOX. OK. I found myself trying to pretend I'm a lawyer and I realize I shouldn't. I'll just turn to the General Counsel.

Senator CRAPO. Well, if you don't know the answer, you are wise not to try to say it.

In its proposal the EPA states that it would:

> . . . only invoke the rule in rare circumstances and then only when there's no reasonable assurance that the silvicultural sources would obtain TMDL load allocations. And the Agency suggests that the rule would not be invoked in States that have forest practice laws or otherwise enforceable best management practices, the BMPs, suggesting that these programs provide reasonable assurance. the Agency therefore assumes, in a way, any potential economic impact for some 32 States that have currently or are expected in the future to have enforceable BMPs.

Let me stop right there and ask, am I correct in assuming that the Agency is going to accept a States enforceable BMPs as reasonable assurance?

Mr. FOX. That is among the issues we are considering right now as we go to final. I think it's fair to say that the rule was not particularly explicit on that point, but that is among the factors that we are considering as we go final. It is certainly our intent that this was not going to apply if there's no problem. And if in fact a State has a good program that is solving the problem this wouldn't apply. But I'm not sure we specifically connected it to the adequacy of an existing State forestry program.

Senator CRAPO. Well, I think that might be one area in which the question of whether you can truly trust a State will show whether the EPA is willing to give the State those decisionmaking

authorities, because if a State has created its BMPs and the EPA won't even let that be reasonable assurance, then that tells me that basically we've just got an overseer and we might as well let you guys do it all.

Mr. FOX. You're going to have a representative from the State forestry industry on your next panel and I'll be interested to listen to what he says on this point.

Senator CRAPO. And in this context, in which States do you think the rule would be invoked either by the State NPDES authority or by the EPA? And what I'm getting at is, would it be applied in important timber producing States like Oregon, California, North Carolina or 20-plus other forestry States?

Mr. FOX. The way the rule was structured, first off, nothing would be applied unless the State had identified a water that was impaired by silviculture. And I just don't have the data here but I can certainly give it to you as to which States have identified problems of silviculture. And then the second part was the economic analysis we did. It didn't get into really identifying which States and which watersheds this would be applied to. And I'm not sure we actually have real good information on that. Because so much of that is going to depend upon what a State ultimately decides to do.

Senator CRAPO. Well, included in the States that I believe were omitted from the impacts in the EPA's economic assessments are five States, including Idaho, that aren't currently NPDES authorized by the EPA, and that's Alaska, Idaho, Maine, Massachusetts and New Hampshire.

And the question I have is, how can it be assumed that the EPA would not use its authority in these States when the Agency already administers the NPDES program directly there?

Mr. FOX. It would be dependent—I just have to look at the data to see if Idaho had any waters that were impaired by silviculture, and I just don't know the answer to that question.

Senator CRAPO. But if they did and the Agency were to assert its existing authority, wouldn't it be generating costs?

Mr. FOX. It would have to be. There would be a few other steps in that process. First is, are they impaired by silviculture. Second, is the State program adequate to resolve those impairments. And then third, if that's not the case and the State has refused to do that and EPA then had to step in and require best management practices to be put on some, then those would be costs. And the way we costed our rule, it was that scenario that ended up coming up with our figure of the estimate of the cost.

Senator CRAPO. If I understand how you have done that, you must have assumed that each of those situations that you just described were the case because you came up with no costs.

Mr. FOX. For Idaho?

Senator CRAPO. Am I right about that? For those five States, that's right.

Mr. FOX. All I remember is—I'm sorry, the aggregate was about a $10 to $11 million—$10 to $12 million national cost, 600 silviculture permits, but I can get you more specific information there.

Senator CRAPO. If you would I would appreciate that.

The EPA states that:

> The potential economic impact of the proposed rule would not exceed $4 to $13 million annually, and that at most 18,000 landowners would be affected. the Agency estimates that the regulatory cost per owner would amount to no more than $88 to $163 per harvest event.

Isn't it likely, though, that in order to obtain an approved NPDES permit a landowner would probably have to submit documentation specific to the TMDL and water body involved and would have to hire a consultant to prepare the application and monitor the activity, would have to respond to and mitigate any concerns of the approving agency, the EPA or whoever was the approving agency, whether those were real or perceived? And then would have to await the approval process and delay their operation until approval is granted?

Mr. FOX. Respectfully, Senator, I hope you appreciate this. Many of these cost analyses were done by a team of economists and I'd respectfully suggest that they could do a better job of answering as to their assumptions than I could do here for you today. If I could respectfully furnish that to the committee, I'd appreciate that.

Senator CRAPO. Well, I would like that because it seems to me—and you know you're going to hear it; you've already heard it through the 30,000 comments that have come in—that $163 cost estimate for someone who's going to have to go through this process is vastly underestimating what is really going to happen out there. And it causes great concern to me to see that because the numbers that the Agency has used have put it below the Federal mandate statute so that they don't have to comply with other requirements. And I'm concerned about that.

Mr. FOX. Yes, I can tell you that wasn't the intent of bringing the numbers down. And if anything, what I remember having a good feeling about, looking at those numbers when the economists produced this, was this was showing to me that the impact of this was going to be relatively small. I don't want to belittle even these costs, but it wasn't our intent that many silvicultural operations would at all be affected by this. The Federal Government would step in only where States failed to do so. And it was our intent that this would be used very minimally and that's generally what these costs showed. But I can get you more specifics about the estimates and how far they amortized them because I'm sure that's some of the issues, whether these were annual cost over 20 years.

Senator CRAPO. That's very much the issue.

Mr. FOX. Senator, one additional explanation I would just offer on the permitting approach for silviculture is that we have assumed that this would fall under what we call our general permitting practices. And typically a general permit is very different from what we consider an individual permit. And the way these work is that they end up putting in a State regulation or in Federal regulation the broad kinds of best management practices that should be implemented. There typically isn't an individual site visit. It is simply that a landowner agrees to abide by these best management practices, and that's how we streamline the bureaucratic process for implementing this.

Senator CRAPO. All right. And I hope those kinds of streamlining efforts are successful.

Let me just go through a couple more questions. One of the major controversies as you know in this proposal is the question of what is a point source and what is a non-point source, and this is particularly relevant in the issue of silviculture. Businesses and landowners, I think, have to have some kind of predictability as to how their activities fit into the structure of the Clean Water Act. What is the EPA doing to clarify this issue?

Mr. FOX. This is an area that has come up repeatedly and I think it's fair to say is an area that we're going to need to clarify as we go final. I think people expect and deserve that we are clear about how this proposal would affect them or not. We have tried very much to track the statutory definition of what constitutes a point source or a non-point source and basically you need to have a point. It has to be a culvert, a drainage ditch, something like that for it to constitute a point source. And that would be a first threshold level about whether this program would ever affect any operation. Was it, in fact, a point source? And if it wasn't a point source, it wouldn't be affected.

Senator CRAPO. I know that a year or two or so ago the EPA was apparently considering a regulation to clarify this. Has anything come of that, is the EPA planning on putting out any further information or guidance on this issue?

Mr. FOX. On what constitutes a point source versus a non-point?

Senator CRAPO. Yes.

Mr. FOX. That one I'm not familiar with. I'll have to answer that one for the record too, I wasn't aware of a regulation on that.

Senator CRAPO. OK. I don't think one was ever actually proposed, but at least we were under the impression that one was being considered at some point. From the looks on your faces——

Mr. FOX. I'm getting fuzzy looks from people but that doesn't mean that somebody wasn't considering it. I will look into that.

Senator CRAPO. Well, we wish they were.

Let me clarify your last question or your last answer that you added. It's my understanding that you can't use general permits when the Endangered Species Act is at issue or endangered species are present, is that correct?

Mr. FOX. That would be news to me. We certainly have issued many general permits in areas where endangered species are present. But I can look into this. I know on a lot of concentrated feeding operations it's very common for a State to issue a general permit. For a lot of storm water operations States issue general permits. It's fairly common. In the air program they use general permits all the time.

Senator CRAPO. OK, hold on 1 second.

OK, the point is that you have to do consultation at that point as to how would a general permit be operable if you have to do the consultation under the section 7 of the Endangered Species Act.

Mr. FOX. Typically the way this works—and I will get more information on this—but the consultation occurs as the overall general permit is developed, should the services require or ask for consultation to occur. So as an example if you are developing a general permit for charbroilers, McDonald's Clean Air Act permits and they're all going to apply under the same rules, the services could request

consultation at that time as the permit gets developed. But then as the McDonald's comes in or a Wendy's comes in——

Senator CRAPO. Then they don't have to go through the consultation again.

Mr. FOX. Right.

Senator CRAPO. All right.

As you may be aware I'm pretty interested in the HCP program and we may be looking at trying to put together some targeted legislation to help facilitate the development of Habitat Conservation Plans. If a company or an individual dealing with water quality has an HCP, would that serve as the functional equivalent of the TMDL, or will the proposed rule override the HCP and force renegotiation of the HCP?

Mr. FOX. Our hope is that we can do these together. There is one fairly successful model that happened with the Simpson Paper Company in Washington State where they put together a series of proposals to meet their Endangered Species Act requirements as well as the TMDL program. The ultimate test that we care about under the Clean Water Act is, will this HCP help us achieve the water quality standards? And if we can find a way that these two programs can work together we can get to that end point, I think, together.

In the case of forestry operations typically what this is going to mean is we will work with the company to figure out what is the right buffer strip requirement that will yield a certain pollution reduction that will get your water quality standards at the same time that this buffer might be protective of salmon, say, for example.

Senator CRAPO. What if an HCP was put together before a stream was listed and then the Agency comes in after the fact and you've got an existing HCP in place?

Mr. FOX. That's an area that we're going to have to work with, but to the extent that an HCP does not achieve our water quality goals or standards, then we might have to revisit that to assure that it can be done. I'm certainly open to ideas about how to make these work together, but as the manager for the Clean Water Act I ultimately need to find a way that we can get to those Clean Water Act goals, too.

Senator CRAPO. Just thinking about it, it seems to me that if the noncompliance is not related to the activities that the HCP deals with, then there may be a way to be more flexible with that. But if the noncompliance is related to HCP authorized activities, then we could have a problem. Because one of the issues that I'm sure you're aware of under HCP reform is to try to figure out a way to get certainty.

Mr. FOX. Right.

Senator CRAPO. So that we have benefits.

Mr. FOX. And I would agree absolutely that that's a great goal. That's the example of the Simpson Paper Company that I mentioned. That was one where we were able to provide certainty to the company for the long term. In Washington State there's another model; the State passed recently a State law, the Timber, Fish and Wildlife Act, that established some statewide performance standards for timber operations on private lands.

We have tried to work with them to give them some certainty with respect to this program within the TMDL program. And in fact, in Washington State I think we have set up a policy where they do not have to have TMDLs on these lands for 10 years until we see how well it's implemented.

Senator CRAPO. All right. Well, I'm sure you're aware of this, but I want to restate that that's a very important issue to me and I would like to keep in contact with you as we move forward in the development of our legislation as well.

Mr. Fox, I have literally a stack of other questions here that I want to ask you, but it's 3:20 and so you're going to luck out with me, I guess. I will submit these questions to you in writing and ask for your prompt response to these questions.

Mr. FOX. You will get that.

Senator CRAPO. That's right, I should remind you that we are going to have you back before us again hopefully in another hearing on this issue, one of our series, at the same time that we're going to have the USDA and Department of Defense in to comment on the some of the concerns that they have raised in the past with regard to it. So I might have another opportunity in person, but we do want to submit these to you in writing.

Mr. FOX. Always a pleasure.

Senator CRAPO. And there is one other question that I was going to ask at the beginning and they want to make sure I don't forget to ask you, which is probably the most important question to ask. And that is, what is the timeframe that the Agency is looking at right now—we heard June—that the Agency is going to proceed? Frankly, as I said in my opening statement, I think that that is far too aggressive and that with a whole litany of circumstances that I described in my opening statement it would not be prudent for the Agency to put this on the fast track and move it ahead that fast. I mean, you just heard Senator Wyden talk about trying to put together a compromise here among the Senators as an approach, and he and I talked on the floor during the break while we were voting about working on something like that. But if the Agency moves ahead on such a rapid pace, then it may force us into action or it may force other responses that are not necessary.

And so I'm asking you, what kind of a timeframe do you expect to work on at this point?

Mr. FOX. The draft schedule worked up with staff is for final promulgation at June 30. I will say that if you would like to engage in some discussions on this I will certainly make myself available and do any kind of consultation with you that you think is appropriate to talk more about some of these issues. We truly haven't made any decisions on this. But out of respect for a lot of the time and energy that a lot of people have put in this, I really think it is important that we can bring this to closure at some point soon.

And as we all know, things change by the end of this year and my hope was that we could get this done before things start changing in this town and try and keep it out of so much of those cycles that tend to happen at this time.

Senator CRAPO. Do you feel that you can adequately review and respond to the comments, the 30,000 comments that have been made, by that time?

Mr. FOX. You should know that of those 30,000 comments, more than about half of them were postcards. Of those 30,000 I think there are approximately a little over 2,000 individual separate comments. So I'm not going to belittle them. I don't want to suggest for a minute that it isn't important, but I think we can process and respond to and consider adequately the comments that we've heard.

As you know and as you mentioned, the Federal Advisory Committee began on these issues in, I guess it was almost 4 years ago, and so there's been a lot of thought given to this. I think we can do it and respect the process.

Senator CRAPO. It's my understanding that OMB review of these kinds of rules takes 3 months, a rule in this kind of circumstance.

Mr. FOX. That is typically the standard, but on a rule of this importance I will be talking with the Office of Management and Budget to see if we can get some compromise there and see if I can expedite that review, but I respectfully have not had all those discussions with the right people at OMB yet. But I guess now I will have to, later this afternoon.

Senator CRAPO. Well, it sounds to me like you're creating a fast track and I have been strongly encouraging you not to do that. I think OMB needs that time. I think frankly you need more time; you and the Agency need to address these issues. And I'm not really talking about the day-to-day function of evaluating the comments and all that so much as I am talking about the fact that we have a tremendous amount of concern across this country that has been expressed.

As I said in my opening comments, again, there have been five hearings in Congress on this and you're going to see more.

Mr. FOX. I've been to every one.

Senator CRAPO. Yes, you're painfully aware of them, I'm sure. And when I walk down to the floor for this vote, I was asking them at the desk, how long is this going to take and are you going to shorten the next vote so I can get back? And somebody said, "Yes, what are you doing?" And I said, "We're holding a hearing on TMDLs."

Everybody—there were about 8 or 10 people standing around—every person knew what I was talking about, because this is an issue that across America is raising a tremendous amount of concern. So I would just encourage you not to fast track this and to give it the time that it takes.

Mr. FOX. OK, thank you.

Senator CRAPO. As I said I've got a lot of other questions, but I'll have other opportunities and I will submit some to you in writing and I thank you for coming here today, Mr. Fox.

Mr. FOX. I look forward to seeing you again.

Senator CRAPO. Thank you.

Our next and final panel will be the Honorable William Nielsen, city council president from Eau Claire, WI, on behalf of the National League of Cities; Ms. Jamie Adams, the secretary of the Kansas Department of Agriculture, on behalf of the National Association of State Departments of Agriculture; Mr. J. David Holm, the director of the Colorado Water Equality Control Division in Denver, CO, on behalf of the Association of State and Interstate

Water Pollution Control Administrators; Mr. Warren E. Archey, Massachusetts State Forester, on behalf of the National Association of State Foresters; and Mr. Richard A. Parrish, the Council for the Southern Environmental Law Center in Charlottesville, VA.

These are very critical issues and it's important for us to spend the time on them. As you probably are aware and can see, we could spend hours with agency officials on these issues, so I appreciate your forbearance.

I believe that each of you have been notified that the rules that we operate under here are that you have 5 minutes to present your testimony verbally. And I ask you to please try to follow that or the hearing will really drag on and others will not have the opportunity to present their materials as well. That will require you—I rarely see a witness who can say their whole piece in 5 minutes. Please understand that we understand that, and we do read your written materials very carefully. I know that the staff here reviews them and outlines them in detail. I read them personally and most of the Senators do. And we do want to have time for give and take and question and answers as well. So the green light is for go. Yellow means 1 minute, right. When the yellow light comes on there's 1 minute left. And when the red light comes on I ask you to please try to finish up your thought and wrap it up even though you may not be finished with everything you have to say and I'll probably give you some opportunities in the questions to pitch in and finish up any thoughts that you didn't get in.

So with that why don't we start in the order that I went, Mr. Nielsen.

STATEMENT OF WILLIAM NIELSEN, COUNCIL PRESIDENT, EAU CLAIRE, WI

Mr. NIELSEN. Mr. Chairman, thank you very much for this opportunity to address your committee today. I have submitted my testimony in writing and I will just give a brief summary and try to emphasize some points that were mentioned there.

As stated I'm the city council president from Eau Claire, WI. Ironically, Eau Claire in French means clear water. I'm here today representing——

Senator CRAPO. Can I interrupt you for a second? Have you ever heard of place called Owen Withee, Wisconsin?

Mr. NIELSEN. Yes.

Senator CRAPO. That's where my wife is from.

Mr. NIELSEN. So she knows we have clean air, clean water and lots of cows.

Senator CRAPO. That's right. In fact, she says those two towns were so small they had to put them both together to have a school.

Mr. NIELSEN. Senator, are you taking some of my time here or do I have——

Senator CRAPO. No, I'll give you extra time.

Mr. NIELSEN. I also serve on a policy committee for the National League of Cities, The Energy Environment and Natural Resource Committee and I also had the pleasure of serving on the Federal Advisory Committee on TMDLs.

Let me first State that NLC and all of its members strongly support the goals of the Clean Water Act.

Throughout the past 25 years the Federal Government and local governments have worked in a strong partnership to address many of our Nation's water quality problems. Unfortunately, we believe the rule that is being proposed will no longer recognize that partnership. It may very well place much of the burden for solving these problems on the local government.

As you stated earlier or as previous witnesses alluded to, the Federal Government generally tells the State government what to do. The State government generally tells the local government what to do. And we're the ones that not only have to do it, but figure out a way to pay for it.

Some of our concerns on these rules are that they may have a severely limiting effect on growth on the local level. Economic development is an important issue on the local level. They have both intended and unintended consequences. These regulations may encourage businesses to relocate in undeveloped and more pristine areas.

Under this proposal it will be difficult to comply with some of the agreements that we presently have with the Federal Government in relation to combined sewer overflows, sanitary sewer overflows and our storm water program. The cities presently are in the process of committing our resources to deal with the storm water program. The Phase 2 regulations were just published in October. And we're somewhat concerned with how the new TMDL regulations will be compatible with the agreements that we have under those regulations.

We believe it would, for example, be very difficult to comply with the diversion of storm water to treatment facilities when we're limited to the loads that we currently have at those facilities. As mentioned earlier, we're very concerned with who pays under this program. We're very concerned with some of the trading provisions. The burden for the non-point pollution that lies outside of our boundaries may be shifted. The financial burden for solving that problem may be shifted to local ratepayers and taxpayers under this program.

The new proposed rules I think will generate a considerable amount of endless legal activity and this will fall primarily on the NPDES permit holders.

Again under the trading program, those who are regulated under statutory control, who hold permits, will be responsible for trading with those for whom compliance is voluntary. Any enforcement action therefore will fall on those who are holding permits. We find this very troubling.

NLC would recommend that the following changes be made to the rules. The offset requirements should be entirely discretionary for municipal facilities and offsets should only be allowable where it can be demonstrated that such a policy is appropriate and will not have adverse unintended consequences.

All Phase 1 and Phase 2 municipal storm water permits should be exempt from TMDL requirements. We also believe that general permits as currently designed should remain EPA's primary recommendation to permitting authorities as the optimal mechanism for municipal storm water discharges. TMDLs should be applicable only to water bodies that are determined to actually be impaired

by water quality data that is quality assured and quality controlled.

Thank you very much for this opportunity and I would welcome any questions that you might have.

Senator CRAPO. Thank you very much, Mr. Nielsen.

Ms. Adams.

STATEMENT OF JAMIE CLOVER ADAMS, SECRETARY OF THE KANSAS DEPARTMENT OF AGRICULTURE, ON BEHALF OF THE NATIONAL ASSOCIATION OF STATE DEPARTMENTS OF AGRICULTURE

Ms. ADAMS. Thank you, Mr. Chairman. I appreciate being here today. My name is Jamie Clover Adams. I am the Kansas Secretary of Agriculture and I appear today on behalf of the National Association of State Departments of Agriculture and my colleagues from across the country.

Like all the previous speakers have said we too desire to improve the Nation's water quality. However, we are greatly troubled by the TMDL rule. We have four major areas of concern. One is that we believe that it exceeds EPA statutory authority. We disagree with EPA's current position that the Clean Water Act provides ample authority to regulate non-point sources of pollution.

And we believe the legislative history is clear. In fact, when I was preparing for this testimony over the weekend I pulled out the brief that EPA filed in our lawsuit in Kansas over TMDLs. They clearly stated it was their belief that Congress did not include any provisions requiring States or EPA to directly regulate non-point sources, but that rather section 319 was the vehicle in order to do that with best management practices.

So, it's very contrary to what they've been saying recently. Second, we believe that the rule jeopardizes successful programs that are already being implemented in the States, both through 319 and 208 and also under the 1985, 1990, and 1996 Farm bills.

And we in the States are developing programs of our own. In Kansas we have a Governor's Water Quality Initiative, a Governor's Buffer Initiative, various other partnerships and collaborative efforts and we have measurable results. We can show that those collaborative voluntary incentive-based actions work and they do reduce pollution in our waters.

We are in the forefront. We know what the problems are. We know what will help. And we just ask EPA to get out the way and let us do our jobs.

In Kansas we have already written and are beginning to implement 90 TMDLs in the Kansas Lower Republican Basin. This year we expect to finish writing 121 TMDLs from three other basins in our State. In fact, members of my staff were out in Garden City, KS, Great Bend, KS and Newton, KS the last two nights holding local, stakeholder meetings with producers, educating them about TMDLs and what their responsibilities are.

Third, the Departments of Agriculture are concerned that the TMDL proposed rules significantly expand command and control regulatory mandates and do not provide flexibility.

Senator I would agree with you that they talk the talk and don't walk the walk. And when you get out in the regions it's very, very different than what we hear from headquarters staff.

We know in Kansas through experience that the geographic and hydrologic extent of non-point source pollution defies a regulatory approach. We also know that you have to have cooperation and collaboration to get results. We had a program in Kansas where we provided an incentive to reduce atrazine runoff. It took one-on-one work. We had a 100-percent participation in the targeted sub-basin and we had measurable results in water quality. It works. We know it works.

Finally, we believe the rule fails to recognize the substantial State resources needed to address non-point source pollution. That's both financial and technical assistance, gathering scientific data, monitoring and doing BMP research. We have found in Kansas—and I believe the other States have too—that technical assistance is just as important to minimize non-point source pollution as is financial assistance for farmers and ranchers. It takes a lot of one-on-one work, helping them understand what the problem is and then how they can go about solving that problem.

We also believe that water quality data in all the States is not adequate to make the kinds of decisions the EPA rule requires. Even in States like mine where we have a network of 200 monitoring sites that have been in place for over 20 years, when we went into the Governor's Water Quality Initiative we had data gaps. We had to do extra monitoring. We did additional biological monitoring through our Wildlife and Parks Division in order to just get a baseline, so if in a State like ours where we do a lot of monitoring there was a problem, I can imagine—and I've heard from my colleagues—the problems they have in other States.

And finally, we are investing a lot of money in best management practice research with our land grant institutions. Farmers and ranchers want to do the right thing. They just need to have the tools in order to do that, and we need to fund best management practice research.

And then finally, we believe that EPA's economic analysis greatly underestimates the costs to the private sector of implementing TMDLs. The State Conservation Commission in Kansas did a review of one half of a county that's in the current implementing area of TMDLs, how much it would cost to implement practices to meet high priority TMDLs on 192,000 acres. They're talking about $4 to $5 million. And I know in Washington that $4 or $5 million dollars is not a large sum, I understand that. But here's what it means for producers on the ground.

The average value of production in that county for a farmer is $90,000. We are talking about 4 to 5 percent of their gross margin to implement TMDLs. And we all know in a good year for a producer it's 3.5 to 5 percent and in the years that we've had, the last two or three—you can't get blood from a turnip. They just don't have it. So we need to think about it in those terms, too. Whether it is or isn't in the statute, it means something to those folks. We're talking about small producers. The map on the back table over there showing the impaired waters for Kansas, many of them you'll see are from pathogens, fecal coliform bacteria. And I can guaran-

tee you if you look at the northeast corner of the State of Kansas those are the producers that have less than 300 animal units because in our State we permit anything over 300 animal units. We are talking about very, very small producers who just don't have the capital that it takes to get this job done.

Finally, I would just close by emphasizing that the rule does exceed their authority. It is rigid top-down. It won't improve water quality. And it fails to recognize the costs having to do with implementation. And if you don't remember anything else I said today, this is not about pushing paper and it's not about process. It's about people. It is about farmers and ranchers and their livelihoods and their businesses and their families. This isn't about what goes on inside the Beltway here. This is about what happens on the ground. And it has a real impact.

Finally, I would just say please judge us on our performance. I agree, and NASDA does too, with the ''functionally equivalent,'' but I would say that if we have data that shows we're meeting the standards or the trends are going in that direction, leave us alone and let us do our jobs. And I would offer also that NASDA would be willing to work with the committee along with WGA to come up with some kind of a compromise.

Senator CRAPO. Thank you very much, Ms. Adams.

Mr. Holm.

STATEMENT OF DAVID HOLM, PRESIDENT OF THE ASSOCIATION OF STATE AND INTERSTATE WATER POLLUTION CONTROL ADMINISTRATORS

Mr. HOLM. Thank you, Mr. Chairman. I'm David Holm, president of the ASIWPCA this year and we're the National Professional Organization that consists of the administrators of programs under the Clean Water Act.

I wanted to talk about the dialog that we've had ongoing with EPA over the past year or so concerning this proposed regulation. Recently in December there was a 2-day very intensive workshop that we had with EPA where we considered this proposal in great detail. And what I would like to do today is talk about the areas where it seemed that the Senior EPA Managers that were there seemed to be agreeing with us and then at the same time highlight where we have some continuing disagreements that are fairly significant.

What I would like to do is track my comments with the basic elements of the TMDL process and EPA's proposed regulations, beginning with monitoring and assessment, because that truly is the foundation of the TMDL program.

We do seem to share some agreement with EPA that the current level of resources that we can bring to bear on this foundational element of the TMDL program is inadequate.

On the other hand EPA sought and received a bump in the budget under section 106 last year. And they're proposing, as Mr. Fox noted, an increase this year as well. While States are somewhat concerned about the 66 percent match that they're proposing for that new funding under section 106, things seem to be moving in the right direction here.

The next major topic is related to the development of the list and listing and delisting issues. In the States' view the comprehensive water body accounting system needs to be the system that's authorized under section 305(b), not the section 303(d) which deals with a very specific list of impaired waters.

I think the EPA was listening to us as we expressed that concern and pressed it at that very intensive meeting. I think they have considered the proposal to move away from multi-lists under 303(d) back to looking at 305(b) as the place where the status of the Nation's water bodies are accounted for.

One of the issues that has received a lot of play, we've heard a lot about today. But it's an issue that not all States are in agreement on. It is that EPA lacks the authority to require a listing of water bodies impacted only by non-point sources. EPA cites its current regulatory authority as the reason it so adamantly insists that such water bodies be listed. That's an area of quite a lot of controversy around the country.

Another issue related to listing with regard to non-point sources and point sources is whether threatened water bodies should be listed. If threatened water bodies really are listed the list will become unimaginably long. In Colorado nearly every water body would be listed as threatened because our receiving waters are so small that it takes very little pollution to use up the assimilative capacity. And our goal is to try to maintain these water bodies at the level of the water quality standards. But they are all threatened. Many other States have expressed that view as well.

One of the next major topics that we've talked to EPA about has to do with scheduling and priorities. We feel that this is very much an issue that should be in the States prerogative. The discretion to set priorities in consultation with the public based on all relevant considerations is the way priorities and schedules should be developed. EPA on the other hand has set a number of triggers that would increase the level of priority for water bodies, including whether they contain ESA-listed species or water bodies where MCLs are being violated.

We disagree with EPA on the definition of TMDLs. They've included the requirement for an implementation plan. That's a major source of disagreement. We have also disagreed with EPA on the reasonable assurance that's necessary to be included with TMDLs.

In conclusion, I want to remind the committee that this regulation proposal has come about in the wake of a tremendous amount of litigation stemming from the failures of States to implement section 303(d) of the Act. And I won't go into all the reasons for that today. But we have had many priorities over the years. It's very clear that this proposal is being developed in the existing climate of regulations, statutes and resources and therefore it needs to fit in, fit in flexibility into that structure. We think that TMDLs should serve a very limited function and that is identifying the assimilative capacity of water bodies for pollutants that really can be measured in terms of concentration and loads.

A TMDL program is only as good as the implementation efforts that follow it, but that doesn't mean that implementation should be part of the TMDL.

Mr. Chairman, we've made many thoughtful and detailed recommendations on this proposed rule by EPA. Where we've not made suggestions EPA can assume that we agree with their proposal as long as the provision is consistent with our other recommendations. But we believe if our comments are incorporated into the rule we'll have a result that will be widely supported. And I thank you very much for the opportunity to speak with you today.

Senator CRAPO. Thank you, Mr. Holm.

Mr. Archey.

STATEMENT OF WARREN E. ARCHEY, MASSACHUSETTS STATE FORESTER, CHIEF OF THE MASSACHUSETTS BUREAU OF FORESTRY, AND CHAIR OF THE NASF WATER RESOURCES COMMITTEE

Mr. ARCHEY. Thank you, Mr. Chairman. I am chief of the Bureau of Forestry in Massachusetts and also committee chairman for the Water Resources Committee of the National Association of State Foresters and that's the position I'd like to bring forward. And I appreciate the opportunity to provide testimony today.

First I will summarize the NASF position, make a few observations and finally propose what we believe are reasonable approaches to solutions.

The NASF position. The State Foresters are strongly opposed to the proposed rules on three major grounds. The proposal is a major departure from the historical interpretation and previous implementation of the Clean Water Act and is not supported by statutory authority. The proposal ignores the minor contribution made by forest management to water quality problems nationwide. And threatens to disrupt the effective approach taken by State foresters and our Federal partners, mainly the Forest Service in concert with 319 and EPA to achieve non-point source mitigation.

Their proposal would be extraordinarily difficult to implement and practice and will result drastically higher implementation costs for both States and that they must develop TMDLs and landowners and wood industry who might become subject to NPDES permitting requirements. Those are the basic position items.

Observations. The NASF is committed to the goals of the Clean Water Act and watershed-based solutions, we're all together on that. Forest management is vital to water resource protection. As an example close to home. The Metropolitan District Commission in Massachusetts manages for what is called for resilient forest, one that will ideally leave a two-tier under story after catastrophic events such as hurricanes. Interestingly, Massachusetts has witnessed a 70-year recurrent cycle for hurricanes and other northeastern States have seen it on more frequent occurrences and though these are unpredictable in the short term, they're statistically predictable for the long term and a fact of life.

So what, what does all this mean? It means that if we're going to have a resilient forest what we've got to do is have the opportunity to manage that forest. And if we observe that protection of forest soils is a large part of the solution recognizing that forest represent the ideal catchment, filter and water storage median, then protecting that forest and that resilient forest is a paramount item.

I should note incidentally that the Metropolitan District Commission provides 2.5 million people around the Boston Metropolitan area with unfiltered water, mainly because of the kinds of management that they're up to and that is testimony to me to the effectiveness of BMP implementation.

Further, forest management should be seen as a non-point source mitigation, a buffer from detrimental land issues through afforestation station and reforestation station. And in this instance we regard forestry as the solution to the problem. Again prevention rather restoration is more effective and much less expensive.

An ideal solution should be voluntary and incentive-based—State/Federal partnerships that produce workable solutions that are being constantly improved. Water and forester licensing and certification, best management practices developed and refined—a process that is not broken. It is only in need of occasional refinement as experience and evolving science dictates.

EPA section 319 is a valuable tool which could be expanded and refined. Solutions, my last thoughts, and there are three.

As we look at the law that exists it needs consistency. I think we've heard that a number of times. Another alternative to how we might deal with this is a silvicultural exemption. Another way to deal with it too is through much more cooperative efforts than we've seen in the past.

Clarification. There's an inconsistent message, preoccupation with bad actors. There are other ways to deal with them. How to differentiate between point and non-point silvicultural activities. How to enforce this. And finally under clarification, a comprehensive examination of costs to be incurred.

Back to the silvicultural exemption. This should be broadened. Note the provisions of Senate bill 2041 as introduced by Blanche Lincoln of Arkansas and House bill 3609 as introduced by Representative Max Sandlin of Texas. But, whether we incorporate an exemption on that, let's simultaneously work together on communication and funding. We should be emphasizing prevention over restoration, much cheaper, I've said that before.

Woefully inadequate today is the funding. If we say the silvicultural activities are a problem, that section 319 is only provided 2 million or 2 percent over fiscal years 1996, 1997 and 1998 as compared to $100 million to $1 billion estimated to implement these new rules.

Let's more fully utilize section 319 as an alternative to TMDLs. We need better focusing and targeting for funds. We need solutions like the watershed forestry initiative. You'll find that that's an attachment to the package in our written testimony.

This kind of thing would put people on the ground with the kind of technical assistance we heard about earlier. The wood industry would be in better shape, certainly landowners on the best management practice implementation. This, the forefront of what we see, is the solution. This works. We need cooperative joint studies as to BMP compliance and effectiveness, again let's make that thing that works even better. NASF is setting the stage for some of that now with a survey of State BMP programs.

And finally, let's intensify non-point source activities among NASF, the Forest Service and EPA at the national level and simul-

taneously seek closer relationships between State Forestry Agencies and State Water Quality Agencies.

Section 319, Source Water Assessment Program, Clean Water State Revolving Fund Grants, these are alternative solutions to all that and I think if we work earnestly on these we can provide an alternative to TMDLs.

Thank you, Mr. Chairman.

Senator CRAPO. Thank you, Mr. Archey.

Mr. Parrish.

STATEMENT OF RICHARD A. PARRISH, SOUTHERN ENVIRONMENTAL LAW CENTER

Mr. PARRISH. Good afternoon, Mr. Chairman. My name is Rick Parrish, I'm an attorney at the Southern Environmental Law Center, a non-profit environmental group that works throughout the south. I too served on EPA's TMDL Advisory Committee and have been working for about 10 years to strengthen the TMDL program. And I want to make sure we keep one thing in mind as we discuss these proposed rules, proposals that would serve to strengthen and clarify the program. We're here because the current rules do not work.

The TMDL program was included in the 1972 Clean Water Act. It has been virtually ignored by States across the country for 25 years. Rules have been in place since 1985, guidance has supplemented the rules throughout the 1990's, and though there has been a considerable amount of effort in the last year or two at different States across the country, which we certainly applaud and appreciate, my question is where have we been for the last 25 years?

Now clearly, there's been a lot of progress under the Clean Water Act in other programs, in particular the point source technology based NPDES permitting program, over the past 25 years. There's been increased attention to non-point sources since section 319 was adopted, in particular over the past 10 years. But, I would submit that the results of that section 319 funding really don't measure up to the commitment that was made by Congress and the desire among the American public that waters be cleaned up.

Currently close to 40 percent of the Nation's waters that are assessed are found to be impaired. Too polluted to be used for whatever purpose the States have designated. The largest component, the largest source or contribution to that impairment States indicate comes from non-point sources. It simply makes no sense whatsoever to talk about a comprehensive cleanup program that doesn't include non-point sources in the package.

But, that doesn't mean you're talking about a regulatory program. Some States have chosen to go that route, most States have not. EPA has sanctioned that choice, whichever it may be. For the most part EPA is telling States, you figure out initially how to solve these problems and as long as what you propose will do the job, then there is no limit to your discretion and your flexibility. Now thankfully EPA is also saying, if what you propose isn't likely to succeed though, we're going to need to go back to the drawing board. Because that's where we've been for 25 years. We've been talking about our joint and mutual and collective commitment to clean water and we haven't been doing it.

We haven't been restoring the worst polluted waters in the country through the TMDL program. A program of emminent sense and logic. Now there can be debate about legal authorities, and there will be. Courts will resolve them this year hopefully, next perhaps. I happen to believe EPA has the authority to include non-point sources in this program because the law simply states, identify waters where technology-based permits, point-source permits, aren't sufficient to keep them clean. And by definition that includes waters impaired by non-point sources. Because the best point source permit isn't going to keep them clean.

There's further debate about whether silviculture belongs in this package as a point source operation. Well silviculture has never been exempted from the point source program of the Clean Water Act. And in fact, since the early 1980's a number of silvicultural types of activities have been included in the NPDES point source permitting program. Log landings and the like, a very small number of operations given the potential impact that other activities within the silvicultural arena have on water quality.

Now, what EPA is proposing here with the silvicultural component of this rule has received an inordinate amount of attention which I would attribute to a highly irresponsible and inaccurate portrayal of that rule by the forest products industry. We've seen publicity about how EPA is asserting Federal land-use authority, Federal regulatory authority, Federal permits to every forestry operation in the country and nothing could be further from the truth. As its been explained over and over and over again, EPA won't even consider designating additional silvicultural operations as in need of a permit and even then a general permit, unless that operation is causing a serious water pollution problem, and unless the State has thrown up its hands and walked away from that problem saying, "We can't deal with it," and there is in fact, a point source—a pipe, a culvert, a ditch—and there's no other way to fix the problem. Only in that rare, extremely rare combination of instances will EPA consider stepping forward and assuming the burden of imposing additional permits or imposing general permits on that operation.

And frankly, if you're not going to do it then, we might as well all throw up our hands and walk away and say we don't mean it when we talk about our collective commitment to clean water.

So I recognize, Mr. Chairman, that these rules will impose additional burdens on States, on local governments, on the public, on point source and non-point source operations when those added burdens are necessary to clean up the water in this country. The people spoke almost 30 years ago through Congress about how important that was, that hasn't changed. And I believe these rules are the first big step toward actually achieving that goal set almost 30 years ago.

Thank you.

Senator CRAPO. Thank you, Mr. Parrish. Members of the panel, I have been writing down questions for each of you as we've been going along here, but I think that I may come back and wrap up with some of those questions, but I think what I would like to do is to get into some of these issues with the whole panel and have some give and take on them. And I'd like to start out with one that

has been sort of a common thread throughout much of the testimony and which frankly Mr. Parrish just spent some time talking about as well.

And that is this question of, have the States and the local communities been getting the job done over the last 25 years? Mr. Parrish, you've indicated that in your opinion they have not in a lot of ways. I think you said there were some successes in some areas.

Mr. PARRISH. I'll clarify, if I may.

Senator CRAPO. Sure.

Mr. PARRISH. There's been tremendous success in the reduction of point source discharges through the technology-based NPDES permitting program. There's been certainly some improvement in the non-point source sector through section 319 funded demonstration projects, studies and research and the like.

There has been abysmally little success in restoring impaired waters through the TMDL program or otherwise.

Senator CRAPO. Are you referring to waters impaired because of non-point source pollution or has the failure also been on the part of point source solution efforts?

Mr. PARRISH. Well I think the failure has been widespread. And that certainly there are many waters on the 303(d) lists that the States develop that are there because of point source discharges. I believe common wisdom among the States is that non-point sources have become over the past 20 to 30 years a larger component of the problem.

Senator CRAPO. Because of the successes in the point source?

Mr. PARRISH. Exactly.

Senator CRAPO. OK. I see several aspects of this issue, but what I would like to ask the panel to focus its remarks on right now is—I will get to the jurisdictional aspects and BMPs versus TMDLs and all that, but the question I'd like to focus on right now for a minute is, is it correct, have we had an abysmal lack of success, Mr. Nielsen?

Mr. NIELSEN. Mr. Chairman, I think Rick hit it on the head when he mentioned—I call him that because we served together on the TMDL FACA so we are somewhat familiar with each other—hit it on the head when he said that we've made great strides using the best technical practices on the point sources. And that's my concern. When Mr. Fox was here and he made a comment that he said, ''Well we don't really care how the States solve this problem, they can do it at non-point sources, they can do it at point sources.'' My concern is that the onus of compliance will fall primarily on the point sources because those are the sources that the States and the Federal Government have statutory control over.

Whereas the problem now exists really with non-point sources. So if you came to me and said, ''Well, we need you to clean up a pound of phosphorous,'' I'd much rather do that from my storm water than I would down at my sewage treatment plant. And the most cost-effective way, especially particularly in regard to nutrients would be to deal with that at the non-point source level from a cost-effective standpoint. So what we've been doing over the last 30 years is building and improving our sewage treatment plants and now we do need to take that next step and deal with the non-point sources.

Senator CRAPO. OK, Mr. Holm.

Mr. HOLM. I do agree that the way the program is currently structured the onus will continue to be on point sources to achieve the gains and that's because there is not yet a climate of pervasive regulatory requirements upon non-point sources to improve water quality. So therefore non-point sources may well be in the catbird seat waiting for point sources to come to them and offer to pay for management practices in order for them to accomplish needed expansions in their infrastructure.

So, that's a problem, but I also wanted to respond to the earlier issue about have we succeeded? Have we succeeded in dealing with these water quality impairment problems and I would say that we have some very noteworthy successes and we have some very important lessons learned. And one of the lessons learned is that when you take a watershed approach and you try to deal with all of the water quality problems in a basin, it takes a long time to bring people together, have them understand that there's a problem, have them understand what it will take to get better information, then to make decisions on how to use that information. The commitment is there, but it's a long process and in the end it's a very successful and solid process. We have a lot of successes, not in proportion to the scale of the national problems that we're dealing with, but I frankly don't think that that commanding kind of approach in the end will get us there any faster. I think the slow way is the fast way in dealing with these water body-wide problems.

Senator CRAPO. Ms. Adams.

Ms. ADAMS. I would just point out that when I did review the Kansas EPA brief for this hearing, the EPA also pointed out in Senator Muskie's comments on the floor when the Clean Water Act was passed, folks were told to focus on the biggest problems which at that time were the point sources. So I think it's a little misleading to say that we've been sitting around doing nothing for 25 years when we focused our limited resources on point sources.

I can say too for the people in the agricultural community they understand they are under the gun and if they don't perform we will get regulation. In our State at least we have a very good working relationship with the cities. Pollutant trading isn't a real option in western Kansas, there aren't big enough cities to trade with so they're going to have to take care of their problems themselves. But I agree with Mr. Holm that this is a long process, you have to bring farmers and ranchers to the table, help them understand why they are part of the problem and how they can be a part of the solution and the 80/20 rule applies, 80 percent of them will do the right thing if they know what the right thing is to do.

Senator CRAPO. Help me understand—did you want to say something, Mr. Archey?

Mr. ARCHEY. Yes, sir. As we look to silvicultural activities for example, I see great progress in that area. And States I'm most familiar with—the northeast and New England, and I'll go back to my own State—we've had two, three different versions of a Forest Cutting Practices Act. And we've gone from voluntary to required. And we've had two different versions of BMPs and we'll have more. And it's a narrative process, one that builds on experience, one that

builds on evolving science and one that we can continually make better. There's no question. We've got a distance to go and we'll never be totally there. But again I would go back to that notion of coordination and communication, working together through maybe non-nuclear means, conventional means rather than TMDLs and get that Act together, give it a better chance, support it through section 319 and other programs.

Senator CRAPO. Did you say conventional BMPs through section 319, is that what you're referring to?

Mr. ARCHEY. Right.

Senator CRAPO. And section 319, help me a—help me understand a little bit about—well, let me ask this question this way.

It's my understanding that basically we've dealt with non-point source, excuse me, point source solution pollution problems through 303 and TMDLs, and we've been trying to deal with non-point source solution through section 319 and BMPs. Is that, does anybody want to clarify that?

Mr. PARRISH. I would just say we have not yet dealt with point sources through TMDLs.

Senator CRAPO. OK.

Mr. PARRISH. We have dealt with point sources almost exclusively through the permitting program, the NPDES point source permitting program.

Senator CRAPO. But that is what we are trying to do, am I correct in that?

Mr. PARRISH. Well, we're trying to get the TMDL program off the ground. The rules have been in place for a good many years.

Senator CRAPO. OK. Let me say it this way then. The TMDL program is directed at the point source solution issue, the BMP and section 319 is directed at the non-point sources, is it not that simple?

Mr. PARRISH. I don't think so. I'm afraid that's really where the hub of the debate is. EPA's feeling with which I strongly agree, is that the TMDL program is directed at the intersection of point source and non-point source activities. It is the big picture. It's the one which really supports this whole watershed approach, where you don't look at just this point source or even just these point sources. You look at everything that's contributing to the problem and you decide which combination of reductions would best, most efficiently fix that problem.

Senator CRAPO. And that issue is what's been litigated in California, am I right about that?

Mr. PARRISH. Whether the non-point source component of that picture belongs in——

Senator CRAPO. In the TMDL programs.

Mr. PARRISH. Exactly.

Senator CRAPO. So as you said, hopefully this year we'll get an answer to that question.

That being the case and I appreciate that this is not only debatable, but litigatable issue, where are we with regard to what the FACA Committee, how many of this panel were on the FACA Committee? The two of you.

Mr. NIELSEN. Notice that they put us opposite each other——

Senator CRAPO. The question I have is did the FACA Committee recognize or take a position or approach this issue from either of these perspectives in terms of how they perceived non-point sources to be dealt with by the statute?

Mr. NIELSEN. There was disagreement on the committee and it came primarily from the agriculture and silviculture representatives and it was their contention that those practices did not fall under section 303(d) of the Clean Water Act.

Senator CRAPO. And so was there a—there was no recommendation in that context from the committee?

Mr. NIELSEN. There was no consensus.

Mr. PARRISH. There was no consensus, because in fact, there was this disagreement, a minority opinion if you will. To their credit though, those representing non-point source interests continued to work with the rest of us to shape what they felt would be a better more effective TMDL program, whether it included non-point sources or not.

But the legalities—we just had to put that issue aside because it wasn't for us to resolve.

Mr. NIELSEN. Senator, if I could jump back to your previous question. I just wanted to make a brief comment on that. On whether there is some problem with including non-point sources in a TMDL. The problem as I see it in 1972, they included both the load allocations from point sources and non-point sources in the definition. The problem we ran into and I think Mr. Fox alluded to this is the difficulty of quantifying the load allocations and identifying the load allocations for those non-point sources.

In the equation for TMDL they're laid out there. But, there is really no good scientific way to quantify and identify where they're coming from.

Senator CRAPO. Mr. Holm.

Mr. HOLM. The way that in Colorado for example we have used TMDLs and we've done close to 300 of them, most of them really related to supporting protective limits for point source permits. The non-point source component becomes a background. It becomes the fixed background against which protective limits for point sources have to be put into permits.

Senator CRAPO. Right.

Mr. HOLM. And I think most States have used TMDLs that way that have done TMDLs.

Senator CRAPO. Let me—this is really for my edification, but I'd like to try to go back to the example I was using with regard to Coeur d'Alene, ID and the basin up there. And I realize none of you are probably aware with much detail there so you'll have to just use this as an example and trust my recitation of the facts. But, that is an ecosystem, if you will, or a basin which has had a tremendous amount of historic hard rock mining for hundreds, for a hundred years or more and so there have been some point source issues, but there has been so much mining throughout the upper reaches of the basin that now there's runoff questions and things like that where you really—I think there's a lot of non-point source issues as well.

And it seems to me as we focus on the question of whether this really is something which the local community has control over

that I saw an interesting dynamic because the Agency officials in all sincerity believed as they testified that this is something where the States can figure out what to do and if they can do it, they can do it.

The problem was as I have come to evaluate it and the testimony of this panel is helping me to see this even in more clarity, that the definition of the standard pretty much establishes what must be done for the implementation. And so you can control the implementation decisions by the standards that you set. And I'd just like your comment on that. Am I correct in that assumption or in that conclusion?

Ms. Adams.

Ms. ADAMS. That's exactly right. In Kansas we made that mistake and that's my own personal opinion in setting our water quality standards about 10 years ago with the idea that they were goals and now they're not goals anymore. And we set them at very, very protective levels. Once you do that there is an extreme burden to change them. We have a natural salt intrusion problem in the center part of our State and at the time that those regulations were passed they didn't take that into consideration. We have 20 years' worth of the data to show that it's a natural intrusion and if you think we can get region 7 to change their mind on that issue, it won't happen.

Senator CRAPO. And as long as the region, is region 7 doesn't change its mind the only way to achieve that standard if it's achievable is very narrowly limited.

Ms. ADAMS. To nail the point sources down till they can't—they're putting cleaner water back in the river than what they're getting out.

Senator CRAPO. Any other comments on this aspect, Mr. Holm?

Mr. HOLM. I can relate very directly to the problem of Coeur d'Alene. In Colorado our most difficult water quality problems are related to past mining and we've been working on a number of basins that have very similar problems to Coeur d'Alene and I'm quite familiar with Coeur d'Alene, as well.

There are a couple of points that I wanted to make and maybe these are things that would be of value.

First of all, it's true that the Gold Book standards, the table value standards will rarely be achievable in watersheds that have been heavily altered both geothermally by the mineralization process and then by man's activities in mining. So therefore, it's a given fact that site specific standards are going to be needed. The other thing though is that with abandoned mines there's a unique problem, there are no operators. You have a succession of landownership where there's no activity any longer taking place that would warrant some sort of treatment.

Senator CRAPO. Right.

Mr. HOLM. Being imposed. And one of the problems in the Clean Water Act is that even if people who don't have responsibility for those problems enter in and try to do something that would make good sense to improve water quality, they could become responsible for the problem and get tagged with the costs of cleaning up to the water quality standards.

There has been discussion of a Good Samaritan provision under the Clean Water Act and I would really urge you to take a look at that and consider supporting it. And what that would do is allow people to come forward with projects that would make the most sense to abate the pollution problems that are there short of installing chemical and physical treatment plants at every old abandoned mine site.

Senator CRAPO. Without picking up liability.

Mr. HOLM. Without picking up liability, but a permitting process where there would be some rigor. It's just that it would be based on practical management practices, the best management practices for a given type of problem. When that kind of a program was put into place in a basin that was impacted like Coeur d'Alene is, there would be a result in water quality. The water quality would be improved to some degree and at that point I think there would be a very solid case to be made that the residual water quality problems are really part of the background. They are—in other words, a higher level of water quality is just simply not attainable.

That would provide a basis for site specific standards.

Senator CRAPO. Thank you. Mr. Parrish.

Mr. PARRISH. If I may add, you're right that the standards set the goal for the TMDL process. If that goal is deemed unreasonably high in specific instances, there is a process in place for changing it. Now frankly, my experience is exactly the opposite with EPA. I have seen EPA only too willing to consider changing a standard to reflect a natural dissolved oxygen level in swamp water for instance that is unattainable given the routine standard for most surface waters in the Commonwealth of Virginia.

That's perfectly reasonable. I suspect there's a serious miscommunication problem if they're—if EPA is seemingly demanding higher than natural standards in Kansas or elsewhere. That is not national policy.

Senator CRAPO. I don't.

Mr. PARRISH. And I will tell you that the first TMDL produced by the State of Tennessee and approved by EPA just last year included a site specific standard because it was deemed that cleaning up that small waterway to fit the State and national standard otherwise applicable was simply not worth the investment to society. A different standard was proposed, EPA accepted it, and the public can live with it. That process is in place.

Senator CRAPO. Good, Mr. Parrish, that is actually very good news for me to hear you say because I only have the one experience I've described here today in Idaho where the process was technically in place, but I'll tell you it's been like pulling teeth to get it to work.

In fact, the standards that they were imposing and still are imposing, are such that if you were to go up into the highest parts of the watershed above any manmade activity and take the purest water you could get it would be out of compliance.

And in fact, I can go on with the stories about this. And it's simply because of the regional circumstances of the geography or whatever the word is that I should be using there. And everybody agrees, but for some reason in our case it doesn't seem to be working. And so I'm hopeful that we are an aberration that is not the

norm and that what you described is accurate. That it works that way most of the time.

Mr. PARRISH. But it even sounded as if it was working that way in Coeur d'Alene. It's just taking a while.

Senator CRAPO. It's taking a while, but it shouldn't have to take a U.S. Senator 8 months to make it work is what I'm saying.

Yes, Mr. Nielsen.

Mr. NIELSEN. Your example you brought up though was something that we wrestled with on the Advisory Committee, the historical or legacy problems that really pre-dated any of the Clean Water Act. And I think the current regulations make exceptions for sites similar to this. We have a situation in Wisconsin of PCB deposits in the Fox River, that's an example of that. There are other cases that we talked about and they're scattered throughout the entire country so it's not an isolated example. There will be such situations.

And I think the regulations or the recommendations if I recall from the EPA are to deal with it in a manner that Mr. Holm suggested that there would be exceptions for backgrounds that would be contributed by these sources and there would be a longer time period beyond the 15 years to deal with that.

Mr. Parrish, is that your recollection on how we decided?

Mr. PARRISH. More or less. I don't think there is actually an exemption in the current regulations, but there's an understanding that these much more difficult problems are going to take longer and are not going to lend themselves to the same kinds of point source or non-point source reductions that hopefully will fix most of the problems.

Senator CRAPO. Mr. Parrish, I have one question specific to you and I do want to say that as we've all said here that clean water is extremely important to us and we want to see it solved and that we have work to do. And I'll be the first to acknowledge that.

You know I'm often asked, being from Idaho, by my constituents why would you leave here and go live in Washington, DC., why do you want to go do that, because we have beautiful clean water and clean air and wonderful environment and we want to make it cleaner and keep it that way, so it's something we can all identify with.

And I appreciate your perspective as a FACA member having gone through the process. And in your written testimony you focused on the implementation plan as an area of agreement and it's my understanding that there was disagreement as to whether the implementation plan should be included in § 303 or 303(e), which basically comes down to whether the EPA has the authority to approve or disapprove and to rewrite a State implementation plan. And to me that seems to be pretty critical. What's your opinion on that issue?

Mr. PARRISH. Your understanding is correct. There was agreement, complete consensus on the Advisory Committee that TMDLs were worthless if they were not implemented.

Senator CRAPO. Right.

Mr. PARRISH. And that implementation plans should be part of a TMDL-based watershed recovery plan.

There was a difference of opinion about whether it should be part of that plan formally and submitted to EPA for review and approval under section 303(d), or developed concurrently or perhaps afterwards, but separately, and submitted as part of the watershed management plan under section 303(e). And the difference is largely whether it will be subject to EPA review and approval.

From a practical standpoint I have firm belief that if implementation plans aren't done with TMDLs and reviewed as part of the TMDLs they are not going to be done.

And if implementation plans are prepared but not subjected to review and approval, well we've seen 20 years of that and I frankly don't think it's worth anything.

Senator CRAPO. If there were not—is there any enforcement mechanism if the EPA doesn't have oversight? I mean what happens under section 303(e)?

Mr. PARRISH. No enforcement mechanism whatsoever. The fallback position for those who work to clean up waters really is asking EPA to step in and take over State programs because States aren't doing the job. That's something nobody wants as a practical matter.

Senator CRAPO. Mr. Holm.

Mr. HOLM. If the TMDL is established and approved by EPA under the current rules, the TMDL must be implemented through NPDES permits that are issued. So clearly there is an enforceable mechanism for the point source component of a TMDL right now, today. With regard to the non-point sources it's true that if implementation plan was done under section 319 or as part of the continuing planning process section 303(e) that that would not separately be approvable by EPA and frankly, I think the States feel that that is a plus. We think that there's an orderly sequence that needs to take place when you're involving real people in this process.

And the first part of that is to develop standards. The second part is to translate those standards into a water body, a very specific water body. That's the TMDL. After that, allocating responsibilities, developing an implementation plan can follow. If you try to force that at the same time you are establishing a water body specific goal everybody just runs away. It stifles the process and you just don't get there.

Senator CRAPO. Ms. Adams, I just wanted to ask you, you mentioned a State voluntary incentive-based program to reduce runoff. Can you elaborate on that or maybe share your thoughts on how such a program might formulate a basis for an alternative solution to the current proposal or a supplement to it?

Ms. ADAMS. That specifically was part of the Governors Water Quality Initiative and what we did we went into the Kansas lower republican basin, it's our most populous basin. It has a mixture of industrial, agricultural and it has a lot of surface waters so it was a good test area for us. We also grow row crops in that area that use a lot of atrazine to keep the weeds down. We identified that Perry Lake, which is a drinking source, had an atrazine problem. We offered a $5-per-acre incentive payment from State funds to producers in the sub-basin if they would apply the atrazine when Kansas State University had determined was the best time to put

atrazine on so it wouldn't run off with the spring rains. We bought half time of the county extension agent. He went out door-to-door to every farmer and talked to them about the program, why they needed to do it and why it was economically feasible for them to participate. He got them to enroll in the program and they applied the atrazine at the appropriate time. They then got their $5-an-acre payment. The levels of atrazine in the lake have dropped to below the drinking water standard.

We have used the Buffer Initiative. We provide a State incentive payment on top of the CRP payment to enroll buffer strips, again in targeted areas to reduce runoff. We've had very good luck getting people to enroll. We're doing the monitoring now to see what kind of results that we've had. The city of Wichita in the Cheney Lake project put a million dollars in of their own money with some Federal moneys and some State moneys to work with producers to reduce non-point loadings so that they wouldn't have to build an addition on to their drinking water plant.

So, we've had a lot of good luck with providing the payments. But, you have to provide the understanding of how it helps them economically. I mean it doesn't help a producer to put on atrazine and have it all run in the river because it doesn't do it's job. And help them do the kinds of things that need to be done. But it was very successful. And now that incentive program is over and all of the landowners in that basin are continuing to apply the atrazine in the best management practice manner even without the incentive.

Senator CRAPO. I just have a couple of more questions. But Mr. Parrish, I'd like to ask your observation on this and anybody else who wants to pitch in on this. There's a voluntary approach there, sort of an incentive-based approach that a State has come up with. How does the EPA or how should the EPA evaluate this in terms of determining whether the States plan is going to achieve the objective? It seems to me that you don't know whether a States proposal is going to work until you've been out experiencing it for 5 or 10 or 15 years or whatever the time period is. And yet the State or the EPA has to approve this up front, doesn't it? How does that all work?

Mr. PARRISH. The EPA has to approve non-point source reduction components of a proposed TMDL in advance of the implementation. These are the types of programs EPA has said would likely be approved. And the types of factors are whether there is, in fact, some funding to support them. Whether there is a track record. Whether there are educational materials and a program for getting them out to the landowners. These are the types of programs that distinguish a reasonably likely success from a wing and a prayer.

But if you propose a non-point source reduction from agriculture, forestry or anything else and you don't really have any solid reason for predicting that it will succeed, then that's the type of program I would expect EPA to say, "No, we need better than this."

Senator CRAPO. OK. The last issue or question I want to get at is one that we've talked about a little already, but I want to just explore it a little bit one more time with the panel.

I'm a very big proponent of collaborative decisionmaking and in my opening statement I referred to a book by Dan Kemmis from

Montana that talks about that issue in some context. To me collaborative decisionmaking just by definition means that people from all the perspectives that we can get, as broad a base as we can get, come together and sit down and try to understand each others concerns, define objectives and figure out solutions and try to do so in a way that is a win/win for everybody.

In fact, Dan Kemmis puts a chart in his book which he got from somebody else. Which is an X/Y axis, with say the X axis being the economy and the Y axis being the environment. And he makes the argument which I agree with, that the current environmental decisionmaking process that we often find ourselves in results in solutions on that X/Y axis graft that are close to the intersection of the two axis, namely they're low for the environment and low for the economy. And they're really high on conflict, but they're low in terms of results from whichever perspective of those two parameters that you choose to view it.

He also contends and which I agree with, that there are solutions that are further up on the X and further out on the Y, or further out on the Y and out on the X axis, that are higher for the economy, better for the economy and better for the environment. And that those solutions are best achieved by people who are closest to the particular issue that is being discussed.

With that in mind as a kind of perspective that I come from, it seems to me that true collaborative decisionmaking means that the—must mean that the people who are sitting at the table doing the collaborating have to have the ability to make the decision. And that if there is someone at the table or someone who's not at the table who is ultimately going to make the decision then it's not really collaboration. It might be advice or consultation and it might be a good discussion, but it's not really a circumstance in which people from competing perspectives, competing interests and competing jurisdictions are sitting down and if you will, I don't think it's exactly this way, but negotiating about how to achieve these results which hopefully are better on both the economy and the environmental axis. And I would just like your comment on that.

What I'm really getting at is this question of whether we will be able to have effective collaboration if, in this case, the EPA is the one who holds all the cards on being able to make the decision or said another way, perhaps this FACA Committee with all the different perspectives at the table should have been able to make the decision and it would be binding and would we have had a better solution had something like that worked? Mr. Nielsen.

Mr. NIELSEN. Mr. Chairman, my experience with this comes from some demonstration projects that we did throughout the State of Wisconsin. I don't think even at the FACA level these decisions can be made. You have to actually have the landowners and the people in that actual watershed that are sitting at the table making the decisions.

Ms. Adams brought up the trading program. The trading program that is prescribed by the EPA and the offset program is fatally flawed. Trading programs do work, but they only work on a local level where there's joint and mutual benefit.

I need to trade copper, there's nobody in the agriculture community that's going to trade copper with me. I need to trade zinc, I

can't find anybody even—no one in the manufacturing community is going to trade copper or zinc with me either. So we're in a bind. We're faced with a couple million dollars improvement to our sewage treatment plant.

So, those are the kind of—the solutions and you've said this and other people throughout the hearing, the solutions really rest at the local level. And they're going to have to be hammered out watershed by watershed. I've seen some problems with that. You run into problems of political jurisdiction. In the State of Wisconsin we can't even get our neighboring township to cooperate with us, so I think you're going to have to set up governmental units that deal with it on a watershed basis.

California has done this, they're way ahead of the curve on those.

The other problem you run into and Mrs. Adams alluded to this, when you're dealing with farmers and the price of milk. I'm not here to talk about milk even though I'm from Eau Claire. The price of milk goes below $10 per hundred weight, the farmers are saying, "I'd love to do this, but I'm just trying to survive."

Senator CRAPO. "I can't." Right.

Mr. Holm.

Mr. HOLM. This brings up an issue that I'd hope to touch on earlier and that is that what you're talking about in the way of collaborative decisionmaking takes time and it costs money. And that's not been built-in to this proposal at all. Not in any way, shape or form. You have to host these kinds of watershed conversations. It takes gifted people to do that so that it does become a collaboration. It takes creative people that are going to persist until they really do find that point that you're describing where it's win/win, it's least cost, and most benefit. It takes trust building. It takes a lot to achieve that goal. And it's exactly what we ought to have before us as the goal, the next goal for water quality management.

It's not a quick hit. But the point I wanted to make is that it's not going to be free either at the community process.

Senator CRAPO. Good point. Mr. Parrish.

Mr. PARRISH. I would say this program presents an enormous opportunity for collaboration, but it is not going to be completely unbound. There is nationwide interest in clean water, and there are national standards in place that can only be departed from with a specific demonstration that it's in a very strong local interest to depart from those standards.

But in terms of choosing how to meet that goal, there's almost complete discretion built into this program as long as what the State and local efforts decide upon has a reasonably good chance of succeeding.

Now as far as time, we've got 15 years built into the regulations as is, and this is on top of almost 30 years of experience or perhaps not so much experience, after the requirement first was adopted by Congress. I think we've taken more than enough time already, and we have an awful lot of additional time built into the regulations as is. Resources and money, I agree, we're going to need more across the board. EPA is proposing almost $100 million more this year. I think that's going to get us well down the road. Some States are already proposing or rather appropriating additional moneys of

their own because they're not willing to wait on the Federal funding.

You're going to see a mixed bag across the country. We've got a lot to learn, but we're not going to learn any of it just talking about our commitment to clean water.

Senator CRAPO. Mr. Archey.

Mr. ARCHEY. I think if we're trying to achieve that farther out X and higher Y it's possible certainly in the context of collaboration. The thing that comes to mind to me, for instance, is if we're going to require people to do more things at greater costs because of public benefits for instance, clean water off their property because of their activities, then we better be able to somehow reward that good work. And I think that kind of thing will push that intersection point up there where we realize that we want both. But if we want both, let's pay for the one that may be suffering the most.

Mr. NIELSEN. Mr. Chairman, I think you mentioned you were—you've been a Senator for 7 years.

Senator CRAPO. No, I've been in Congress for 7 years. I was in the House for 6 and this is going on 8 years.

Mr. NIELSEN. If you look at what was achieved in the early years of the Clean Water Act through dealing with point sources, most of that funding came from the Federal Government. This is a nationwide problem. And I would concur with the rest of the panelists that I think we need to look at Federal funding sources to deal with this nationwide issue.

I would mention that Dan Kemmis, when he was the Mayor, served on our National League of Cities Board of Directors.

Senator CRAPO. Yes, he was the Mayor of Missoula, wasn't he?

Mr. NIELSEN. Was he in Missoula? I don't know; it was before my time. Missoula is a great town.

Senator CRAPO. All right, anybody else want to get in their last hit?

[No response.]

Senator CRAPO. OK, let me thank you. I know that it's been a long afternoon for all of you, but these are very critical issues and I can assure you that this committee is going to pay very close attention to them. We want to find the right solutions and we're going to be paying as close attention as we can and perhaps finding some bipartisan solutions at this level or if possible driving it as far out as we can into the local regions with that flexibility we've talked about. But thank you all for your attendance here.

The hearing is adjourned.

[Whereupon, at 4:40 p.m., the subcommittee was adjourned, to reconvene at the call of the chair.]

[Additional statements submitted for the record follow:]

STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Thank you, Mr. Chairman.

This is an important hearing. The new Clean Water Act "TMDL" regulations cut right to the heart of the matter.

That is, how do we keep making progress toward the goal, established in 1972, of "restoring and maintaining the chemical, physical, and biological integrity of the nation's waters" so that, wherever possible, those waters are fishable and swimmable (section 101 of the Act).

As we all know, we've made a lot of progress. But we're not there yet, by a long shot. More than 25 years after the original Clean Water Act was enacted, almost 40 percent of our waters still do not meet water quality goals.

TMDLs can be an important part of the solution. But establishing a good TMDL program won't be easy.

It's like it is with other pollution control laws. Imposing technology standards is the easy part, at least relatively speaking. Achieving ambient standards, in this case clean water, is the hard part.

I think of a TMDL as a pollution budget for a watershed. Kind of like the Clean Water Act version of a Clean Air Act State implementation plan.

Like with a SIP, establishing a pollution budget for a watershed is complex. What's the target? Who bears the burden? How do you monitor, and measure progress? How much authority rests with the States, rather than EPA?

I think that, with some prodding from the courts, EPA is basically on the right track with these proposed new rules.

But I have two general concerns.

The first is with the proposal to repeal the regulation that treats most silviculture practices as nonpoint sources rather than point sources. I've written Administrator Browner about this, and Assistant Administrator Fox has made a partial reply, which I ask be included in the hearing record.

I appreciate the progress that this exchange of letters represents. But I'm still not convinced that, as a matter of law or policy, EPA's silviculture proposal makes sense.

My second concern is with the level of prescription in the new rules. Governor Racicot and others will address this.

We need to make sure that, as the courts have insisted, EPA and States get on with the job of developing TMDLs.

But we need to do so in a way that enhances, rather than detracts from, the operation of good State programs.

I look forward to continuing to work with EPA, the States, and others to help strike the right balance.

STATEMENT OF MARC RACICOT, GOVERNOR OF THE STATE OF MONTANA

Mr. Chairman, Senator Reid, and members of the committee, I am Marc Racicot and I have the pleasure of serving as Governor of the State of Montana.

I greatly appreciate the invitation to share my thoughts regarding the Clean Water Act and specifically Total Maximum Daily Load (TMDL). This is of great importance to our State, both to our people and the resources we cherish.

We are pleased this committee is taking an active role in reviewing the Environmental Protection Agency's (EPA) proposed revisions to the agency's water quality regulations, 40 CFR Part 130, published in the Federal Register on August 23, 1999.

Before I begin, I want to mention to the subcommittee members that I have attached to my testimony the formal comments I submitted on behalf of the State of Montana to EPA on this proposed rule. Our State's natural resource agencies worked together to analyze the proposed rule and to develop the consensus comments attached.

The State of Montana is very committed to achieving the clean water goals set forth in Section 303(d) of the Clean Water Act (CWA). This is especially demonstrated through our 1997 passage of State legislation pertaining to the Total Maximum Daily Load (TMDL) process.

Our TMDL amendments to the Montana Water Quality Act successfully address many of the same issues that are now the focus of EPA's proposed rules. Our comprehensive State law establishes 303(d) listing methodologies and criteria, specifies a public involvement plan, sets a 10-year schedule for statewide TMDL development, addresses TMDL implementation and monitoring, and authorizes pollution offsets.

As well, our State TMDL program funding appropriation provides new State revenues for accelerated water quality problem solving. Indeed, we are currently achieving at the State level what EPA hopes to accomplish nationally with the proposed rules.

EPA's presumption that solutions to long-standing national TMDL issues must be prescribed within the context of new Federal regulations is at the core of Montana's concerns over the proposals. We fear that the program changes envisioned by EPA will add unnecessary and inappropriate specificity that will ultimately hinder the success of our current program.

The proposed changes could seriously compromise our State program goals and strategy, undermine recent intensive implementation efforts and public trust, and reduce our overall progress in achieving the water quality restoration goals of the Federal Clean Water Act.

Mr. Chairman, I would like to mention briefly the process which lead up to enactment of our State law. And, I must confess, we are very proud of the work we have accomplished to date.

A dialog was begun late in 1996 between Montana natural resource agencies, businesses and industries, and conservation groups to gage interest in developing State TMDL legislation which would address these concerns. A briefing paper was developed and distributed and a broad range of interests were invited to participate on a work group to draft legislation.

Over several weeks, the group met regularly to revise drafts of a bill and to try to achieve consensus on bill content. While complete agreement was not achieved prior to the deadline for submitting the bill, remarkable progress was made in coming together on many of the issues. This effort paid off in strong support for passage of the bill in both houses of Montana's legislation and few amendments in the legislative process. House Bill 546 was passed into law in the State of Montana and became immediately effective with my signature on May 5, 1997. Funding totaling nearly $1.4 million for the biennium was also provided by the Montana legislature.

At the heart of Montana's program is the TMDL Advisory Council. The Council is made up of representatives from agriculture, industry, environmental groups, State and Federal agencies, and recreationists. The group provides input and advice to State decisionmakers and professional staff, and helps insure that the development and implementation of measures to improve water quality are truly grass roots approaches. We believe that those landowners and users who are asked to host and support on-the-ground measures should have a say in their development.

Although EPA's stated objective in developing the proposed rules was to strengthen the efficiency and effectiveness of the Clean Water Act's TMDL program, the rules do little to accomplish this objective. Instead, the new regulations would add unnecessary complexity to Montana's ability to develop TMDLs in a timely fashion. The new regulations appear to focus on listkeeping and technical reporting to EPA, rather than effective assessment, implementation, and resolution of water quality problems. The rules also create a regulatory framework that is inherently inconsistent with section 303(d) of the CWA.

Specifically, the rules create a presumption that a State's entire TMDL program, including its process and methodology of identifying impaired waters, prioritizing those waters, developing TMDLs for those waters, and addressing nonpoint sources in its TMDL process, are all subject to EPA's approval. In effect, the rules provide EPA with a "veto" power over a State's entire TMDL program. This is not a power envisioned by Congress when it granted EPA a limited oversight role to review a State's submission of lists and TMDLs under section 303(d). The State of Montana objects to the imposition of regulations establishing regulatory requirements over every component of a State's TMDL program when Congress has not sanctioned that approach.

One of the primary drawbacks of EPA's proposed regulations is that they impose numerous regulatory details to address prior inefficiencies in TMDL development that have already been addressed by many States. Montana has already accomplished what EPA is attempting to achieve through the proposed rules. Montana is already more than 2 years into the process of making comprehensive changes to its 303(d) listing methodology and creating a publicly supported approach to development of TMDLs. We have a TMDL development schedule, new listing methods and decision criteria, a new publicly accessible data base to support listing decisions, a new TMDL prioritization process, and we have been working with local groups to ensure that TMDLs will be implemented over the long term with reasonable assurance.

Also, Montana's monitoring provisions require that after 5 years, TMDL plans will be evaluated to determine if implementing organizations are making satisfactory progress. While we recognize the need for consistent guidance to States and the public regarding TMDLs, the new regulations do not give those States already implementing programs of their own enough latitude to determine appropriate management measures, especially for land use-related nonpoint source problems.

In its finalization of the rules, EPA must acknowledge that Montana and many other States have already developed processes, methods and approaches to meet court, legislative or stakeholder demands for their existing TMDL programs. In many cases, EPA's proposed new substantive rules might be disruptive and expensive to States that have already developed effective TMDL programs endorsed by

stakeholders and elected officials. This issue is at the forefront of Montana's concerns with the rules as currently proposed.

Existing processes and approaches that meet court decrees and/or provide positive and beneficial results should not be compromised or superseded by these new rules. At the same time, States should be encouraged to be innovative in developing new processes and approaches that achieve the results envisioned by these rules in a more efficient manner.

With this in mind, the State of Montana encourages EPA to apply a "functional equivalency" test to State TMDL programs prior to the imposition of any new program requirements. The test would provide a demonstration that a State process, method or approach achieves the same desired results intended to be achieved by the proposed rules. There are numerous examples of these cases, including how States prioritize their lists, incentives that States have built into their programs to achieve correction of impaired conditions in lieu of a TMDL, and recognition of various approaches to implementing TMDLs.

Frankly, Mr. Chairman, we strongly believe EPA must recognize that "one size does not fit all" and the TMDL rules must remain open to alternative methods of doing business that achieve comparable results.

We are also seriously concerned about the fiscal implications of the proposed changes. By all indications, the proposed program and its increased scientific rigor and reporting burden would cost substantially more to administer while achieving fewer water quality improvement results. The State of Montana operates its current TMDL program on a limited budget but achieves a high degree of efficiency through local leadership and volunteerism and by minimizing administrative overhead costs. Increasing program administrative costs would translate directly to less money available for local, on-the-ground implementation of water quality improvement measures.

The State of Montana is very concerned that the new TMDL rules would result in significant additional costs to States over current law. According to EPA's Water Quality Workload Model, Montana currently has minimal resources to run a TMDL program under the rules as they now stand. Currently, the Montana Department of Environmental Quality (DEQ) has about 13 FTE (full time employees) committed to water quality standards activities, including monitoring, reporting and TMDL activities, with a budget of about $1.35 million. EPA's Water Quality Workload Model: Draft Module 2, when calibrated to Montana's parameters, suggests that 58 FTE and a total budget of about $4.9 million would be needed to implement TMDLs on time under the rules as they now stand.

It follows then that the new and more complicated rules proposed by EPA would set back the staff and unduly slow the TMDL process unless additional resources were obtained. In addition, the new rules undo much of the work and fiscal investments already put into Montana's current TMDL program. By our most conservative estimate, DEQ would need at least twice the current resources to comply with the proposed rules in a timely fashion. Our best guess is that between 22 and 24 additional FTE over the 13.5 currently employed would be needed to comply with the new TMDL rules, along with several tens of thousand of dollars in new equipment.

Again, Mr. Chairman, for the new regulations to be successful in achieving national clean water goals, they must accommodate a degree of flexibility on the part of the States that are charged with primary responsibility to implement the TMDL program. The rules must acknowledge that individual States are in the best position to formulate the most effective and efficient water quality improvement strategies for their regions.

The rules must also recognize that States have primary responsibility for achieving water quality improvements through State authorized and funded programs. EPA also needs to carefully consider the water quality consequences of proposed program changes toward more intensive agency list keeping, administrative oversight and analytical rigor, and less focus on community based water quality problem solving.

The top-down, prescriptive complexion of the proposed rule is contrary to the Clean Water Act and contrary to Montana's grassroots approach to TMDL development. Last, but no less importantly, EPA must remain sensitive to the need for additional State resources if national clean water goals are to be further expedited. In accordance with these basic tenants, the State of Montana recommends the following changes to the proposed rule:

1. We support the need for a consistent, technically sound and well-documented listing methodology as the foundation for State TMDL programs. EPA should provide non-regulatory guidance to aid States in developing sound methods, should accommodate flexibility in adopting these methods, and should accept methods documentation on the same schedule as the 303(d) List submittal.

2. EPA should require the submittal of a one-part 303(d) List of water quality-limited segments and should retain an optional provision for listing threatened waters and those impacted solely by "pollution". A tracking mechanism is needed for water quality-limited segments with approved TMDLs, but decisions to retain or delist water bodies following TMDL approval and pending water quality standards attainment are best left to the States.

3. We support changes that would require less frequent mandatory reporting. EPA should adopt a 5-year 303(d) reporting cycle and retain current provisions for interim list modifications.

4. The State of Montana supports the proposed 8- to 15-year TMDL scheduling requirement, but recommends the inclusion of provisions for periodic adjustments during subsequent listing cycles. We urge EPA to continue to accommodate State flexibility in establishing TMDL prioritization criteria and in targeting water bodies for TMDL development. Specifically, endangered species and drinking water issues should be considered in State TMDL priority setting, but should not necessarily take precedence over all other possible State concerns and priorities.

5. We support the need for timely implementation of TMDLs, including the need for accountability and reasonable assurance of water quality improvement. These concepts are an important part of Montana's program and implementation plans are a standard component. However, we propose that EPA's minimum required TMDL elements be provided in the form of guidance to States, not regulations. Allowances for future growth, however, are a local issue that should not be addressed within the guidance.

6. We encourage EPA to retain States' discretion to use alternative expressions of TMDL water quality improvement targets in lieu of actual load reductions, in cases where this is appropriate. This is consistent with EPA's current TMDL development guidance and would ensure the needed State flexibility to select the most appropriate and cost-effective units of TMDL expression for each water quality improvement project.

7. We fully endorse the need for public involvement in all phases of the TMDL process and this is at the cornerstone of Montana's program. However, additional EPA specificity in this regard, achieved through rule revisions, is unnecessary and unwarranted.

8. EPA should recognize the States' primary role in implementing Section 303(d) and should not create a petition process that encourages EPA intervention in State TMDL programs. If this concept is to be retained in the rule, specific requirements should be added which require petitioners to demonstrate a good faith effort to resolve their issues with the State and to submit relevant supporting information. States should also be granted an opportunity within the rule to respond to petitions prior to any intervention on the part of EPA.

9. EPA should approve any State TMDL submitted within 12 months of the final rule changes as long as it meets pre-amendment or post-amendment requirements.

10. The required inclusion of atmospheric deposition in non-point source pollution load allocations is premature, given the State of the available science. States should be delegated the authority to decide how and when, on a case-by-case basis, State air quality management issues should be coupled with the TMDL process.

11. Montana supports the concept of giving special consideration to threatened and endangered species during the TMDL process. Montana does not agree, however, that the rules should require States to engage in the consultation procedures applicable to Federal agencies under Section 7 of the Endangered Species Act. Instead, the rules should simply require States to informally involve the assistance of the U.S. Fish and Wildlife Service during TMDL development.

12. Considering that the new TMDL rule would result in significant additional costs to the State of Montana, we recommend that EPA more accurately quantify these costs and address solutions to the anticipated State fiscal shortfalls before finalizing the rule package.

Finally, Mr. Chairman, we are concerned that, despite receiving several tens of thousands of comments on the proposed rulemaking, EPA intends to "fast track" the proposed rules into adoption this summer. We ask that the agency consider carefully the concerns expressed by various States and stakeholders, and reserve to those States the discretion to continue to administer the TMDL programs in which we have invested so much effort and are receiving such good results.

Again, Mr. Chairman and Senator Reid, thank you for the invitation to join you today and for considering our thoughts on this important issue.

OFFICE OF THE GOVERNOR,
Helena, MT, January 19, 2000.

Hon. CAROL M. BROWNER, *Administrator,*
U.S. Environmental Protection Agency,
Washington, DC.

Attn: Water Docket (W–98–31)

Re: Proposed Revisions to the Water Quality Planning and Management Regulations

DEAR ADMINISTRATOR BROWNER: I am writing to you on behalf of the State of Montana concerning the Environmental Protection Agency's proposed revisions to the agency's water quality regulations, 40 CFR Part 130, published in the Federal Register on August 23, 1999. We appreciate the opportunity to comment on the proposed rule. Our State natural resource agencies have worked together to analyze the proposed rule and to develop consensus comments.

The State of Montana is very committed to achieving the clean water goals set forth in Section 303(d) of the Clean Water Act (CWA), as demonstrated through our 1997 passage of State legislation pertaining to the Total Maximum Daily Load (TMDL) process. Our TMDL amendments to the Montana Water Quality Act successfully address many of the same issues that are now the focus of EPA's proposed rules. Our comprehensive State law establishes 303(d) listing methodologies and criteria, specifies a public involvement plan, sets a 10-year schedule for statewide TMDL development, addresses TMDL implementation and monitoring, and authorizes pollution offsets. As well, our State TMDL program funding appropriation provides new State revenues for accelerated water quality problem solving. Indeed, we are currently achieving at the State level what EPA hopes to accomplish nationally with the proposed rules.

EPA's presumption that solutions to long-standing national TMDL issues must be prescribed within the context of new Federal regulations is at the core of Montana's concerns over the proposals. We fear that the program changes envisioned by EPA will add unnecessary and inappropriate specificity that will ultimately hinder the success of our current program. We encourage the application of a "functional equivalency test" to State TMDL programs prior to considering the need for more Federal oversight. Montana would very likely pass such a test.

For the new regulations to be successful in achieving national clean water goals, they must accommodate a degree of flexibility on the part of the States that are charged with primary responsibility to implement the TMDL program. The rules must acknowledge that individual States are in the best position to formulate the most effective and efficient water quality improvement strategies for their regions. The rules must also recognize that States have primary responsibility for achieving water quality improvements through State authorized and funded programs. EPA also needs to carefully consider the water quality consequences of proposed program changes toward more intensive agency list keeping, administrative oversight and analytical rigor, and less focus on community based water quality problem solving. The top-down, prescriptive complexion of the proposed rule is contrary to the CWA. and contrary to Montana's grassroots approach to TMDL development. Last, but no less importantly, EPA must remain sensitive to the need for additional State resources if national clean water goals are to be further expedited. In accordance with these basic tenants, the State of Montana recommends the following changes to the proposed rule:

1. We support the need for a consistent, technically sound and well-documented listing methodology as the foundation for State TMDL programs. EPA should provide non-regulatory guidance to aid States in developing sound methods, should accommodate flexibility in adopting these methods, and should accept methods documentation on the same schedule as the 303(d) List submittal.

2. EPA should require the submittal of a one-part 303(d) List of water quality-limited segments and should retain an optional provision for listing threatened waters and those impacted solely by "pollution". A tracking mechanism is needed for water quality-limited segments with approved TMDLs, but decisions to retain or delist water bodies following TMDL approval and pending water quality standards attainment are best left to the States.

3. We support changes that would require less frequent mandatory reporting. EPA should adopt a 5-year 303(d) reporting cycle and retain current provisions for interim list modifications.

4. The State of Montana supports the proposed 8–15-year TMDL scheduling requirement, but recommends the inclusion of provisions for periodic adjustments during subsequent listing cycles. We urge EPA to continue to accommodate State flexi-

bility in establishing TMDL prioritization criteria and in targeting water bodies for TMDL development. Specifically, endangered species and drinking water issues should be considered in State TMDL priority setting, but should not necessarily take precedence over all other possible State concerns and priorities.

5. We support the need for timely implementation of TMDLs, including the need for accountability and reasonable assurance of water quality improvement. These concepts are an important part of Montana's program and implementation plans are a standard component. However, we propose that EPA's minimum required TMDL elements be provided in the form of guidance to States, not regulations. Allowances for future growth, however, are a local issue that should not be addressed within the guidance.

6. We encourage EPA to retain States' discretion to use alternative expressions of TMDL water quality improvement targets in lieu of actual load reductions, in cases where this is appropriate. This is consistent with EPA's current TMDL development guidance and would ensure the needed State flexibility to select the most appropriate and cost-effective units of TMDL expression for each water quality improvement project.

7. We fully endorse the need for public involvement in all phases of the TMDL process and this is at the cornerstone of Montana's program. However, additional EPA specificity in this regard, achieved through rule revisions, is unnecessary and unwarranted.

8. EPA should recognize the States' primary role in implementing Section 303(d) and should not create a petition process that encourages EPA intervention in State TMDL programs. If this concept is to be retained in the rule, specific requirements should be added which require petitioners to demonstrate a good faith effort to resolve their issues with the State and to submit relevant supporting information. States should also be granted an opportunity within the rule to respond to petitions prior to any intervention on the part of EPA.

9. EPA should approve any State TMDL submitted within 12 months of the final rule changes as long as it meets pre-amendment or post-amendment requirements.

10. The required inclusion of atmospheric deposition in non-point source pollution load allocations is premature, given the State of the available science. States should be delegated the authority to decide how and when, on a case-by-case basis, State air quality management issues should be coupled with the TMDL process.

11. Montana supports the concept of giving special consideration to threatened and endangered species during the TMDL process. Montana does not agree, however, that the rules should require States to engage in the consultation procedures applicable to Federal agencies under Section 7 of the Endangered Species Act. Instead, the rules should simply require States to informally involve the assistance of the U.S. Fish and Wildlife Service during TMDL development.

12. Considering that the new TMDL rule would result in significant additional costs to the State of Montana, we recommend that EPA more accurately quantify these costs and address solutions to the anticipated State fiscal shortfalls before finalizing the rule package.

Attached is our compendium of detailed comments and analyses that support these recommendations. Thank you again for the opportunity to comment on these very important regulations. We look forward to working with EPA to develop a final rules package that will support and enhance our mutual clean water objectives.

Sincerely,

MARC RACICOT,
Governor.

DETAILED COMMENTS BY THE STATE OF MONTANA ON PROPOSED REVISIONS TO THE WATER QUALITY PLANNING AND MANAGEMENT REGULATIONS, 40 CFR 130

INTRODUCTION

The State of Montana provides the following comments regarding EPA's efforts to improve the quality of the nation's waters through the water quality-based management approach outlined in Section 303(d) of the Clean Water Act (CWA). Our commitment to this process is perhaps best demonstrated through our recent passage of legislation to implement comprehensive State water quality assessment and TMDL development. These 1997 amendments to the Montana Water Quality Act provide specific State authority to implement the provisions of Section 303(d) and outline the methodologies, framework and schedule for assessing water quality statewide, and for developing and implementing TMDLs for threatened and impaired stream segments and lakes. Our primary concerns over proposed changes to

the Federal TMDL regulations stem from anticipated conflicts with our existing State program. The proposed changes could seriously compromise our State program goals and strategy, destroy recent intensive implementation efforts and public trust, and reduce our overall progress in achieving the water quality restoration goals of the Federal CWA.

Although EPA's stated objective in developing the proposed rules was to strengthen the efficiency and effectiveness of the CWA's TMDL program, the rules do little to accomplish this objective. Instead, the new regulations would add unnecessary complexity to Montana's ability to develop TMDLs in a timely fashion. The new regulations appear to focus on listkeeping and technical reporting to EPA, rather than effective assessment, implementation, and resolution of water quality problems. The rules also create a regulatory framework that is inherently inconsistent with Section 303(d) of the CWA. Specifically, the rules create a presumption that a State's entire TMDL program, including its process and methodology of identifying impaired waters, prioritizing those waters, developing TMDLs for those waters, and addressing nonpoint sources in its TMDL process, are all subject to EPA's approval. In effect, the rules provide EPA with a "veto" power over a State's entire TMDL program. This is not a power envisioned by Congress when it granted EPA a limited oversight role to review a State's submission of lists and TMDLS under Section 303(d). The State of Montana objects to the imposition of regulations establishing regulatory requirements over every component of a State's TMDL program when Congress has not sanctioned that approach.

One of the primary drawbacks of EPA's proposed regulations is that they impose numerous regulatory details to address prior inefficiencies in TMDL development that have already been addressed by many States. From Montana's perspective, EPA is attempting to do too much too late in the process. Montana is already more than 2 years into the process of making comprehensive changes to its 303(d) listing methodology and creating a publicly supported approach to development of TMDLs. Montana is addressing the same issues that EPA is proposing to address in its new regulations. We have a TMDL development schedule, new listing methods and decision criteria, a new publicly accessible data base to support listing decisions, a new TMDL prioritization process, and we have been working with local groups to ensure that TMDLs will be implemented over the long term with reasonable assurance. Finally, Montana has a monitoring requirement that after 5 years TMDL plans will be evaluated to determine if implementing organizations are making satisfactory progress. While we recognize the need for consistent guidance to States and the public regarding TMDLs, the new regulations do not give those States already implementing programs of their own enough latitude to determine appropriate management measures, especially for land use-related nonpoint source problems.

The proposed regulations also take a highly technical approach to developing TMDLs involving water quality modeling, quantifying actual loading rates, and generally providing for an unrealistic degree of scientific certainty in establishing TMDLs. This approach would push most of the TMDL work toward highly specialized water quality professionals in State government and away from community-based watershed groups and local governments. If the regulations were written to recognize the importance of local leadership and public involvement, they would encourage more flexible approaches to resolving water quality concerns.

EPA's FACA (Federal Advisory Committee Act) group recognized the need for flexibility in the TMDL process. In the draft regulation, EPA appears to have ignored key recommendations of the group in developing the proposed regulations. These recommendations include the ability for States to include, in some instances, "surrogate measures and measures other than daily loads" and "taking an iterative approach to TMDL development and implementation [to] assure progress toward water quality standards attainment. . . These issues are directly addressed in the guidance document that accompanied the draft regulations. This document allows more flexibility than the draft regulation on these issues. A question might arise as to which applies if the regulations are not adjusted to provide some allowance for these approaches.

We are also concerned about the proposed definitional focus on pollutants and not pollution. This aspect of the rules makes it appear that EPA is retreating from the broader Clean Water Act goals (chemical, physical and biological integrity) and focusing on just one type of water quality problem—those that can be calculated in terms of load. This approach ignores current new understandings in water quality science relating to roles of changes in hydrology, habitat quality and biological indicators relating to water quality. It also seems to ignore the fact that about 90 percent of Montana's (and many other western States') water quality problems stem from nonpoint source pollution and related habitat degradation. The proposed TMDL program would require us to focus on a relatively small subset of our State's

water quality problems and would slow our pace at achieving comprehensive statewide water quality improvements. The proposed regulations do not appear to support the CWA's "clean water" bottom line in this regard.

The State of Montana is concerned about proposed changes to the 303(d) List and supports the retention of one List, to include water bodies impaired, or threatened, as a result of habitat degradation, flow alteration, and non-point pollution. Our current program focuses on comprehensive water quality problem solving, including development of water quality improvement strategies for all listed water bodies, within a reasonable (10-year) timeframe. At the same time, we must reserve the right to be flexible in *how* we address our problems. For example, our experience has shown that water quantity issues can be addressed creatively among willing players and within the confines of existing law. In this regard Montana's TMDL program is stronger than EPA's proposal, which chooses not to require TMDLs for impairments resulting from "pollution," including habitat and flow alterations. The principles of innovation and creative, but comprehensive, problem solving are at the core of our State TMDL law and the proposed rules would eliminate much of this current flexibility.

In its finalization of the rules, EPA must acknowledge that Montana and many other States have already developed processes, methods and approaches to meet court, legislative or stakeholder demands for their existing TMDL programs. In many cases, EPA's proposed new substantive ruses might be disruptive and expensive to States that have already developed effective TMDL programs endorsed by stakeholders and elected officials. This issue is at the forefront of Montana's concerns with the rules as currently proposed. Existing processes and approaches that meet court decrees and/or provide positive and beneficial results should not be compromised or superseded by these new rules. At the same time, States would be encouraged to be innovative in developing new processes and approaches that achieve the results envisioned by these rules in a more efficient manner. The State of Montana encourages EPA to apply a "functional equivalency test to State TMDL programs prior to the imposition of any new program requirements. The test would provide a demonstration that a State process, method or approach achieves the same desired results intended to be achieved by the proposed rules. There are numerous examples of these cases, including how States prioritize their lists, incentives that States have built into their programs to achieve correction of impaired conditions in lieu of a TMDL, and recognition of various approaches to implementing TMDLs. EPA must recognize that "one size does not fit all" and the TMDL rules must remain open to alternative methods of doing business that achieve comparable results.

As we've said previously, we're also seriously concerned about the fiscal implications of the proposed changes. By all indications, the proposed program and its increased scientific rigor and reporting burden would cost substantially more to administer while achieving fewer water quality improvement results. The State of Montana operates its current TMDL program on a limited budget but achieves a high degree of efficiency through local leadership and volunteerism and by minimizing administrative overhead costs. Increasing program administrative costs would translate directly to less money available for local, on-the-ground implementation of water quality improvement measures.

In the following pages we are providing you with more detailed comments and analyses of these and other aspects of the proposed regulations.

303(D) LIST DEVELOPMENT

It is Montana's position that a consistent, technically sound, well-documented listing methodology is a critical component of any TMDL program. Montana's State TMDL law establishes standards for data quantity and quality, and the Department of Environmental Quality (with comments from the public and EPA) has developed detailed criteria for making beneficial use support determinations.

We are committed to a high-quality listing process, but we see EPA's proposed process for submitting State listing methodologies to EPA as being unworkable. In Montana, with State law requiring a 60-day public comment period on a draft 303(d) List, the State must startupdating the list nearly a year before its due date, so our methodology must be essentially final at that time. Under the proposed process, a State would not receive EPA's comments on its methodology until three or 4 months (or even a few weeks) before the List submittal is due. At that point it would be impossible for the State to make any significant changes to its methodology in response to EPA comments.

States occasionally may make major changes to their methodology, but most changes between editions of their list will be fine-tuning. Experience gained or the availability of new methods will create opportunities to make small improvements.

If such fine-tuning can only be done at the cost of going through the cumbersome proposed process, States will likely choose to lock-in their existing methodology and forego making improvements.

The list of factors [identified in §130.23(c) and (d) of the proposed regulations] which must be addressed in the methodology submission also is unacceptable. This listing obviously is not a comprehensive statement of the elements that a methodology would need to address, and some of the factors listed would not be relevant for all methodologies in all jurisdictions.

Based on the concerns expressed in the preceding paragraphs, the State of Montana recommends adoption of an alternative approach, as follows:

1. Retain the existing regulatory requirement that documentation of the methodology used to develop the List be submitted with the List. Include a requirement that the methodology address the factors to be considered in deciding what data and information to use, or not use, in making assessment decisions.

2. Provide non-regulatory guidance, assistance and examples to aid States in developing sound methodologies. This would give the States the flexibility they need to develop methodologies suited to their specific needs.

3. If a State submits a list based on an unacceptable methodology, disapprove the list if warranted, or identify concerns and put the State on notice that the next submittal will be disapproved if the deficiencies are not corrected.

303(D) LIST FORMAT

The State of Montana is adamantly opposed to the proposed 303(d) List formatting scheme which would split the list into four separate parts. This proposal would hinder State efforts to improve the water quality of impaired waters by increasing the administrative workload and would complicate efforts to obtain public understanding and support for State TMDL programs. Montana requests that the single list format be retained with an *optional* provision for displaying pollutant/pollution data when available. A separate mechanism should be used to track water bodies that have not ye attained standards though they are covered by a TMDL plan.

The need for separating waters impacted by "pollutants" from those impacted by "pollution" is an artifact of the attempt to define the term TMDL as a plan rather than a load and of the legal hair-splitting made necessary by that definition. In practice, making this distinction would require an amount and specificity of data that is almost never available when listing decisions are made. Even if a tremendous increase in the available funding were to give us the data needed for list partitioning, separating the list into separate parts would draw agency and public attention away from the program goal of correcting water quality impairment—regardless of its cause.

Montana strongly agrees with the need to have an accounting mechanism for water quality-limited segments for which TMDLs have been approved but in which standards have not yet been attained, because this provides a continuing incentive to implement TMDLs and a recognition of where implementation is occurring. However, a separate tracking mechanism is needed and a number of alternatives are available to accomplish this goal, including the 305(b) statewide water quality assessment report, or the inclusion of separate appendices within the 303(d) List. The proposed requirement to retain these water bodies on the actual 303(d) List until water quality standards are attained is in direct conflict with the Montana TMDL law. Our law, patterned after the current EPA protocol, provides for Relisting following TMDL development and approval. The current delisting provision has been a powerful motivator for participation in TMDL development and implementation by some landowners and local groups. We feel that discretion to delist or retain water bodies following TMDL approval by EPA legitimately belongs to individual States.

303(D) LIST FREQUENCY AND TIMING

The State of Montana supports the adoption of a 5-year reporting cycle, with provisions for list modifications during the interim period. As Montana has worked to provide more information and better coverage of State waters in the 303(d) list and has developed a listing methodology considering chemical, physical, biological and habitat factors, the amount of effort and information required to compile the List has expanded tremendously. We have reached a point where the effort required to prepare biennial lists is taking resources away from water body monitoring and working with local watershed groups on developing TMDL plans. A change to a 5-year cycle would definitely reduce these problems.

While we support changes that would require less frequent mandatory 303(d) reporting, we urge EPA to accommodate interim additions and deletions to the State lists, based upon specific State requests and EPA review and approval. This would accommodate Montana's 303(d) petition process and would allow for timely de-listing of water bodies as TMDLs are approved or water quality standards are attained.

Montana urges that April 1 be retained as the due date for the 303(d) List. This schedule allows State staff to focus on data collection during the late spring and early summer field season, to compile a draft list during the fall, and to obtain public comment and finalize the list during the winter for April 1 submission. An October 1 due date would make it impossible to incorporate data from the most recent field season into the list assessments, and would place the timing of the office work and public consultation effort needed for list compilation squarely in conflict with the field season.

We understand that some States object to having the 303(d) List and the 305(b) Report due on the same date. Montana recommends that conflict with the 305(b) Report schedule can be avoided by encouraging States to submit only the minimal electronic version of the 305(b) Report in years when a 303(d) List is due.

TMDL SCHEDULES, PRIORITIZATION AND TIMING

Montana is concerned with EPA's proposal to require a high priority ranking for any waters where threatened or endangered species are present and for waters that are listed due to violations of the Safe Drinking Water Act's maximum contaminant levels (MCL). While the State agrees that protecting public health and endangered species is important, the State does not agree that it is EPA's responsibility to impose national priorities over State priorities. Given that EPA's approval authority extends only to the "identification" of impaired waters in the States' 303(d) Lists, Congress clearly intended that the prioritization of those waters should be left to the States. EPA should not go forward with this proposal, because States are in the best position to evaluate the truly significant water quality problems, including problems that are not related to endangered species and MCL violations, and to develop solutions for those problems according to local policies and priorities.

The practical problems arising from EPA's proposal illustrate that States are better equipped to establish their priorities and assign resources to address those priorities in an effective and efficient manner. For example, if Montana were to assign high priority for all waters where threatened and endangered species are present, then a significant percentage of the State's current list of approximately 900 impaired waters would immediately become-high priority. This is due primarily to the wide range of bull trout (*Salvelinus confluentis*) in streams west of the Continental Divide in Montana, and other listed species within the State. Developing TMDLs for potentially hundreds of high-priority streams within 5 years, as proposed by EPA, would not be feasible and would defeat the purpose of listing streams that require immediate attention.

In order to avoid the high priority ranking of potentially hundreds of stream segments, Montana would be required to undertake the onerous task of proving to EPA that the impaired quality of those streams did "not affect" the listed species. Montana believes that this would not be an efficient and effective use of State resources. States should be allowed the flexibility to establish realistic lists of priorities that can be addressed within a reasonable period of time. Establishing unrealistic timeframes for federally mandated "high-priority waters without regard to State resources only invites failure from States that cannot comply with these requirements.

TMDL development for some high priority water bodies can be complex and time consuming. States should be able to list as "high priority" impaired waters that are relatively simple to correct, particularly if the water segment is important to the local community and restoration efforts receive their full support. Efficiency at addressing water quality problems within a watershed context is another important consideration. A State's ability to develop TMDLs for separate listed segments within the same watershed and to bundle TMDLs must be accommodated. The States should be given the flexibility to address as "high priority" impaired waters other than those associated with endangered species and MCL violations.

The proposed scheduling requirement for establishing all TMDLs no later than 15 years from the date of initial listing is consistent with Montana's TMDL law, which establishes a 10-year schedule for completion of all TMDLs listed as of 1996. However, it is unreasonable to expect that a comprehensive schedule for the development of all TMDLs will not require modification over time. To help avoid unrealistic expectations and an illusion of certainty regarding the initial schedules submitted, EPA should explicitly recognize the potential need for modifications of schedules during subsequent listing cycles and establish some parameters for such modifica-

tions. For example, modifications should be allowed if States can provide a rationale demonstrating that substantial efforts have been undertaken and that new information or unanticipated difficulties make the previous schedule unrealistic or make a revised schedule more effective in making overall progress toward water quality improvement. In order to evaluate the need for such modifications, a review should be performed periodically, perhaps every 5 years. Alternatively, EPA may wish to consider requiring States to set more definitive, shorter-term TMDL development goals. This option would be especially compatible with our proposed 5-year reporting cycle and would allow greater assurances of compliance on the part of States.

TMDL ELEMENTS

The draft regulations propose that any TMDL submitted to EPA for approval must contain 10 specific elements. Some of the elements are: quantification of the current pollutant loads, deviation from acceptable rates of loading, a detailed Implementation plane, and allowances for future growth which account for foreseeable increases in pollutant loads. Our specific concerns and recommendations on these selected minimum elements for TMDL approval are outlined below.

Identifying the pollutant load

The State of Montana recommends that EPA revise 40 CFR 130.34 (b) to clearly specify that TMDLs may be expressed in terms of a numerical pollutant load or other appropriate surrogate measures. More discussion on this aspect of the proposed rules may be found in our comments under the heading How TMDLs are Expressed.''

Identify the deviation from pollutant load

In accordance with our comments on identifying the pollutant load, EPA should revise 40 CFR 130.33 (b)(3) or alternative TMDL guidance to authorize the use of surrogate water quality targets in lieu of specific pollutant loads.

Allowance for Future Growth

EPA proposes that each TMDL must provide an allowance for future growth, which accounts for any reasonably foreseeable increase in pollutant loads. Providing for future growth during the development of a TMDL is sound State and local policy and ensures that resulting water quality improvements can be maintained into the future. In fact, provisions for future growth have been addressed within some Montana TMDLs. However, EPA should not propose a requirement that is not supported by the CWA. Under the CWA, TMDLS must be established at the level necessary to achieve applicable water quality standards. In order to provide for future growth, States would now be required to establish TMDLs that result in water quality that is better than the standards in order to accommodate future increases of pollutant loads. Since the CWA does not require TMDLs to restore waters to a level better than the standards, EPA's rules should not. Clearly, the issue of providing for "future growth" in the development of TMDLs is a local issue that Congress has left for the States to decide. EPA should not go forward with this proposal.

Implementation plans

Montana agrees that TMDL implementation is an important and necessary component of a successful water quality restoration program. In fact, Montana has routinely submitted implementation plans to EPA in support of nonpoint source TMDLs. There is an important distinction, however, between a State's voluntary submittal of a plan in support of a TMDL and a requirement that a State submit a detailed plan subject to EPA's review and approval. The consequences of establishing regulatory requirements governing a State's submission of an implementation plan rather than a voluntary submittal are fairly obvious. If EPA adopts a regulatory approach to the State's submission of implementation plans, the perception (or reality) will be that the approved implementation plan will have legal effect. In that event, a State's failure to ensure strict compliance with the details of an approved implementation plan will invite lawsuits challenging the State and EPA's failure to strictly enforce the terms of the plan. If EPA wishes to encourage States to develop implementation plans in support of TMDLs, it should establish nonbinding guidance that may be used by the States rather than embark on a regulatory approach that has no support under the CWA.

EPA's suggestion that it has authority to impose an implementation requirement because Congress neglected to do so is contrary to the CWA's separate and distinct treatment of point and nonpoint sources. Contrary to EPA's contention, Congress has addressed the issue of developing and implementing control strategies for nonpoint sources by placing sole responsibility over nonpoint sources with the States

under Section 101(b), Section 319 and Section 208 of the CWA. In regard to point sources, there is simply no need for "implementation plans," since those sources implement TMDLs by achieving the required waste load allocations imposed in their NODES permits. The proposal to subject a State's implementation plans to EPA's approval is simply an attempt to vest EPA with "veto" power over the State's plans or programs to control nonpoint sources via the TMDL review process.

EPA's proposal is contrary to the long-standing practice of many States that use a voluntary, incentive-based approach to address nonpoint sources. This voluntary approach has been successful in Montana and has been adopted into Montana's Water Quality Act as a means of addressing nonpoint sources during TMDL development and implementation. EPA's proposed emphasis on "requiring" Federal approval of a plan that establishes drop-dead timelines, milestones, reasonable assurance, and a recitation of the State's regulatory controls over nonpoint sources would defeat the voluntary approach that most States rely upon.

Montana further questions EPA's ability to develop an implementation plan within 30 days after it disapproves a TMDL. It is unlikely that EPA will have the resources to develop a plan for nonpoint sources that includes "reasonable assurance" that the TMDL will be developed. More importantly, a plan developed within 30 days would not allow for sufficient public comment or be supported by the individuals or entities responsible for implementing the TMDL.

Although Montana currently includes many of EPA's proposed elements for implementation plans into the State's plans for nonpoint TMDLs, Montana does not believe that the proposed implementation plan elements discussed below are necessary or warranted for effective TMDL development.

Reciting legal authorities

Generally, listing legal authorities is not necessary when promoting community-based partnerships. Watershed project participants for nonpoint TMDLs are interested in improving water quality for their own use, as well as for the benefit of the community and local economy. Since these groups are being asked to develop watershed plans voluntarily, it makes no sense to list the State's authority to enforce water quality standards, which may be viewed by project participants as an implied threat of an enforcement action. A listing of this nature serves no purpose. and would likely be counter-productive.

Developing monitoring milestones and re-evaluating plans

Establishing specific timeframes within which water quality standards will be achieved is not relevant in practical terms and not realistic in terms of establishing achievable milestones for nonpoint sources. Most water quality improvement projects for nonpoint sources, especially for agriculture lands in Montana, balance the need to achieve immediate water quality improvements against the need to implement projects that are practical, supported by the community, and based upon resource considerations. For these reasons, Montana frequently takes an adaptive management approach that develops best management practices (BMPs) for specific nonpoint sources and then uses monitoring as a feedback mechanism to adjust management measures as needed. Although water quality models may make it possible to estimate water quality response prior to implementation, use of an iterative management approach allows water improvements to proceed while the effectiveness of BMPs is being evaluated. By contrast, modeling or predicting the effectiveness of a nonpoint source project takes time and resources and ultimately does not provide a reliable method of establishing specific timeframes for water quality improvements.

It has been Montana's experience that evaluations conducted after an initial period of implementing nonpoint source projects provide a better framework for determining improvements achieved by the project. Persons with technical expertise within local watershed groups, such as State and Federal specialists, are important in implementing successful watershed projects in Montana. They advise the groups as to whether monitoring results show the projects are being effective. Their onsite evaluations provide "best professional judgments" which watershed groups rely upon to modify or improve projects. Since projects are routinely evaluated on the basis of monitoring data and analysis, a reevaluation plan and monitoring milestones are not necessary to achieve successful TMDL implementation in Montana. The proposed requirements focus too much attention on predictive planning and, in Montana's experience, this emphasis would reduce the time available for local groups to actually implement and monitor water quality improvement projects.

Reasonable assurance

Montana supports the concept of providing reasonable assurance that a TMDL will be implemented. It has been Montana's experience that "reasonable assurance"

is best achieved through the State's efforts at providing the technical, educational, and financial assistance necessary to ensure the successful implementation of a TMDL. For nonpoint source TMDLs, Montana typically develops a plan that identifies specific tasks, provides an estimated schedule for completing target goals, identifies the project participants, identifies initial funding sources, identifies monitoring requirements, and is supported by a contract whenever the project is funded by §319. In at least one instance, Montana has also provided "reasonable assurance" for a point source TMDL by developing a cooperative agreement for voluntary reductions of nutrients in the Clark Fork of the Columbia River. Although Montana supports the concept and, in fact, currently provides "reasonable assurance" for TMDL implementation within the State, Montana objects to EPA's proposal to require approval of a State's methods for providing "reasonable assurance" for nonpoint source TMDLs. This is particularly true in relation to EPA's statement that it may require the States to adopt a regulatory approach to achieving "reasonable assurance," if a State's voluntary approach is ineffective. EPA has no authority to require regulatory controls over nonpoint sources and should not consider a proposal that coerces States into abandoning their voluntary programs. EPA's suggestion that it may veto NPDES permits, redirect §319 funding, or designate certain silvicultural or animal feeding operations as point sources in the event the States do not provide adequate "reasonable assurance' is indicative of the coercive approach EPA is proposing.

EPA's proposal would do little to ensure that TMDLs for nonpoint sources are actually implemented. Instead, the proposal would divert State resources away from education and technical assistance for nonpoint sources to engaging in a paper exercise of predicting precise timeframes, schedules and funding, even though predicting those factors may not be feasible during the initiation of a project. For example, requiring States to identify adequate funding at the time a TMDL is submitted is both unrealistic and counterproductive. In many cases, adequate funding for nonpoint source TMDLs is not identified until a project is 2 or 3 years underway. It has been Montana's experience that funding needs rarely are fully known when goals for restoring streams impaired by nonpoint sources are initially established. Requiring the identification of funding prior to submitting a TMDL may discourage States from submitting TMDL projects and defeats efforts to restore impaired streams in a timely fashion. The same objection can be made to the requirement that States identify specific delivery mechanisms such as contracts, local ordinances, and cost-share agreements for nonpoint source TMDLs. Although §319 source projects will likely be supported by a contract, there are other nonpoint source projects in Montana that will not. EPA's proposal to adopt a requirement for the identification of funding and a specific delivery mechanism for every nonpoint source TMDL would invite lawsuits from groups that do not believe a State, such as Montana, has provided adequate assurance that the TMDL will be implemented. EPA should not adopt binding regulations governing a State's ability to provide "reasonable assurance," but rather should provide the States with guidance that will assist in the effective implementation of TMDLs.

Endangered Species

Montana supports the concept of addressing federally listed threatened or endangered species during the TMDL process. The State is concerned, however, with EPA's proposal to require States to engage in the rigorous and time consuming consultation process prescribed under Section 7 of the Endangered Species Act (ESA). Under EPA's proposal, States will now be required to ensure that their TMDLs will not likely jeopardize the continued existence of threatened and endangered species or destroy their critical habitat. Although Section 7 was enacted to ensure that no Federal activity would contribute to the extinction of an endangered species, EPA's rule proposal would subject the States' water quality restoration projects to the Federal consultation process. The time and resources generally required to conclude consultation under Section 7 would severely impact the States' ability to develop TMDLs in a timely manner. Moreover, since TMDLs are designed to restore impaired waters, the State questions why a requirement ensuring TMDLs do not jeopardize a listed species is necessary. By adopting this proposal, States may be challenged by individuals who do not believe that a particular TMDL goes far enough to restore listed species or their habitat. EPA should not go forward with its proposal to require a "no jeopardy" finding as a required TMDL element. Instead, EPA should adopt a rule that simply requires States to consider native or endangered species in their development of TMDLs and to informally involve the U.S. Fish & Wildlife Service during the TMDL process. This approach is consistent with Montana's process of including the protection of native fish in its criteria for ranking TMDLs as high priority and informally consulting with the U.S. Fish & Wildlife Service during its development of Section 303(d) Lists and TMDLs.

HOW TMDLS ARE EXPRESSED

According to 40 CFR 130.33 and 130.34, TMDLs must contain a load reduction that ensures the water body will attain and maintain water quality standards, including aquatic or riparian habitat, biological, channel, geomorphologic, or other appropriate conditions that represent attainment or maintenance of the water quality standard. For example, for a stream impaired by sediment deposits, reduced sediment loading is required. The proposed regulations appear to *require* that all TMDLs be expressed in terms of loading. Even in Part 130.34, which indicates that EPA recognizes the importance of habitat quality, biological measures and geomorphology, it appears that a loading must be calculated in relation to these water quality characteristics.

The vast majority of the water quality problems in Montana are due to nonpoint sources and many of those problems are due to irrigation and riparian management problems that cause habitat degradation. Calculation of specific pollutant loads is simply not a suitable method to describe these problems, much less lead to practical solutions. There are cases where it would be possible to measure and calculate sediment loads that would relate to the problem, but this is rarely practical due to the expense and technical and practical difficulties that would be involved, as follows:

1. The extremely variable nature of sediment data collected in such systems often requires many years of extensive data collection and analysis to produce conclusive information.

2. Spring ice breakup or peak-flow seasons are often the key times to collect sediment data, but traveling and working in many parts of Montana during that time often is not practical or possible.

The new TMDL guidance document, "Draft Guidance for Water Quality-Based Decisions: The TMDL Process (Second Edition)," that was published in draft with the new regulations, however, allows for TMDLs to be expressed in terms other than load. This guidance says on page 3–10:

> Are surrogate targets appropriate or necessary? In some situations, there are no numeric water quality criteri[a] or quantifiable pollutant load that can be used to define the allowable pollutant load and express the TMDL. In these situations, surrogate targets that have a quantifiable with the water quality criteri[a] or pollutant load can be used to provide numeric indicators of quantifiable measures to express the TMDL. The relationship between a surrogate measure, the water quality standard and the pollutant load should be clearly described.

The draft regulations should be modified to be consistent with this guidance. We believe the statements in the draft guidance are absolutely true; in some cases there is no quantifiable load. The bulk of the loading of many streams is carried by the streams at times and quantities that are nearly impossible to quantify. We believe that indicators such as biological health indices and measures of changes in eroded or deposited sediments are scientifically justifiable and make good economic sense. EPA has promoted rapid bioassessment methods for years, understanding their utility for water quality management. It is inconceivable to us that EPA would ignore this type of monitoring and focus solely on an engineering-based loading calculation for all pollutants.

There are practical ramifications from narrowing the scope of what constitutes a load under the proposed rules. We are concerned that the proposed rules will significantly reduce our flexibility in how TMDLs may be expressed and evaluated. We see the potential for adverse consequences such as significantly increased monitoring costs, reduced public acceptance of our programs, and a concomitant decrease in overall improved water quality due to being forced to direct our limited resources more intensively on water quality research. Rather than focus on actual loads in ail situations, we support giving the States discretion to apply cost-effective and easily understood surrogate measures where appropriate. EPA's existing rules allow broad use of surrogate measures of loading to address a broad range of habitat and other problems common in Montana. In contrast to what we foresee under the proposed regulations, our current approach has proven to be cost-effective, efficient to implement, and palatable to the public.

PUBLIC PARTICIPATION

The State of Montana is strongly committed to public involvement and community-based environmental protection and restoration. We wholeheartedly support this concept in the proposed regulations and have adopted these principles as the cornerstone of our State TMDL laws. However, as with our other concerns on the proposed rules, we take exception to the proposed specificity with which States

would be required to engage their citizens in the TMDL process. A close look at the Montana approach will demonstrate our sincerity in meeting this obligation. We have established a requirement for a 60-day public comment period on the 303(d) List. We have also established a requirement to involve local watershed advisory groups, conservation districts and various other interest groups in development of the draft rankings and priorities for TMDL development in Montana. We are currently planning 17 public hearings this winter on our year 2000 303(d) List, including listing methodologies, TMDL priority designations, and water body assessment schedules. Public involvement is a standard practice for TMDL development in Montana because of our strong link to local watershed groups. We have routinely reported on the level of public involvement associated with each TMDL submitted to EPA for approval. Establishment of a Statewide TMDL Advisory Group, representing 14 stakeholder groups, is required by Montana TMDL law. The group's formal role is to assist in TMDL priority development and to advise the State of Montana government on other TMDL related issues. .We have also included a public petition process within our State TMDL program whereby any person can request that a water body be added to, or deleted from, the 303(d) List by providing the data and information necessary to support the requested change. This provision provides an extra measure of public involvement in our water quality approach by allowing for public input on the 303(d) List at any time, not just during the intermittent (currently biennial) reporting cycles. All elements of Montana's TMDL public participation program are a result of intensive, broad-based discussion and deliberation, followed by legislation. Additional EPA specificity dictated through rules revisions is unnecessary and undesirable.

We already routinely incorporate endangered species concerns into our watershed management approach, as previously discussed, and encourage USFWS and our Department of Fish, Wildlife and Parks and Natural Heritage Program to be involved throughout the process of watershed management and nonpoint source pollution control. However, it is the State of Montana's firm position that TMDL development by the State is not a Federal action, and therefore, formal consultation is not required under the Endangered Species Act.

PETITION PROCESS

EPA's proposal to create a public petition process, by which any person could petition EPA to develop lists and TMDLs in the event a State fails to "substantially" meet its schedule, is problematic. The State views this as another instance in the rules where EPA is expanding its limited authority to review lists and TMDLs to now include EPA's authority over the States' pace of TMDL development. While we agree that States should make every effort to meet their schedules for TMDL development, EPA's proposal may unnecessarily encourage public requests that EPA intervene in a State's TMDL program. States should be allowed to develop ambitious schedules without fear that EPA may elect to "take over" their TMDL program, if a citizens group is not satisfied with the State's progress in TMDL development.

It is important that EPA's regulations encourage effective public participation in State programs, and not establish a system whereby citizens are implicitly encouraged to bypass the State. EPA should establish specific requirements for these petitions.

In particular, petitioners should be required to demonstrate that: (1) they have requested the State to take action; and (2) the State either refused or was unable to take the requested action. Petitioners should be required to submit any available information as to why the State has declined to take the requested action and the process should provide an opportunity for States to respond before EPA determines an appropriate response. Our suggested modifications to the petition process are necessary to recognize the States' primary role in implementing Section 303(d) and to support, rather than hinder, the viability of State efforts.

TRANSITIONAL TMDLS

Under its new proposal, EPA would approve any TMDL submitted within 12 months of the final rule changes if it meets either the pre-amendment requirements or the post-amendment requirements. The State of Montana strongly supports this proposal. TMDL processes are often lengthy and more than 100 Montana water quality improvement strategies are currently under development. Without a provision in the amended rule to address transitional TMDLs, it would be necessary to stop and reevaluate or revise pending TMDL development efforts to ensure that the new requirements were met. This would be an inefficient use of resources and would hinder the progress of Montana's efforts toward water quality improvement.

ATMOSPHERIC DEPOSITION

The proposed definition of load allocation would include atmospheric deposition as a non-point source of pollutants. The State of Montana has voluntarily considered the importance of atmospheric deposition in its development of pollution allocations for some lakes. However, the technical difficulties and absence of appropriate data and analytical models present significant barriers to widespread development of water quality improvement strategies that include atmospheric deposition. Until such capabilities advance, it would be an inefficient use of limited State resources to develop technically weak TMDLs for these water bodies. Potential relationships to other Montana program goals would also need to be evaluated, for example, the Montana Smoke Management Program and Hazard Reduction Law pertaining to logging slash disposal (burning). In the interim, we recommend that States should be delegated the authority to decide how and when, on a case by case basis, State air quality management issues should be coupled with the TMDL process.

LEGAL ISSUES CONCERNING ENDANGERED SPECIES ACT (ESA)

EPA's new rule proposal would require States to ensure that their TMDLs will not likely threaten the continued existence of threatened and endangered species or destroy their critical habitat. (*See* 40 CFR § 130.33(d)). In support of this proposal, EPA simply suggests that endangered species are an important component of the ecosystem and it wishes to "integrate" the CWA with the Endangered Species Act (ESA). In effect, EPA is proposing that States fulfill the obligations imposed under Section 7 of the ESA, which was enacted by Congress to ensure that no *Federal activity* will contribute to the extinction of an endangered species. Although Section 7 refers exclusively to "Federal action," EPA's rule proposal would subject State actions, such as the development and implementation of TMDLs and lists, to the consultation requirements that apply only to Federal actions. In addition, States will now be required to give "high priority" to waters where a threatened or endangered species may be present and to submit their lists and TMDLs to the U.S. Fish & Wildlife Service and the National Marine Fisheries Service (Services). (*See* 40 CFR § 130.28 and 130.37). None of these requirements are supported by law and their implementation would blur the clear distinction between the State's primary authority over TMDL development and EPA's limited role in overseeing the States' activities. As a result, the primary authority of the States to prioritize their lists and develop TMDLs for the purpose of achieving applicable *water quality standards* will become secondary to protecting federally listed species and their habitat. If EPA's proposal to address endangered species is adopted, EPA's statutory "oversight" role under Section 303(d) will be significantly expanded to become the driving force behind the development of TMDLs. The following comments address each of EPA's rule proposals that require States to ensure that endangered species are not jeopardized.

Priority Ranking for endangered species

Under Section 303(d) of the CWA, States are to prioritize their lists of impaired waters ". . . taking into account the *severity of the pollution* and the *uses* to be made of such waters." Under EPA's current guidance, States may expand upon the statutory list to consider additional factors in setting priorities. In Montana's view, EPA's current approach is appropriate, because the guidance does not compel States to ignore the statutory factors in favor of a single factor that has never been endorsed by Congress. Under EPA's rule proposal, States would be required to give "high priority" status to any threatened or impaired stream where an endangered species may be present. This requirement not only ignores the statutory factors under the CWA, but eliminates the States' discretion to consider other "high priority" factors, such as the importance of a particular water body for recreational or aesthetic purposes, the vulnerability of a water body as an aquatic habitat, and the State's immediate programmatic needs. All of these factors are recognized under EPA's current guidance and are consistent with the CWA's directive to establish priorities based upon beneficial uses and the severity of pollution. Under the rule proposal, States would be compelled to prioritize their waters in favor of restoring endangered species to the detriment of restoring severely polluted waters. This requirement has no basis under the CWA and directly conflicts with the statutory factors enacted by Congress. Since the CWA does not require States to consider federally listed species during the State's development of TMDLs, EPA should not proceed with this proposal until clearly authorized by Congress.

Soliciting comments to ensure the protection of endangered species

EPA is proposing rules that would establish various requirements for public participation (*See* 40 CFR § 130.37). Among those requirements is a provision "encouraging" States to establish processes with both the Services that will provide for the early identification and resolution of threatened and endangered species as they relate to lists of impaired or threatened water bodies, priority rankings, schedules and TMDLs. Accordingly, the rule would require States to submit their draft lists and TMDLs to the Services at the time that public comment commences, unless the State requests EPA to do the submittal. In order to facilitate early consideration of endangered species during the stalest listing and TMDL process, EPA will request the Services to provide their comments to both the States and EPA. The State then would be required to consider the Services' comments and document the basis of its response. Prior to EPA's approval of a list, priority ranking, TMDL or schedule, EPA will review the sufficiency with which the State "addressed" the Services' comments.

On its face, the rule appears only to require a State to consider the comments of the Services without imposition of additional Federal requirements to ensure the continued existence of endangered species. When read in conjunction with the proposed new rule requiring that TMDLs must not be likely to jeopardize endangered species or their habitat, it is clear that the consultation requirements applicable to "Federal actions" under Section 7 will now apply to the States. These requirements are spelled out in rules adopted by the Services and generally would result in intensive data collection, resources, and delay.[1]

Under EPA's proposal, the Federal agency's responsibility to collect the necessary data and to engage in consultation will be shifted from EPA to the States. In effect, the rules unconstitutionally "commandeer" the States to implement a Federal program. See *New York* v. *U.S.*, 505 U.S. 144 (1992); *Prinz* v. *U.S.*, 521 U.S. 898 (1997).

Although EPA's rule proposal does not elaborate upon the deference given the Services' comments on lists and TMDLs, it is clear from the rules implementing Section 7 that the Services would have a major role in determining whether a TMDL or list may be approved by EPA. If a biological opinion is required as a result of the Services' review, EPA will have little choice but to require the States to adhere to the conditions in the biological opinion. In some instances, the State may be unable to follow the conditions of the opinion due to lack of regulatory controls over nonpoint sources. Montana urges EPA not to adopt these proposals, but rather consider addressing the issue of endangered species in guidance.

FISCAL IMPACTS OF PROPOSED RULES

The State of Montana is very concerned that the new TMDL rules would result in significant additional costs to States over current law. Our Department of Environmental Quality (DEQ) has primary responsibility for implementing the provisions of 303(d). Given the formidable workloads of DEQ TMDL staff, the new rules would likely significantly raise the costs per TMDL, greatly slow the entire process and lead to an overall decrease in water quality from present conditions. They also would require that additional staff and resources to be devoted to the TMDL process and that local water groups, technical advisers and consultants be educated on new program requirements.

According to EPA's Water Quality Workload Model, Montana currently has minimal resources to run a TMDL program under the rules as they now stand. Currently, DEQ has 13.5 FTE (full time employees) committed to water quality standards activities, including monitoring, reporting and TMDL activities, with a budget of about $1.35 million. EPA's Water Quality Workload Model: Draft Module 2, when calibrated to Montana's parameters, suggests that 58 FTE and a total budget of about $4,896,000 would be needed to implement TMDLs on time under the rules as they now stand. Despite this discrepancy with EPA's modeled numbers, DEQ staff has been highly effective in implementation and in—as gained valuable assistance from local watershed groups and other outside groups.

While the DEQ staff has been effective, the previous paragraph demonstrates that they have a challenging task to meet TMDLs on time given their current resources. It follows then that the new and more complicated rules proposed by EPA would set back the staff and unduly slow the TMDL process unless additional resources were obtained. In addition, the new rules undo much of the work and fiscal investments already put into Montana's current TMDL program. By our most conservative estimate, DEQ would need at least twice the current resources to comply with the

[1] EPA estimates that consultation on a State's water quality standards takes "approximately 18 months." 64 Fed. Reg. 2742 (Jan. 15, 1999). In Montana, Section 7 consultation on the State's revised water quality standards began in 1994 and has yet to be concluded.

proposed rules in a timely fashion. Our best guess is that between 22 and 24 additional FTE over the 13.5 currently employed would be needed to comply with the new TMDL rules, along with several tens of thousand of dollars in new equipment. These figures are further explained in the paragraphs that follow.

Given that an additional FTE in standards activities costs about $65,000 a year (including benefits and operating expenses), the additional staff would cost an estimated $1,448,000. These figures suggest that EPA probably is not correct that the rules would cost less than $100 million annually for all the States. This would be less than $2 million per State on average in additional costs. It is likely that average costs per State will be much greater. Costs for Montana could be much higher than the conservative estimate of about. $1.4 million, due to uncertainties about the consequences of the new rules. Montana is a small State with respect to population and polluting sources. Many States' current costs are much greater and the potential cumulative increase in costs under the new rules would likely be greater than what EPA has estimated.

The following four paragraphs explain in more detail the estimated 22–24 extra FTE and extra equipment needed under the new rules. If all TMDLs in Montana were required to focus mainly on specific pollutants as Stated in the new rules, it is estimated that at least 4 additional FTE would be needed for modeling, monitoring and sampling. These new staff would also need several thousand dollars in new sampling equipment, as a conservative estimate. The additional FTE would be needed in part to continually monitor and model pollutant loads for certain water bodies for which current law applies more effective and less expensive surrogate measures to achieve desired levels of water quality. The more comprehensive listing for impaired waters in the new rules would require additional labor hours in both the office and field including additional travel to selected water bodies and increased monitoring, sampling, data collection and administrative work. We estimate that about 0.25 additional FTE would be needed just to administer the more complicated listing method EPA has proposed.

Under the new rules, States would assign a "high" priority to certain impaired waters identified by EPA and would complete these TMDLs within 5 years. Montana already has a system of prioritization that considers but does not necessarily give highest priority to drinking water or waters harboring endangered species. DEQ estimates that a full 60–70 percent of Montana's current TMDL list would have to be listed as high priority (just from the drinking water and endangered species
concerns) and thus would require completion within 5 years. The result would be a significant increase in workload within a relatively short time period, requiring additional FTE and resources. Conservative estimates suggest that 18 additional employees would be needed to complete high priority TMDLs within 5 years. This number constitutes three times the current personnel (six FTE total), four dedicated to regulatory monitoring, one to TMDL methods, and one to involvement with the 303(d) List.

An expedited TMDL process (due to having to complete high priority TMDLs in 5 years) would impose significant additional costs upon DEQ. For one, we would have to quickly hire new FTE and hastily train them. We might also be forced to neglect other parts of TMDL implementation, or implementation in areas of the State with no high priority waters. Such costs are difficult to quantify.

Other additional costs from the new rules include meeting the 10 specific elements and providing "reasonable assurance" that goals are met. The most conservative estimate would put the costs of meeting these elements at $5,000 (for additional monitoring equipment, modeling software and computers) with any additional labor hours included in the additional 18 FTE mentioned above. This proposal also would allow EPA to demand or revise a TMDL if petitioned to do so. This could lead to occasional litigation and additional costs to the State of Montana. These costs have not been included in this analysis. The costs of requiring a public review of TMDLs every 2 years are estimated to be 1 FTE the first year and 0.5 FTE in subsequent years.

In conclusion, it is apparent despite our conservative calculations that the proposed rule changes would have a significant fiscal impact on the State of Montana, and one EPA has not accurately quantified or addressed. The impacts could be sufficient to upset our entire TMDL process and program. Few aspects of the proposed rules can be seriously considered in the absence of a more detailed fiscal analysis and a Federal funding package.

DEPARTMENT OF ENVIRONMENTAL QUALITY,
Helena, MT, January 20, 2000.

Hon. CAROL M. BROWNER, *Administrator,*
U.S. Environmental Protection Agency,
Washington, DC.

Attn: Water Docket (W–99–04)

Re: Proposed Revisions to the National Pollutant Discharge Elimination System (NPDES) Program and the Federal Antidegradation Policy

DEAR MS. BROWNER: I am writing on behalf of the State of Montana concerning the U.S. Environmental Protection Agency's (EPA) proposed revisions to the NPDES rules and Federal antidegradation requirements, 40 CFR Parts 122, 123, 124, and 131, published in the Federal Register on August 23, 1999. The enclosed comments are the combined effort of our State natural resource agencies who have worked together to analyze the rules and to develop consensus continents. The State appreciates the opportunity to comment on the proposed rules and supports EPA's efforts to address the Clean Water Act (CWA) goals of restoring and improving the nation's waters.

Montana wishes to emphasize that it shares with EPA the common goal of protecting and improving water quality and we remain dedicated to meeting that objective. Although we share a common goal, Montana does not agree with EPA's approach to achieving water quality improvements by imposing Federal regulatory controls over nonpoint sources. Montana continues to believe that nonpoint source pollution is best controlled at the State level through programs based on land management practices and land use decisions. We feel that EPA's emphasis on obtaining Federal regulatory control over nonpoint sources is not warranted and may be counterproductive to achieving cleaner water. Montana's program of best management practices for forestry activities has continued to improve over the years and the program has demonstrated its effectiveness in protecting water quality through State-sponsored audits. From the State's perspective, adding a Federal permit requirement to address nonpoint source forestry activities is duplicative of State programs and adds little in terms of actual water quality improvement.

In general, we think the existing CWA program to restore impaired waters through the development of TMDLs is adequate and that EPA's proposal to require "reasonable progress" in restoring impaired waters to TMDL development is not justified by the additional costs. Implementation of EPA's offset proposal would divert limited State resources away from the core activities of developing and implementing TMDLs, which produce the most benefit in terms of restoring water quality.

Attached are Montana's detailed comments on the proposed rule revisions. We look forward to working with EPA to ensure that our mutual objectives in protecting and restoring waters are reasonably and effectively achieved.

Sincerely,

MARK A. SIMONICH,
Director.

DETAILED COMMENTS BY THE STATE OF MONTANA ON PROPOSED REVISIONS TO THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PROGRAM AND FEDERAL ANTIDEGRADATION POLICY—WATER QUALITY PLANNING AND MANAGEMENT REGULATION, 40 CFR 122–124 AND 131

INTRODUCTION

The State of Montana has long supported the goals of the Clean Water Act (CWA) to restore and maintain the quality of the nation's waters. Montana also recognizes the need to continually evaluate and, if necessary, improve the methods by which States address nonpoint sources. Although EPA's rule proposal attempts to address the issue of "progress" in improving water quality, we cannot identify any additional realistic benefits that would further the CWA's goals and that are justified by the added regulatory burdens and costs. Instead, the new rules add unnecessary complexity to the States permitting process.

The State is concerned with EPA's attempt to redefine activities traditionally considered as nonpoint sources as point sources and require permitting and regulatory controls for those sources. The State believes that the move to redefine nonpoint sources might negate much of the cooperative approach that the Montana forestry best management practice (BMP) process has engendered and cause unnecessary disruptions to the State's process for managing nonpoint sources through reasonable

and effective land management practices. The State is also concerned that the imposition of offsets for new or increased point sources will overburden State resources in administering an already cumbersome permitting process and unfairly single out certain point sources to demonstrate net progress in restoring impaired waters prior to the development of a TMDL.

In general, Montana believes that the existing regulatory framework implementing the CWA's NPDES program and the Federal antidegradation policy is adequate. The State also disagrees with EPA's efforts to address the issue of nonpoint sources and lack of TMDL progress by adopting rules that are not supported by the CWA. For these reasons, Montana objects to EPA's proposals to modify the existing requirements and urges EPA to address these issues, if necessary, in guidance.

ANTIDEGRADATION CHANGES—OFFSETS FOR NEW OR EXPANDED SOURCES

EPA is proposing changes to its antidegradation rules to require any new or existing discharger undergoing significant expansion in an impaired water body to obtain a 1.5:1 offset. The purpose of the rule is to promote "reasonable progress" in restoring impaired waters prior to the development of a TMDL. The choice of a 1.5:1 offset ratio appears to be entirely arbitrary and is also a serious deterrence. This proposal is not supported by the CWA and clearly goes beyond what Congress has expressly sanctioned as the appropriate method for States to restore impaired waters. The TMDL process established under Section 303(d) of the CWA requires States to identify pollution sources in an impaired water and develop wasteload and load allocations for point and nonpoint sources, respectively, that will bring the water body into compliance with water quality standards. A rule requiring restoration limits for a particular discharger prior to TMDL development may needlessly interfere with the TMDL process which requires a comprehensive and equitable pollution allocation process. We also believe that, regardless of the status of a discharge as "new" or "expanded", the imposition of offsets prior to TMDL development may be disruptive for a discharger whose permit limits may require changes after a TMDL has been developed by the State.

While we appreciate EPA's concerns regarding the slow pace of TMDL development nationally, the State of Montana and other States have taken effective measures to strengthen their programs. We should not be penalized by the imposition of the proposed additional and unnecessary NPDES requirements that significantly impact our State permitting program. States should be allowed to focus their efforts and resources on addressing impaired waters under the TMDL process, not through additional permit requirements. The limited environmental gain from imposing offset requirements on a single point source within an impaired watershed does not justify the adoption of these requirements.

Although EPA admits there is no authority in the CWA to support its proposal, it relies on the antidegradation policy as a vehicle to impose the offset requirements. EPA's proposal goes beyond the primary objective of the Federal antidegradation policy, the stated purpose of which has been to protect and *maintain* existing water quality. While the State does not disagree with the historical concept of EPA's antidegradation policy as a means of maintaining existing water quality, we do object to a proposal that would require States to restore impaired waters outside of the TMDL process. EPA's proposal needlessly intrudes upon the States' primary responsibility to ensure compliance with their water quality standards through State-issued permits and State programs for nonpoint sources prior to TMDL development. The heavy-handed approach of EPA's proposed rule would require States to divert their limited resources away from the CWA's goals of developing TMDLs and toward administration of an increasingly complex permitting program. For example, if an offset is obtained from a nonpoint source, State resources would be diverted to ensure that a net improvement from a particular landowner is achieved. Rather than impose "regulatory" requirements over a single landowner, States should be given the flexibility to use their resources in a manner more suited to controlling land practices within the entire watershed. This proposal is simply another attempt by EPA to encourage States to "regulate" nonpoint sources through the imposition of offset requirements that ultimately result in enforceable load reductions for nonpoint sources.

Establishing an administrative process to establish, track and enforce offsets would: (1) require significant new resources for permitting programs, (2) retard the permitting process and contribute to an increased permit backlog, and (3) create burdensome regulatory requirements for nonpoint sources that are best managed through improved land practices. In Montana, about 90 percent of the streams and 80 percent of the lakes identified on our Section 303(d) list are impaired due to a variety of nonpoint pollution problems The process of establishing; and monitoring

offset requirements for impaired water bodies with multiple nonpoint sources would be difficult, if not impossible. to effectively administer and enforce. The proposed regulation may force the State into situations where it is unable to effectively administer or enforce its own permit requirements.

Finally, EPA's proposal might, in certain circumstances, hinder water quality improvement because the proposal focuses solely on reducing the load of the pollutant, rather than the concentration of the pollutant. This approach is not necessarily consistent with TMDLs, where an objective may be to reduce the in-stream concentration of a particular pollutant. An example is a stream impaired due to high metals levels. If a facility proposed to discharge effluent containing lower metals concentrations than the receiving stream, the net effect would be to lower the in-stream metals concentrations. Under EPA's proposal, the discharger would be required to offset the load of metals us the discharge, regardless of the effect of that discharge on the beneficial uses that have been determined to be impaired. If EPA goes forward with this proposal, offsets should be applied in two situations: (1) where the load, and not the concentration, is perceived to be the problem (such as phosphorus accumulations in a lake), or (2) where a discharge is proposed in pollutant concentrations greater than those of the receiving water.

POINT SOURCE DESIGNATION FOR CERTAIN OPERATIONS

EPA is proposing amendments that will allow it to designate certain animal and aquatic feeding operations and silviculture activities as point sources. EPA is proposing to make this designation in instances where EPA has promulgated a TMDL for the State. According to EPA, the designation would provide EPA with "reasonable assurance" that the Federal TMDL will be implemented by requiring designated sources to obtain an NPDES permit. In order to designate timber harvest activities as point sources, EPA is also proposing to remove an exemption that has been in effect for more than two decades. EPA's proposal to designate what could be all silvicultural activities as point sources ignores the directive of Congress to address nonpoint sources through State-administered programs under § 319 and § 208 of the CWA. Further, since EPA is proposing to designate point sources based upon "other" considerations that are not typically relied upon by the States, EPA's approach would leave many operators subject to what they perceive as an arbitrary designation process.

Montana is concerned with EPA's attempt to change the regulatory setting of more than two decades of consistent and intentional Congressional recognition of silvicultural activities as nonpoint sources that are not subject to NPDES permit requirements. The character of most silviculture activities as nonpoint sources, and the policy determination to manage these activities through planning and management techniques rather than permits, is firmly rooted in the CWA and its legislative history. The control of nonpoint sources under § 319 specifically leaves the development of control programs, including the consideration of a regulatory approach, with the States. This means that Congress has concluded that additional processes, such as Federal permits to control nonpoint sources, are duplicative and not needed to achieve the goals of the CWA. Since all States have either voluntary or regulatory programs for nonpoint source pollution, EPA's proposal seems to ignore the congressional intent that the choice of nonpoint source control approaches is left to the States. By imposing NPDES permits on nonpoint sources, EPA's proposal will effectively preempt State programs that use a voluntary approach to control these activities.

If adopted, EPA's proposal will disrupt the functions that are split among State agencies. In many cases, State programs are built around the differences between point and nonpoint source discharges and the responsibilities for administering regulatory programs and land management programs are vested in different agencies Subjecting traditional nonpoint source activities to permitting requirements or Section 401 certification will only add duplication of effort by these agencies, particularly in States with mandatory or well-developed best management practices.

EPA's proposal ignores the success of Montana's nonpoint source pollution control program, which relies upon innovative and effective land management practices that have demonstrated significant improvements in water quality without regulatory controls. In Montana, a combination of voluntary BMPs and statutory requirements for "streamside management zones" provides protection to Montana water quality during timber harvest operations. The BMPs were developed over the last decade through a cooperative effort between Montana agencies and forest industries. As a result of this cooperative effort, the State's forest industries voluntarily implement these BMPs as a matter of properly doing business.

During the past 10 years, Montana has documented the success of its voluntary nonpoint source program by conducting biannual audits to monitor the implementation and effectiveness of BMPs in protecting water quality. Formal audit reports have been issued every 2 years for the past 8 years. These audits demonstrate steady improvement in both the application and the effectiveness of forestry BMPs in protecting water quality. For example, the percentage of forestry practices that meet or surpass BMP requirements has increased from 78 percent in 1990 to 94 percent in 1998. From the State's perspective, the success of the voluntary program results from educational programs and continuing cooperation bestrewn the State and the forest industry. EPA has recognized the success of Montana's voluntary BMP program and the State's program received EPA's nonpoint pollution prevention award. The entire voluntary program has been at a minimum expense to the State of Montana. Based upon Montana's and other States' experience, EPA should recognize that voluntary programs are often more effective and less costly than adopting a regulatory approach to control forestry activities. States should be allowed to continue with their efforts to improve their voluntary programs without needless interference or additional regulatory controls.

EPA's proposed rules would have a profound affect on TMDL implementation in Montana and would disrupt our successful efforts at implementing voluntary BMPs. The new rules, if implemented, would negate much of the cooperative approach that the forestry BMP process has engendered. Designation of certain silviculture activities as point sources that would require an NPDES storm water permit would provide little additional benefit toward achieving compliance with water quality standards. The storm water permits issued by the State will ultimately rely on the BMPs that have already been developed by the State and which are currently implemented voluntarily. A requirement for a Federal NPDES permit is unnecessary and duplicative of State efforts.

The only possible benefit resulting from designating a silviculture activity as a point source would be the threat of enforcement. A regulatory threat over timber activities in impaired watersheds may provide a strong disincentive for road maintenance and improvement projects, revegetation projects, and other activities that are now routinely done by forest landowners as part of their commitment to BMP implementation. The reluctance to undertake activities that ultimately reduce nonpoint source runoff would be exactly the opposite result of the CWA's objective to restore and improve the nation's waters. The State opposes EPA's proposal because it would impose a Federal "top down" approach that may impede the State efforts at achieving actual water quality improvements through a demonstrably effective voluntary approach. Moreover, EPA's proposal to designate point sources using "other" criteria that are typically not used by the States will leave EPA's designation open to challenges resulting from arbitrary and capricious decisions.

ECONOMIC IMPACT OF PROPOSED RULES

We feel that the resulting costs of the new rules to small entities, point source dischargers and to States would greatly outweigh the benefits and that, in this regard, the new rules are not economically justifiable.

Offsets

EPA claims that because the proposed offset provisions in the rules would require a new or increased discharger to obtain offsets only from large entities, there would be no impact on small entities. This seems plausible. There would, however, be potential costs to State agencies from enforcing offsets, sewing up monitoring programs and guidelines for offsets to be included in permits, process and issue new permits, and modify any existing permits involved in offset contracts. There also would be State-incurred costs in determining and enforcing "reasonable further progress" toward attainment of water quality standards. Because Montana's permitting system is funded entirely by fees collected from permit holders, any added costs must be passed along to all the permittees in the system. Most importantly, the benefits resulting from the new rules are uncertain, unclear and at best do not seem to justify the extra program costs.

Offsets could prove to be a major bureaucratic burden to States while providing little or no gain in water quality improvement. For one, dischargers would have to locate and bargain with each other to establish offsets. This would require some assistance by States and would require additional resources. Offsets would also impose transaction costs on the dischargers. Further, the cost of establishing and administering offsets would depend upon the particular State and the geographical distribution of large dischargers. Facilitating pollution offsets may be more difficult in a State such as Montana where a given water body is affected by only a few discharges.

EPA's proposed requirement that all conditions necessary to ensure the load reduction must be included in NPDES permits would require reworking and restructuring permits to include all relevant offset information. Information within the permit would have to specify all details of the offset including the stipulations between discharging parties and the effects upon the water body. This would slow the permitting process and would cause more work for those involved with water quality enforcement. Almost certainly, additional staff end funding would be needed to prevent an increase in the backlog of cases if this requirement were made law.

Additional costs would result from EPA's suggested point and non-point source trading option. This would be difficult to accomplish in practice and raises a number of questions. If States failed to quantitatively confirm non-point loading reductions that were needed to offset point sources, they might be liable for costly citizen lawsuits or EPA intervention. Given that Montana's water quality problems are largely due to nonpoint sources, isolating load reductions from nonpoint source controls through monitoring can be difficult and expensive. Again, it seems that the costs of administering these complex regulations outweigh the small gains in net progress.

Designating Certain Activities as Point Sources

EPA maintains that the effect of eliminating the current categorical silvicultural exclusion would be limited. EPA says that this provision would not impose significant new costs on a substantial number of small entities and that it can predict with a high degree of confidence that it would need to exercise the proposed new designation authority on only a few occasions. We disagree with these assertions.

Many small timber operations in Montana not subject to permitting under current law would be brought into the process under the new rules. In high priority TMDL areas, timber companies receiving permits under this proposal would immediately begin to develop a pollution prevention plan, which may involve modeling future allowable harvests. The main costs to newly regulated timber companies would come from preparing and putting in place a detailed pollution prevention plan, paying permit fees and monitoring the effectiveness of their best management practices. The preparation of a pollution prevention plan can be a complex and overwhelming task, even for a relatively minor timber project. Clearly this is beyond the capabilities of many small operators and could easily cripple their business activities.

Animal Feeding Operations (AFO) and Aquatic Animal Production Facilities (AAPF) that are designated as point sources to be permitted under the new rules would incur costs associated with a pollution control plan and consultation with either the State or a consultant for technical intonation. Further, permitting could greatly affect decisions that AFO and AAPF managers make, such as the need to apply for loans or purchase new equipment. As a result, production within these facilities could be delayed or greatly modified. Many capital expenditures for both production and pollution control take years to resolve and permits may make some of those investments obsolete, inefficient or very uncertain. Permits, when they do become effective may also alter production patterns for these types of operations. Such changes could result in less product being available when prices and markets are at their peak. Uncertainty as to whether operation would be permitted may result in additional company expenditures on research, equipment, and consultations with the State. While we do not necessarily disagree with permitting such operations, it is clear that EPA is wrong in saying that permitting would carry no substantial costs.

EPA's Assertions as to the Effects of the Rules on States

According to EPA, the total costs to State, local and tribal governments as a result of the new rules would not exceed $96 million in any 1 year, with a majority of these costs borne by State government. While the total costs to States may be less than $100 million annually, the State of Montana asserts that EPA's total cost projections of less than $1 million is not correct. Further, we question why States should incur any additional costs considering the limited environmental benefits.

EPA indicates that other costs would be borne by the private sector. Because of the way Montana has set up their discharge permitting program, all additional costs would be passed along to the permit holders. However, we again question why any additional costs can be justified if water quality benefits accruing from the proposal would be limited or non-existent.

STATEMENT OF J. CHARLES FOX, ASSISTANT ADMINISTRATOR FOR WATER, ENVIRONMENTAL PROTECTION AGENCY

INTRODUCTION

Good afternoon Mr. Chairman and members of the subcommittee. I am Chuck Fox, Assistant Administrator for Water at the U.S. Environmental Protection Agency (EPA). I look forward to talking with you this afternoon about the Nation's clean water program and, more specifically, about our efforts to identify polluted waters around the country and restore their health.

Over the past several years, EPA has worked closely with other Federal agencies and States to coordinate programs designed to protect natural resources and water quality. For example, EPA and USDA led the effort to develop the Clean Water Action Plan announced by President Clinton just over 2 years ago. We continue to work together to oversee implementation of the Action Plan and to coordinate key projects, such as our work to improve management of excess nutrients in waste from animal feeding operations.

I am pleased that the President has proposed to substantially expand fiscal year 2001 funding for grants to States for water pollution control. The President's Budget proposes increased funding of $45 million for grants to States to identify and address the remaining polluted waters around the country. This funding, when matched by States will result in an increase of $75 million annually for development of "Total Maximum Daily Loads" or "TMDLs." As my testimony will explain, TMDLs are critical to attaining our water quality goals.

The fiscal year 2001 budget also includes an additional $50 million in funding for Grants to States to implement projects to reduce pollution from diffuse or "nonpoint sources," bringing the total value of these grants to $250 million, a 150 percent increase in 3 years.

An additional $50 million for grants to support efforts to restore water quality in the existing "areas of concern" in the Great Lakes is also proposed in the budget.

Finally, the President's recent proposal to provide an increase of $1.3 billion in fiscal year 2001 for diverse USDA conservation programs provides an opportunity to further strengthen coordination between USDA and EPA to protect natural resources and water quality.

This new funding for clean water programs, when approved by the Congress, will provide States and others with significantly enhanced resources to clean-up water pollution problems around the country.

In my testimony today, I want to describe the work EPA is doing to carry the clean water program forward in this new century, giving special attention to our recent proposals to strengthen regulations guiding our efforts to identify and restore polluted waters under the Clean Water Act.

CLEAN WATER FOR THE FUTURE—THE CLEAN WATER ACTION PLAN

Twenty-eight years ago, the Potomac River was too dirty to swim in, Lake Erie was dying, and the Cuyahoga River was so polluted it burst into flames. Many rivers and beaches were little more than open sewers.

Enactment of the Clean Water Act dramatically improved the health of rivers, lakes and coastal waters. It stopped billions of pounds of pollution from fouling the water and doubled the number of waterways safe for fishing and swimming. Today, many rivers, lakes, and coasts are thriving centers of healthy communities.

Despite this tremendous progress in reducing water pollution, almost 40 percent of the Nation's waters assessed by States still do not meet water quality goals. The States report that pollution from factories and sewage treatment plants has been reduced but remains a concern in many areas. Soil erosion and wetland losses impair or threaten the health of many aquatic systems. Pollution from a wide range of sources (e.g. storm water from city streets, agricultural lands, forestry operations, and others) degrade water resources. Fish in many waters contain unacceptable levels of mercury and other toxic contaminants. Beaches are too often closed due to poor water quality.

Several years ago, after taking a hard look at the serious water pollution problems around the country, the Administration concluded that current implementation of the existing programs was not fully addressing serious water pollution threats to public health, living resources, and the Nation's waters.

In response to this concern, President Clinton and Vice President Gore announced, in February 1998, an interagency effort to enhance existing clean water programs and speed the restoration of the Nation's waterways. The Clean Water Action Plan was the product of a cooperative effort by USDA, EPA, the Department of the Interior, the National Oceanic and Atmospheric Administration, the Army

Corps of Engineers and others. It describes over 100 actions—based on existing statutory authority—that these agencies and others will undertake to strengthen efforts to restore and protect water resources.

The Action Plan is built around four key tools to achieve clean water goals.

• *A Watershed Approach.*—The Action Plan envisions an improved collaborative effort by Federal, State, Tribal, and local governments, the public, and the private sector to restore and sustain the health of over 2,000 watersheds in the country. The watershed approach provides a framework for water quality management and is a key to setting priorities and taking action to clean up rivers, lakes, and coastal waters.

• *Strong Federal and State Standards.*—The Action Plan describes how Federal, State, and Tribal agencies may revise standards where needed and make programs more effective. Strong standards are key to protecting public health, preventing polluted runoff, and ensuring accountability.

• *Natural Resource Stewardship.*—Much of the land in the Nation's watersheds is crop land, pasture, rangeland, or forests, and much of the water that ends up in rivers, lakes, and coastal waters falls on these lands first. Clean water depends on the conservation and stewardship of these natural resources. This Action Plan encourages Federal natural resource agencies, including the Department of Agriculture, to support State and local watershed restoration and protection.

• *Informed Citizens and Officials.*—Clear, accurate, and timely information is the foundation of a sound water quality program. Informed citizens and officials make better decisions about their watersheds. The Action Plan encourages Federal agencies to improve the information available to the public, governments, and others about the health of their watersheds and the safety of their beaches, drinking water, and fish.

USDA, EPA and others are making good progress in implementing the over 100 specific actions described in the Clean Water Action Plan. Congress has provided vital support to this work by appropriating critical funding, including doubling EPA's State grants for reducing nonpoint pollution to about $200 million.

A key accomplishment promoted by the Action Plan is completion of State assessments of watershed health and initiation of over 300 Watershed Restoration Action Strategies to restore polluted waters on a watershed basis. These Action Strategies are a tremendous tool for drawing together the diverse authorities and resources of local, State, and Federal agencies to restore watershed health.

Other accomplishments include a new BEACH Action Plan, a response plan for pollution threats to coastal waters, new regulations to control discharges of stormwater, new efforts to support establishment of riparian buffers, and a contaminated sediment strategy. We are also supporting efforts to protect water quality and wetlands on a watershed basis through "watershed assistance grants" and the five State grant program.

The Clean Water Action Plan is a sound blueprint that brings the Nation's clean water programs into the new century. I ask, Mr. Chairman, that a copy of the first annual report of progress in implementing the Clean Water Action Plan be included as part of my testimony in the hearing record.

RESTORING AMERICA'S POLLUTED WATERS

The clean water programs that EPA and the States implement—ranging from financing assistance for sewage treatment facilities, to permits for dischargers, to technical assistance to control pollution from nonpoint sources—are all intended to reduce water pollution.

For many years after passage of the 1972 Clean Water Act, pollution problems were so common that any reduction in pollutants made a contribution to improving the health of waters. Today, however, some of the most obvious water pollution problems have been addressed. To restore the health of those waters that remain polluted, we need to complement existing programs with a more focused effort to identify specific polluted waters and define the specific measures needed to restore them to health.

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 in section 303(d) of the Act.

In my testimony today, I want to discuss the existing TMDL program, the story that it tells about the health of our waters, and the regulatory revisions that EPA is proposing in order to strengthen the existing program.

The Total Maximum Daily Load (TMDL) Program Background

The TMDL program, as it exists today, has two key phases—identification of polluted waters and restoration of the health of these waters.

In the identification phase of the program, the States, with EPA oversight and approval, usually develop lists of polluted waterbodies—waters that do not attain the water quality standards adopted by that State—every 2 years. States consult with the public in developing lists, rank waters on their lists based on the severity of the pollution, and set schedules for the development of TMDLs for each water body over an 8–13-year period.

The second part of the program is the development of the actual ''TMDL,'' which is, in effect, a State's plan to restore the uses of the water that the State has determined to be appropriate (e.g. swimming). It includes a quantitative assessment of water quality problems and the pollutant sources that contribute to these problems. A TMDL for an impaired water defines the amount of a pollutant that can be introduced into a waterbody so that the waterbody will achieve the water quality standards adopted by that State and allocates reductions in the pollutant or pollutants among the sources in a watershed. Therefore, a TMDL is in effect a ''pollution budget'' for an impaired waterbody. As such, it provides a guide to taking on-the-ground actions needed to restore a waterbody.

A TMDL can focus on a small segment of a waterbody or on a group of waters in a larger watershed. Where many polluted waters are clustered together, some States have chosen to develop a more comprehensive, watershed approach to the problem—such as a Watershed Restoration Action Strategy as described in the Clean Water Action Plan.

States develop the lists of polluted waters and the specific TMDLs, both of which must be approved by EPA. If EPA disapproves a State list or TMDL, the Clean Water Act requires EPA to establish the list or TMDL for the State.

Program Status

The TMDL program was designed to provide a safety net, catching water bodies that were not protected or restored by the implementation of the range of general, broadly applicable, pollution control programs authorized in the Clean Water Act.

Until the early 1990's, however, EPA and States gave top priority to implementing these general clean water programs and gave 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 waters and were not submitted in a timely manner.

Several years ago, citizen organizations began bringing legal actions against EPA seeking the listing of waters and development of TMDLs. To date, 17 of these cases have been resolved with agreement for State actions to identify impaired waters and establish TMDLs. Where States fail to act, EPA will step in and identify the polluted waters or establish the TMDLs.

In 1996, EPA determined that there was a need for a comprehensive evaluation of the TMDL program. The Agency 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.

The TMDL FACA committee was composed of 20 individuals with diverse backgrounds, including agriculture, forestry, environmental advocacy, industry, and State, local, and Tribal governments. Two representatives of the USDA served as ex-officio members of the FACA.

In July 1998, the committee submitted to EPA its final report containing more than 100 consensus recommendations, a subset of which would require regulatory changes. Although the TMDL FACA committee did not meet agreement on all issues, the recommendations guided EPA in the development of the revisions to the TMDL regulations proposed in August of last year.

EPA already has taken a number of other significant steps to improve State progress in listing polluted waters and developing TMDLs. For example, in August 1997, EPA issued two policy memoranda providing guidance for State lists and requesting that States work to improve the pace of establishing TMDLs. In particular, EPA asked that States develop 8–13-year schedules for developing TMDLs for all listed waterbodies, beginning with the lists due April 1, 1998.

States have made very good progress developing lists of polluted waters. All States submitted 1998 lists and EPA has approved all but one of these lists. In a few cases, EPA added waters to a State list. These lists, and maps of each State's polluted waters, are available over the Internet at www.owow/tmdls.epa.gov.

In addition, the number of TMDLs developed by States and approved by EPA has been steadily increasing over the past several years. Between 1972 (when Congress passed section 303(d) as part of the Clean Water Act) and 1999, States and EPA established approximately 1000 TMDLs.

Since October 1999, States have established, and EPA has approved, over 600 TMDLs for a variety of pollutants, including sediments and nutrients which are pre-

dominately caused by polluted runoff. Across the country, over 2000 TMDLs are now under development.

What Do the 1998 Polluted Waters Lists Tell Us?

The 1998 State lists of polluted waters tell us that the overwhelming majority of Americans—218 million—live within 10 miles of a polluted waterbody. Over 20,000 waterbodies across the country are identified as not meeting water quality standards. These waterbodies include over 300,000 river and shore miles and 5 million lake acres. The size of these impaired waterbodies range from short sections of headwater streams to long sections of major rivers like the Mississippi and the Colorado.

Direct pollution discharges from sewage treatment plants and factories are the sole cause of pollution in about 10 percent of polluted waters. Another 47 percent are impaired by a combination of point source discharges and polluted runoff. The remainder are impaired by polluted runoff from diffuse or nonpoint sources. Some of the impairments are the result of ongoing discharges while others stem from historic or "legacy" problems resulting from past activities.

The pollutants most frequently identified as causing water quality impairment include sediments, excess nutrients, and harmful microorganisms. Metals, including toxics, also contribute to these impairments.

On average, there are about two pollutants identified for each of the impaired waters. This means that as many as 40,000 TMDLs may need to be done, although watershed approaches can be used to address many of these individual segments at the same time and in a coordinated manner for greater efficiency.

To better illustrate the story that the 1998 polluted waters lists tell, I have several maps and graphs—including a national map depicting the percent of impaired waters by watershed, and a bar graph indicating the leading reasons that waters do not meet their clean water goals—that I would like to enter into the record.

Proposed Regulatory Revisions

On August 23, 1999 President Clinton announced proposed revisions to the existing TMDL program regulations that will significantly strengthen the Nation's ability to achieve clean water goals and provide States, Territories, and authorized Tribes clearer direction for identifying and restoring polluted waters. In addition, EPA proposed changes to the Clean Water Act discharge permit program and the water quality standards program that complement the proposed TMDL regulatory revisions.

These regulatory revisions are mid-course changes to the existing program based on current data and first-hand, on-the-ground knowledge regarding the status of the Nation's waters. Moreover, the insights we gained from the Advisory Committee process provided guidance on constructive changes to the program.

I want to briefly describe several of the key changes we have proposed to the TMDL program.

- *Schedules for TMDLs.*—The proposed rule calls for States to develop schedules for establishing TMDLs within a 15-year timeframe, 2 years beyond the current 13-year schedule. By proposing this 15-year period, EPA is recognizing that some States need to develop many TMDLs and that it takes tirade to develop a useful and effective TMDL. In addition, the regulation does not set a time period for implementing the TMDL and attaining water quality standards, thereby giving States discretion to develop appropriate schedules for implementation.
- *Priorities for TMDLS.*—The proposed regulations also give States considerable flexibility in setting priorities for the development of TMDLs over the 15-year period. While the proposed regulations would require States to prioritize their listed waters, the only specific priority setting requirements in the proposed rule are that States assign a high priority to polluted waters designated as a public drinking water supply where the pollutant of concern causes a violation of a drinking water standard, and to waters where pollutants threaten species listed as endangered or threatened under the Endangered Species Act.
- *Allocating Needed Pollution Reductions for Polluted Waters.*—The proposed regulations make clear that TMDLs include an allocation of the needed pollutant reductions among sources of pollution, but give States freedom to allocate needed pollution load reductions among sources in whatever manner they deem appropriate, provided that the sum of the allocations will result in the water attaining State water quality standards.
- *Defining "Reasonable Assurance".*—EPA's current guidance asks that there be a "reasonable assurance" that a source actually will attain its pollution reduction allocation. Without such assurance, the TMDL may not result in attainment of the State-adopted water quality standard.

The proposed regulations more explicitly define "reasonable assurance." In effect, "reasonable assurance" means a high degree of confidence that allocations in the TMDL will be implemented. For point sources, reasonable assurance would mean that Clean Water Act permits will be consistent with any applicable pollution reduction allocation contained in the TMDL.

For diffuse or "nonpoint" sources, where no permit is required, "reasonable assurance" would mean that nonpoint source controls are specific to the pollutant causing the impairment, implemented according to an expeditious schedule, and supported by reliable delivery mechanisms and adequate funding. Some examples include regulations or local ordinances, performance bonds, memoranda of understanding, contracts or similar agreements. Voluntary and incentive-based actions may also be acceptable measures of reasonable assurance and are encouraged. It is important to note that a State decision to allocate load reductions to nonpoint sources does not bring that operator into a permit or regulatory program.

• *TMDL Implementation Plans.*—The proposed regulations call for organizing TMDL related information concerning needed pollution reductions, allocation of pollution reduction effort among sources, and "reasonable assurances" in a single document called an implementation plan.

States will have the responsibility for developing the plans, but will work closely with a range of stakeholders at the local, waterbody level. States could develop implementation plans for clusters of listed waters on a watershed scale, as long as the scale of the implementation plan is consistent with the geographic scale at which the TMDL is established.

• *Permit Program Revisions.*—In cases where a State developed a TMDL that is disapproved by EPA, the Clean Water Act requires EPA to establish the TMDL. In such cases, the proposed regulations would allow EPA to use the authority that States now have to designate certain sources, such as large Animal Feeding Operations and large fish farms, as needing Clean Water Act permits. EPA would use this authority only where a permit is needed to assure implementation of measures called for in a TMDL established by EPA.

The new regulations also would provide EPA the authority to object to and, if necessary, reissue expired permits issued by States for discharges to polluted waterbodies where reissuance is necessary to move toward meeting water quality standards while a TMDL is being established or to ensure that a completed TMDL is adequately implemented.

• *Silviculture Activities.*—The proposed regulation provides States with discretionary authority to require that discharges of stormwater from forest activities such as road building and harvesting have a Clean Water Act permit, but only where the discharge contributes to the nonattainment of a State-adopted water quality standard or is a "significant contributor" of pollutants to waters.

Although silviculture activities are not the most significant source of water pollution nationwide, they can cause serious pollution problems in some areas. In the preliminary data for the forthcoming 1998 305(b) report, thirty-two States identified forestry as a source of water quality problems for 20,000 miles of rivers and streams and 220,000 acres of lakes. Other States identified serious problems from pollutants, such as sediment and nutrients, that can result from forestry and other activities, but did not identify source categories.

This regulatory revision is narrowly tailored to allow the State permitting authority the option of requiring an individual silviculture discharger to address a significant water pollution problem through the use of a permit when other tools (e.g. financial assistance, voluntary measures) are unavailable, are not being implemented, or have proven ineffective.

EPA recognizes that many States have strong and effective voluntary programs for reducing water pollution from silviculture operations, and expects that most States will continue to rely on these programs both to protect the quality of waters that are now clean and to restore the quality of waters identified as polluted.

Where EPA uses its backstop authority and establishes a TMDL for a State, and allocates pollution reductions to forestry sources, the Agency will rely on voluntary, incentive and financing approaches for implementing these load allocations where they are proven effective. Only in cases where no other option offers a "reasonable assurance" of implementation would EPA consider using the proposed regulatory authority to require a discharge of stormwater from a forestry operation to have a Clean Water Act permit. EPA expects to use this authority as a last resort.

• *New Discharges to Polluted Waters.*—The proposed regulations outline a new approach to achieving progress toward attainment of water quality standards in polluted waterbodies after listing and pending establishment of a TMDL. Because the new regulation would allow up to 15 years for States to develop TMDLs, there is

a significant risk that conditions will decline in many waters before the TMDL is developed.

Existing regulations allow new dischargers to polluted waters, as long as the discharge "does not cause or contribute to the violation of water quality standards." This means the dischargers either will not discharge pollutants causing the water to be impaired, or if they intend to discharge such pollutants, their permit must include effluent limitations that "derive from and comply with" water quality standards (e.g. the pollutant concentration level in the newly permitted effluent does not exceed the allowed concentration level of the pollutant in the receiving water).

EPA is proposing to strengthen this requirement by requiring that, where a State (or EPA where it issues the permits) allows large new or significantly expanded discharges to these waters, discharge permits must result in "reasonable further progress" toward water quality goals. Where possible, permits are to include an offset from another pollution source of one-and-a-half times the proposed new or expanded discharge. At a minimum, the permit is to do no further harm to the receiving water. This provision would help to assure that pollutants that bioaccumulate or are controlled based on mass loading, rather than concentration, do not make already polluted waters worse.

CONCLUSION

Most Americans are rightly proud of the tremendous progress the country has made over the past 25 years in improving the quality of our rivers, lakes, and coastal waters. The days of rivers bursting into flame and lakes dying are behind us.

This accomplishment resulted from a team effort—Congress lead the way in passing the Clean Water Act and other Federal laws, and Federal agencies like EPA and the Department of Agriculture did their part. But much of the real, on-the-ground work has been done by the States, cities, small towns, and individual stewards of the land, like farmers, ranchers, and woodland managers.

The 1972 Clean Water Act set the ambitious—some thought impossible—national goal of "fishable and swimmable" waters for all Americans. At the turn of the new millennium, we are finally within striking distance of that goal. We need to maintain our traditional programs to protect clean waters. But today, we are able to list and put on a map each of the 20,000 polluted waters in the country. And, we have a process in place—the TMDL program—to define the specific steps needed to restore the health of these polluted waters and to meet our clean water goals within the foreseeable future.

It is critical that we, as a Nation, rededicate ourselves to attaining the Clean Water Act goals that have inspired us for the past 25 years. The TMDL regulations we have proposed draw on the core authorities of the Clean Water Act and refine and strengthen the existing program for identifying and restoring polluted waters. They provide a map that will support us in our effort to fulfill the original promise of the Clean Water Act.

Some who have commented on the proposed regulations have suggested that we are asking the country to take too great a step toward cleaner water and that we should set aside these proposals. I respectfully and strongly disagree.

We began this effort over 3 years ago by forming a Federal Advisory Committee including a wide range of interested parties. We used the report of this Advisory Committee, and input from States and others, to develop a proposed regulation. We extended the comment period on the proposed rules to January 20 of 2000 and actively sought public comments and input from all interested parties for 150 days. We held a series of public meetings around the country on this proposal to respond to questions and listen to alternatives.

A key theme of many of the comments we heard in developing the rule is the need to increase financial resources for States to manage this effort and to assist pollution sources in implementing needed controls. We recognize this need. We have increased funding for key State grant programs in recent years. Congress approved the Administration's requests to add $100 million to State grants for the nonpoint pollution control program in fiscal years 1999 and 2000. Most importantly, for fiscal year 2001, the President has proposed a major increase to EPA grants to States targeted specifically for development of TMDLs. This funding, when matched by States, will provide $75 million for this important work. This is complemented by the proposed $1.3 billion increase in conservation programs at USDA. We heard the call for increased resources and we responded.

Mr. Chairman, some observers will tell you that these new regulations are more of the old, top-down, command-and-control, one-size-fits-all approach to environmental protection. In fact, the regulations are guided by a vision of a dramatically new approach to clean water programs.

This new approach focuses attention on pollution sources in proven problem areas, rather than all sources. It is managed by the States, rather than EPA. It is designed to attain the water quality goals that the States have set and to use measures that are tailored to fit each specific waterbody, rather than a nationally applicable requirement. And it identifies needed pollution reductions based on input from the grassroots, waterbody level, rather than relying on a single, national, regulatory answer. In sum, we think we are on the right track to restoring the Nation's polluted waters.

Over the next several months, we will work with other Federal agencies, States, and other interested parties to develop a final regulation to help the Nation better achieve the goal of restoring polluted waters.

Thank you, Mr. Chairman and members of the subcommittee for this opportunity to testify on EPA's efforts, in cooperation with States and other Federal agencies such as the Department of Agriculture, to restore the Nation's polluted waters.

I will be happy to answer any questions.

STATEMENT OF WILLIAM NIELSEN, COUNCIL PRESIDENT, EAU CLAIRE, WI, ON BEHALF OF THE NATIONAL LEAGUE OF CITIES

Mr. Chairman, members of the subcommittee: I am Bill Nielsen, President of the Eau Claire, Wisconsin City Council and a member of the National League of Cities Energy, Environment and Natural Resources Steering Committee. I also served as the only elected representative of the nation's cities on the TMDL Federal Advisory Committee. I am here today to testify on behalf of the National League of Cities and the 16,000 cities across the Nation we represent on the regulations recently proposed by the Environmental Protection Agency on Total Maximum Daily Loads.

I would like to make clear at the outset of my testimony that, while city officials are distressed and frustrated by endless unfunded Federal mandates, we vigorously support the goals and objectives of the Clean Water Act. We recognize and appreciate the invaluable contribution made by the Federal Government in assisting cities in restoring and protecting our nation's rivers, lakes and streams. Without the substantial financial investment made by all three levels of government in our municipal wastewater infrastructure, cities would not have made the progress we have over the past 20 plus years. Since the 1972 Amendments to the Clean Water Act were passed we have been using best available technology to address pollutants from point sources. We believed that the TMDL program would take the next step in addressing the major remaining sources of pollutants—those from nonpoint sources.

This partnership of Federal, State and local governments, as this committee knows well, has resulted in significant reduction of pollution from point sources at levels approaching 95 percent or better. NLC believes that EPA's TMDL regulation, if implemented as proposed, fractures our partnership and unjustifiably places the burden solely on the nation's cities.

That we continue to have impaired waterbodies is not in question. That some of these impairments can be attributed to municipal activities or activities in municipalities is also not in question. What is in question is who will bear the preponderant responsibility for attainment of water quality standards: those over whom there is statutory control because they fall within the purview of the law, or those whose contributions cause continued nonattainment of water quality standards?

We understand that the Clean Water Act principally addresses point sources. We know there are sources contributing to stream degradation that do not fall within the parameters of the Clean Water Act. What we do not understand is how EPA can manipulate the statute to make municipalities—in effect—legally responsible for the pollutant contributions of sources not covered by the law.

The National League of Cities believes the TMDL proposal, if not amended, will:

- severely limit growth and economic development in urban areas;
- obstruct compliance with remediation of sanitary sewer overflows (SSOs) and/or combined sewer overflows (CSOs);
- impose impossible requirements on discharges from municipal separate storm sewer systems (MS4s);
- halt conversion initiatives to bring septic systems into treatment facilities and thereby adversely affect logical and orderly annexation procedures;
- shift the financial burden for pollutant reductions from nonpoint sources to local tax and ratepayers; and,
- generate endless litigation that will fall principally on National Pollutant Discharge Elimination System (NPDES) permit holders, not on sources that contribute to stream degradation.

AFFECTS ON URBAN GROWTH AND ECONOMIC DEVELOPMENT

NLC believes that the proposed "offsets" and changes to the antidegradation policies of the Clean Water Act will have significant negative ramifications on growth and economic development in the nation's cities.

First, while the offsets are limited to "large" facilities, that is the direction municipalities are moving in dealing with wastewater treatment. We are unaware of any decentralization initiatives of these operations occurring now, and it is doubtful that such a strategy would be workable, cost-effective or even allowable. As the requirements imposed on municipal wastewater treatment facilities and their adjuncts—CSOs, SSOs, and MS4s—become more complex and costly, consolidation, more often than not, provides better opportunities for economies of scale, access to expert professional staff, and adequate funding. Thus, as municipal wastewater treatment operations move into the "large" category (defined as publicly owned treatment works [POTWs] serving populations of 50,000 or more), the requirement will fall more heavily on this sector of dischargers, thus penalizing, or halting entirely, efforts to become more effective and efficient in meeting the needs of growing populations and in controlling pollutants.

Second, from the perspective of municipalities, the statement in the preamble to Part III (see Federal Register, Vol. 64, No. 162, page 46067) indicating that "[e]xisting dischargers are likely to be in a poorer position to bargain for offsets because they may not have a realistic option to locate on a different water body" is both naive and appallingly revealing of the agency's agenda.

Water treatment facilities (both wastewater and drinking water) are located where they are because they serve the needs of a specific population in residence in a specified area. Moving them to "a different water body" is simply not an option unless the agency envisions wholesale relocation of entire cities. NLC would argue that these provisions are inappropriately applied to the nation's cities, which should be exempt from any offset requirements given the nature of municipal operations that affect receiving waters.

NLC also has significant concerns with EPA's suggestion that non-municipal (industrial) operations—which may actually be in a position to relocate to a more pristine waterbody—be encouraged to do so. The nation's city officials work very hard to keep their communities economically viable. NLC can neither condone nor support a Federal agency's policy that has such major ramifications and unintended consequences for the economic well being of urban America.

While the preponderance of cities in the United States have populations of 50,000 or less, population is not inherently representative of pollutant loadings. It is unclear whether EPA proposes to exempt non-municipal (industrial) point sources in these cities from the offset requirements. If that is not the case, the agency is again encouraging behavior that is inimical to the interest of these cities by creating an incentive for major industrial dischargers to move to smaller jurisdictions to avoid having to comply with the offset provisions. This is unacceptable.

Third, NLC also takes exception to EPA's rationale that "such narrowed coverage [i.e., application of the offset policy to large new or significantly expanding dischargers] is more likely to insure development of a successful market for pollutant trading." Anyone who has ever been in a large city would know that they are primarily surrounded by smaller cities—not by the nonpoint source activities that are responsible for the preponderance of the remaining pollutants to the nation's waterbodies. It is much more likely that "success" in "pollutant trading"—assuming point source to nonpoint source trading is even viable—would occur outside of urban areas, precisely where EPA is proposing it to be inapplicable. We completely disagree that the target dischargers are "in the best position to achieve offsets."

Since we oppose the idea of pollutant trading in the first instance, we are not proposing that EPA broaden the applicability of this concept to more areas of the country. We merely wish to point out that the entire concept is fatally flawed.

And finally, we believe the proposed changes to the antidegradation policy will have the effect of placing every waterbody in the United States on the table for TMDL consideration. Such a policy will force growth and expansion to unpolluted areas, particularly in light of the presumed "zero" discharge mandate that is implied in the proposed regulations. In our view, the proposal establishes zero tolerance for any new discharges in every city bordering or affecting a waterbody not meeting water quality standards, thus precluding any growth or major redevelopment in already developed areas.

SHIFTING FINANCIAL BURDEN TO LOCAL TAX AND RATEPAYERS

NLC also has environmental justice concerns about the offset proposals. The proposed rule, in effect, mandates that the nation's larger cities—or rather its tax-

payers—finance the pollutant control activities of *private sector entities*. In the case of most nonpoint sources of pollutants, these entities will be outside the jurisdiction of the city. City elected officials cannot justify the use of local tax dollars to finance water pollutant control practices of entities over which we have no authority. And, whether a point or nonpoint source is within or outside of the city boundary, cities cannot finance the activities of a private/for profit venture. Nor can we justify such expenditures to our local tax and ratepayers when there are significant environmental and non-environmental unmet local needs. We, at the local level are currently struggling with implementation of the new Phase II stormwater program. That is where we need to invest our limited resources, not in solving problems caused by others.

What is more, before we can implement effective offsets we need mechanisms that will help identify what is coming from where, how much is coming from whom, and whether there are strategies that will actually impact on these pollutants. This is true not only for nonpoint sources, but equally relevant to any inter-media trades such as EPA is proposing for waterbodies affected by air pollution.

There is also very little certainty involved in the implementation of best management practices in the nonpoint source arena. EPA itself makes this case by elaborating on the uncertainty of successfully implementing and attaining the necessary reductions from nonpoint sources and the inconsistent enforcement authorities available to insure such reductions actually occur. Were this not the case, the agency would scarcely find it necessary to hold dischargers responsible for the attainment of the reductions by including such reductions in the discharger's NPDES permit.

The proposal to incorporate assurances and enforceable mechanisms with respect to offsets obtained by point sources in their NPDES permits is one of the most egregious provisions in the proposed rule. NLC believes this proposed requirement clearly exceeds EPA's legitimate authority. To the best of our knowledge, Congress has not authorized the agency to designate point sources as surrogate authorities to ensure the attainment of water quality objectives from sources of pollutants not regulated by the law. EPA has no authority to expand the law beyond Congressional intent, nor can it take enforcement action against a specific discharger for the pollutant loadings of another discharger. NLC does not believe the agency can circumvent this fact by incorporating such requirements in an NPDES permit. Further, a city cannot assume liability for the actions of others carried out under contract. In effect, including pollutant loading reductions from sources outside of a city's boundaries in a municipal NPDES permit is unallowable.

In the abstract, offsets may indeed be more "cost effective" than financing the removal of the last miniscule pollutant from a point source, but unless offsets work, they will be totally useless. Until all pollutant sources function under the same, or substantially similar, enforcement authorities, EPA cannot expect effective trading markets by simply shifting the burden of controlling pollutants from nonpoint sources to point sources.

WET WEATHER ISSUES (STORMWATER, CSOS, SSOS)

EPA has proposed strategies for addressing TMDLs that appear to have been developed without consideration of the interrelationships among programs, the overarching goals and objectives of the Clean Water Act, or previously negotiated agreements between EPA and affected stakeholders. We believe, if implemented as proposed, the rules will either preclude or inhibit the ability of municipal point sources to comply with other significant requirements of the Clean Water Act. NLC believes this is especially true with respect to wet weather issues: CSOs, SSOs and municipal stormwater programs.

City officials believe the proposed TMDL rules will nullify virtually all of the agreements reached by the three Federal advisory committees convened by EPA over the last 15 years to address urban wet weather problems. This includes any relief that may be realized from the recently concluded SSO FACA with respect to wet weather facilities, as well as any relief granted municipalities in EPA's August 1996 Interim Permitting Approach for Water-Quality Based Effluent Limitations in Storm Water Permits which limited requirements to meet numerical effluent limits in municipal separate storm sewer system discharges. The specter of exactly such requirements seems inescapable in the continual references to wasteload allocations for stormwater discharges under the TMDL proposal. This dichotomy is of significant concern to the nation's cities since we believe there is inadequate knowledge, inexact technology, insufficient resources, and other insurmountable barriers, to assure that such an objective is attainable. We are concerned about the likelihood of having unattainable, enforceable standards imposed on local governments and reiterate our continuing opposition to the imposition of TMDLs on stormwater dis-

charges until there is a substantially improved and objective body of knowledge demonstrating how and/or whether these objectives are realistic.

Stormwater

EPA has just finalized regulations for the Phase II municipal separate storm sewer systems (MS4s). EPA, in convening a Federal advisory committee to assist the agency in developing these regulations, clearly indicated that it was the agency's intent that the Phase II program—which will apply to cities in urbanized areas of 50,000 or more population—be significantly less complicated than the program developed by the agency for the Phase I cities. Many of the provisions in the Phase II MS4 regulations are based in large measure on recommendations and, in some cases, agreements among the participants in the Federal advisory committee. The use of general permits—as currently constituted—was perceived by the municipal community as a major step in the direction of simplifying an unnecessarily complicated program. If the TMDL proposal alters the use of general permits and information required in the Notice of Intent (NOI), the agreements by many members of the Phase II Stormwater FAC—*and the commitments made by EPA to the municipal caucus*—will, in effect, be nullified.

What is more, significant changes to the general permit provisions will invalidate EPA's claim (see Federal Register, Vol. 64, No.162, page 46084, C. Unfunded Mandates Reform Act) that there will be no impact on small governments. As cities have learned from their experience[1] with the Phase I stormwater program, obtaining an individual permit, which may well be the result of these proposed provisions, will have a major financial impact on all local governments, including those with populations of less than 50,000.

Most importantly, the nation's Phase II cities are just now beginning to develop their stormwater programs under a set of rules that were finalized last October. About the time these cities will have completed their stormwater program planning and begun implementation, a new regulation—TMDLs—will be superimposed creating a whole new set of criteria. A set of criteria, I might add, that we doubt anyone will know how to implement. It is already an uphill struggle for cities to get voter approval of new programs. Shifting targets and extensive program revisions exacerbate the problem not only for our local tax payers, but also for city officials who are called upon to explain why they didn't get it right the first time.

NLC believes it is inappropriate to alter the parameters of general permits with respect to municipal stormwater discharges; impossible to meet more stringent requirements in a stormwater permit; and disruptive to continually change the requirements of programs, such as the MS4 program, that are new and largely experimental.

Combined Sewer Overflows/Sanitary Sewer Overflows

NLC is also concerned about the impact of implementing TMDLs on municipal initiatives to comply with Federal requirements to address combined and sanitary sewer overflows. If one Federal regulation requires cities to, in effect, divert these overflows to treatment facilities—either expanded existing facilities or new ones—what is the point of developing another regulation that will preclude cities from doing so? Cities cannot comply with Federal directives to redirect excess wet weather flows to treatment facilities while simultaneously being precluded from doing so unless they can obtain substantial offsets from other sources. In addition, cities face significant financing issues here. On the one hand the agency requires costly strategies to address overflows; on the other hand, cities can only secure permits for such facilities if they also buy offsets—all without any financial help from the level of government mandating the requirements. Cities, which are facing close to $1 trillion in unfunded water infrastructure needs over the next 20 years, simply do not have the required resources to do both. As usual, EPA is continually "sensitive" in the proposed TMDL rules to its own limited resources as well as those of the States, but seems to be indifferent to similar constraints on local government.

Septic Systems

As a matter of good environmental policy, many cities are attempting to bring users of septic systems into their treatment works as well. Here again, because of the increases in discharges resulting from such conversions, the TMDL proposed rules pose a disincentive to take such action because of the additional costs of offsets. Such a policy, we believe, will adversely affect local decisions and relationships with respect to annexation policies and procedures.

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[1] EPA estimated the cost of a Phase I permit to be between $35,000 and $75,000. Nationwide, the average cost of a Phase I permit application is $650,000 to $750,000.

In sum, NLC believes implementation of the proposed TMDL regulations would serve as a disincentive to replace septic systems and as an absolute bar to complying with CSO requirements and any future SSO mandates. We do not believe that EPA, in drafting the "significant expansion" proposals, adequately considered the impact on municipalities with respect to their wet weather responsibilities.

LISTING DECISION

NLC is also concerned about the overreaching proposal to identify "threatened" waters in the TMDL process. There are reportedly over 40,000 impaired waterbodies that will be subject to TMDL requirements. We do not believe it is either appropriate or within the scope of the law to extend the program to waters that may, at some uncertain future date, have problems. Addressing the known problems in the nation's waters should be the nation's priority and limited resources should be targeted to these waterbodies. We believe there is more than sufficient work for the States and other affected entities in dealing with known impaired waterbodies. In our opinion, it is both unnecessary and overburdensome to involve waters that may have the "potential" to become impaired since the mere threat of being listed will serve as a significant incentive to take appropriate pollution prevention measures.

NLC also believes the agency should require quality assured/quality controlled data as the basis for making TMDL listing determinations. While citizen monitoring activities are helpful, the results of these types of efforts cannot be the sole basis for making determinations that have significant resource implications for the nation's cities unless the accuracy of the information has been validated.

City officials also object to the recommendation that there be limits on permit renewals in threatened waterbodies. Here again, EPA is targeting part of the problem to be all of the solution. At a minimum there should be an analysis to identify what sources are contributing to further impairment. The sources responsible for the impairment should then be the subject of actions to minimize or eliminate their contribution. The entire problem should not be presumed to come from point sources since they are not the only sources contributing to stream degradation.

NLC RECOMMENDATIONS

At a minimum, NLC believes the following changes are essential:

Offsets: NLC believes the offset provision should be discretionary for municipal facilities on the part of the permitting agency. In such cases offsets should be allowable only where it can be demonstrated that such a policy is appropriate and will not have adverse unintended consequences.

Stormwater Permits: NLC believes all (Phase I and II) municipal stormwater permits should be exempt from the TMDL requirements.

General Permits for Stormwater Discharges: EPA may find it necessary to alter the information sought in an NOI for non-MS4 general permits. However, since the stormwater regulations will apply for the first time to cities with populations between 50,000 and 99,999 (as well as those with populations under 50,000 in urbanized areas), NLC believes any such amendments should exempt all MS4 permits, not just those issued to "small entities." Furthermore, general permits as currently designed should remain EPA's primary recommendation to permitting authorities as the optimal mechanism for municipal stormwater discharges.

Listing: Only waterbodies that are determined to be impaired by quality assured/quality controlled data should be subject to listing for a TMDL.

STATEMENT OF JAMIE CLOVER ADAMS, SECRETARY, KANSAS DEPARTMENT OF AGRICULTURE, ON BEHALF OF THE NATIONAL ASSOCIATION OF STATE DEPARTMENTS OF AGRICULTURE

Mr. Chairman and members of the subcommittee, thank you for the opportunity to present testimony on the Environmental Protection Agency's (EPA) proposed rules on Total Maximum Daily Loads (TMDLs). My name is Jamie Clover Adams. I am the Secretary of the Kansas Department of Agriculture and I appear today on behalf the National Association of State Departments of Agriculture (NASDA) and my colleagues from across the nation.

We share your commitment to cleaning up the waters of the United States. American agriculture is dependent upon continued access to clean water, air, and fertile land for its viability. There are four issues of great concern to the nation's Secretaries, Directors and Commissioners of Agriculture regarding the proposed TMDL rule.

- It greatly exceeds EPA's statutory authority;

- It jeopardizes successful voluntary, incentive-based, nonpoint source management programs,
- It significantly expands command and control regulatory mandates with no flexibility to implement strategies that achieve results; and
- It fails to recognize the substantial State resources needed to address nonpoint source pollution—financial and technical assistance, scientific data, monitoring and Best Management Practice (BMP) research.

A. THE TMDL RULE EXCEEDS EPA'S STATUTORY AUTHORITY

We disagree with EPA that the Clean Water Act (CWA) provides ample authority to regulate nonpoint sources of pollution. Legislative history is clear that Congress made a conscious decision to treat point and nonpoint sources differently and separately. Point sources are directly regulated through National Pollutant Discharge Elimination System (NPDES) permits and nonpoint sources are addressed and managed under Section 319. In fact, in the EPA brief filed as part of *Kansas Natural Resources Council and Sierra Club* v. *Carol Browner and State of Kansas, defendant-intervenor*, EPA makes this very point. They argued, "Congress did not include any provisions requiring States or EPA directly to regulate *non*point sources . . . Rather, under Section 319 of the Act, Congress required States to prepare reports and develop management programs addressing various strategies, including 'best management practices,' to reduce pollution from nonpoint sources." We believe the intent of the Clean Water Act is clear and EPA has also acknowledged this fact—nonpoint sources of pollution are not subject to mandatory regulations under the Clean Water Act, but are to be addressed through voluntary, outcome-based programs. It is imperative that the TMDL program not require States to operate in any different manner.

B. THE RULE JEOPARDIZES SUCCESSFUL PROGRAMS ALREADY BEING IMPLEMENTED

The Clean Water Act contains valuable provisions for nonpoint source management under Section 319 and 208. Also, farmers and ranchers have made great strides through their participation in programs established under the 1985, 1990 and 1996 Farm Bills. States are developing and implementing their own programs. For example, in my own State of Kansas, we are implementing voluntary incentive-based practices as part of the Governor's Water Quality Initiative, and we have monitoring data which shows these practices are improving the water quality in the area.

EPA's TMDL rule fails to give States the flexibility that is needed to build on our progress. Instead, EPA's TMDL proposals substantially rewrite implementation of the Clean Water Act with prescriptive requirements, short deadlines, new and additional layers of planning, implementation, and oversight. This is counterproductive.

States are on the forefront of addressing nonpoint water quality issues. We know what the problems are, we know what programs will help. States don't need EPA trying to dictate and prescribe solutions. In Kansas, we have written and are implementing 120 TMDLs in the Kansas Lower Republican Basin. We will have more done in the Upper and Lower Arkansas River Basins, as well as the Cimarron Basin by mid-2000. Lack of flexibility in the TMDL rule will slow our progress and our efforts to improve water quality in Kansas.

C. THE TMDL RULE SIGNIFICANTLY EXPANDS "COMMAND AND CONTROL" REGULATORY MANDATES WITH NO FLEXIBILITY TO IMPLEMENT STRATEGIES THAT ACHIEVE RESULTS

States must have flexibility to build on programs that are already working to improve water quality. Almost all States are utilizing existing laws, regulations, strategies and programs to address water quality concerns related to agricultural runoff. States are aggressively pursuing and expanding resource conservation efforts to minimize nonpoint source pollution. To reduce nonpoint source pollution and improve water quality, we must have the cooperation of the agricultural community. Proceeding with a strategy that is based on heavy-handed mandates will not foster cooperation. In Kansas, for example, we implemented a State, voluntary, incentive-based program to reduce atrazine runoff. In the target subbasin, one-on-one work with landowners has resulted in 100 percent participation and improvements in water quality.

D. EPA'S RULE FAILS TO RECOGNIZE THE SUBSTANTIAL STATE RESOURCES NEEDED TO ADDRESS NONPOINT SOURCE POLLUTION—FINANCIAL AND TECHNICAL ASSISTANCE, SCIENTIFIC DATA, MONITORING AND BMP RESEARCH

Over the past two decades, Federal agencies have seriously under-invested in nonpoint source abatement programs. Nonpoint source programs have received only one to 2 percent of what has been spent on point source control. Technical assistance is equally as important as financial assistance for best management practices (BMPs). In Kansas, convincing farmers and ranchers to implement BMPs takes one-on-one dialog and assistance with implementation. Water quality data in all States is not adequate to make the kinds of decisions the EPA rule requires. Even in States like Kansas, where we have a network of 200 monitoring stations across the State that have been in place for 20 years, significant data gaps exist. Work in the Governor's Water Quality Initiative required additional chemical monitoring, as well as biological monitoring.

States, like Kansas, are also investing in best management practice research. Farmers and ranchers want to do the right thing. We need to continue to provide the tools for them to do the job in a cost-effective way. We need help funding this type of research.

EPA's economic analysis greatly underestimates the cost of implementing TMDLs to the States and the private sector. In Kansas, the State Conservation Commission estimated the cost to implement practices on 192,000 acres in Nemaha County to achieve high priority TMDLs at $4 to $5 million. With the average value of production per farm in the county at $90,000, high priority TMDL implementation will cost four to 5 percent of the average farm's gross income.

SUMMARY OF REMARKS

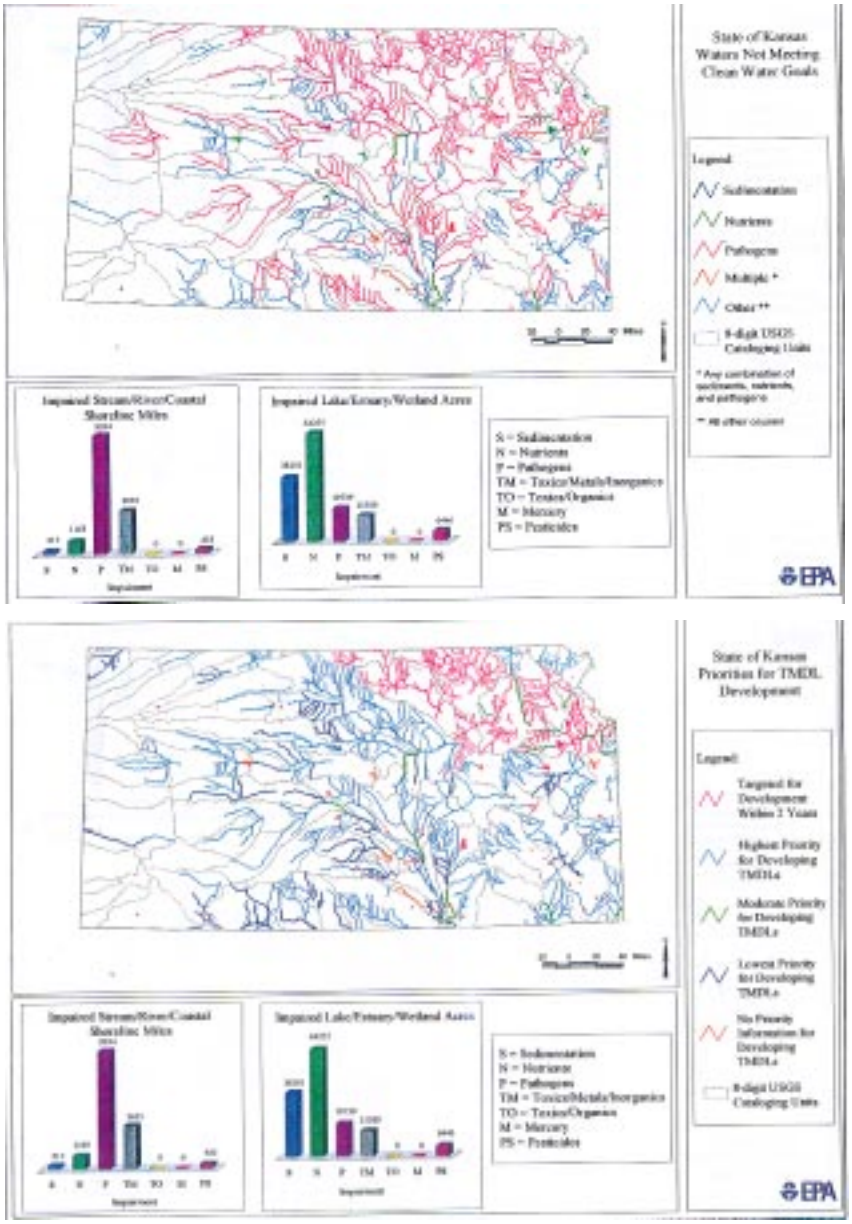
Proper management of nonpoint source pollution lies in State and local efforts. It is important to note that the Clean Water Act gives States the lead responsibility to prevent, eliminate, and reduce pollution. EPA's proposed regulations do not reflect this leadership role for the States. We need that partnership to jointly tackle the challenges of further reducing nonpoint source pollution. We hope the subcommittee will review our concerns closely.

1. The TMDL rule exceeds EPA's authority. It is a rigid, top-down program that will not improve water quality.

2. It fails to recognize the substantial costs associated with its implementation. Without adequate funding, States will not be able to move forward in addressing agricultural nonpoint source pollution.

3. It is important to remember that this is NOT about pushing paper and process, it is about people. It's about farmers and ranchers, their livelihoods, their businesses and their families.

We stand ready to work with Congress, EPA, and USDA on constructive solutions to improve water quality. On behalf of my State colleagues, I thank you for this opportunity to speak before the subcommittee.



STATEMENT OF DAVID HOLM, PRESIDENT, ASSOCIATION OF STATE AND INTERSTATE WATER POLLUTION CONTROL ADMINISTRATORS

Mr. Chairman, members of the committee and subcommittee. My name is David Holm. I am the President of the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) and the Director of the Colorado Water Quality Control Division. ASIWPCA is the national, professional organization of State officials who are responsible for implementation of the Clean Water Act. As those on

the front line, the Association's membership has a unique perspective on the issues before this committee.

In the 1972 Clean Water Act, Congress gave the States the lead role to develop and implement the water quality program. States support the Act's goal to restore and maintain the nation's water quality and we believe the establishment of total maximum daily loads (TMDLs) is one of many important mechanisms to be used to achieve cleaner water.

The States have been in a continuing dialog with USEPA concerning the proposed regulation. As co-regulators, we met to address State issues and consider options for addressing those concerns. In addition, ASIWPCA has sponsored a series of State/EPA conference calls on the regulations and has been a co-sponsor with the Western Governors Association of a series of workshops. These forums have allowed significant discussion that, we are hopeful, will ultimately bear fruit. USEPA appears to be receptive to a number of State recommendations to modify and streamline the current proposal and build upon existing program authorities.

Because of constraints placed on USEPA in the rulemaking process, the Agency has not been able to make any commitments to the States. For this reason, Mr. Chairman, my comments will address the regulation as proposed.

States have invested significant staff resources in analyzing the proposed rule and have spent many hours in joint consideration of the anticipated impacts on our existing programs. What we see here is an effort by USEPA to move the water quality programs forward, which is of course laudable. We are concerned however, that the rule, as proposed, will have serious, if perhaps unintended, consequences on State programs. For details, we refer you to the attached written comments developed jointly by ASIWPCA, the Environmental Council of the States (ECOS) and the Coastal States Organization (CSO) which were shared with USEPA in the spirit of partnership as co-regulators.

States are mindful that the proposed wholesale modification to the TMDL regulation is being put forth in the context of existing statutory authorities and current funding levels. We caution that State program budgets and staffing levels are not sufficient to implement the current regulation. Those levels will not likely to grow to meet an ambitious waterbody restoration agenda merely because an arcane Federal regulation is changed.

SECTION 303(D)

The provisions of Section 303 (d)(1)(A) are fairly limited. States must:

(1) identify waters that do not meet State water quality standards (WQS) after application of basic point source control requirements,

(2) prioritize those waters and

(3) determine the total waste load the water body is able to receive and still meet WQS (with a margin of safety).

USEPA has 30 days to take approval action on a State submittal. If USEPA disapproves a State list or TMDL, they have 30 days to finalize one.

HISTORICAL PERSPECTIVE

The Clean Water Program is complex and, as the attached diagram illustrates, TMDLs were envisioned as one component of a broad Clean Water Act program.

Since 1972, States have allocated the limited funds available to address the ambitious Clean Water Act agenda. They established water quality standards, built and managed permitting and enforcement programs, financed municipal wastewater treatment facilities and developed nonpoint source (NPS) and watershed management programs. Since TMDLs were expensive and time consuming and the data and state-of-the-art was limited—other Clean Water Act and State authorities were generally more useful.

USEPA's priorities varied and did not, until recently, include TMDLs. Due to the failure of States and USEPA to achieve Section 303(d) there have been numerous court cases. States agree that TMDLs should be a meaningful and fundamental component of State water quality management programs. To bring this about, the Association believes that three fundamental challenges must be addressed:

1. The significant lack of funding and adequate initiatives to address nonpoint source and other water quality problems in the current program,
2. Major gaps in available data, research and monitoring, and
3. Insufficient attention to multi-media and multi-jurisdictional water problems.

GUIDING PRINCIPLES

In moving forward to improve the TMDL program, State water quality and environmental program managers emphasize:

1. The States' lead role in the nation's clean water program must be maintained.
2. TMDL requirements need be flexible and consistent with (a) existing statutory authority, (b) available resources, and (c) State water quality agency jurisdiction.
3. Existing initiatives should be used, wherever possible, to achieve objectives.
4. Expectations need to be clearly focused on desired environmental outcomes.
5. The iterative approach is crucial to success, particularly for nonpoint sources.

The magnitude of the task is formidable. Assuming an even distribution and no additional TMDLs, one TMDL would need to be approved *each* workday for the next *15 years* by *each* of the 10 USEPA Regional Offices to complete all of them. Assuming (optimistically) that an "80 percent savings" could be achieved (taking advantage of lessons learned, economies of scale, and delisting inappropriate waters), States would have to produce (and USEPA approve) one TMDL per week per USEPA region for the next 15 years. This does not consider the need to plan for implementation, conduct additional monitoring, or actually implement the TMDL. Unless additional funds are provided, State would have to divert resources from other worthwhile water quality activities to keep on schedule.

State experience demonstrates that cost estimates developed by USEPA are inadequate and incomplete (see attachments). USEPA states that TMDLs will cost $25,000 each. But, a mid-range is more likely to be $300,000-$1,000,000, depending on complexity (in Long Island Sound, $20,000,000 has been spent thus far on a nutrient TMDL). Annual costs for a decent effort at the State level could be in the range of $670 Million-$1.2 Billion.

CONCERNS REGARDING USEPA'S PROPOSED REGULATION

The Association has read a significant number of the comments submitted to USEPA on their proposal. Commenters share a common interest in the overall goal to improve water quality and further develop and implement TMDLs. But, they differ greatly regarding:

(1) How much of a burden can legally and realistically be placed on Section 303(d) to carry out the Clean Water Act and

(2) The appropriate role of Federal, State, and Local governments.

The primary State concerns are that:

- *The proposal broadly expands the Federal role in water quality management and permitting, which would seriously undermine USEPA's relationship with State government.*
- *The role of Section 303(d) is greatly enlarged, beyond what the Act envisioned.* It is not clear to the States, for example, that USEPA has statutory authority to:

1. Cover waters that are: (a) impaired solely by nonpoint sources, (b) are not violating WQS or (c) have solutions underway using other authorities;
2. Require that implementation plans: (a) be part of TMDLs and (b) include explicit assurances that the plan will be fully implemented, fully funded, adequately monitored, and fully compliant with the WQS; and
3. Intervene in a State's TMDL development or administration of the delegated point source permit program (to permit NPS or issue expired permits).

- *The proposal is too prescriptive.* States should be able to take alternative approaches that achieve the intended environmental outcome (functionally equivalency) particularly with regard to nonpoint and wet weather sources.
- *The proposal adds burdensome new layers to the existing program.* The additional lists, implementation plans, reporting, etc., confuse an already complex situation and waste scarce resources.
- *The proposed regulations would significantly restrict State ability to take "adaptive management approaches" to TMDL development and implementation.*
- *State water quality program officials cannot unilaterally develop TMDLs and implementation plans for problems that are beyond their jurisdiction.* Impairments to interstate and international waters also present unique challenges.
- *USEPA does not acknowledge the significant funding increases needed.*

BOTTOM LINE

The likely outcome of USEPA's proposal (unless refinements are made) would be less environmental progress and more litigation and delay. While the proposal is premised on the need for a major significant shift away from the historic point source focus toward watershed-based restoration, they reflect a pervasive top-down approach. This is unworkable where NPS management is the primary challenge and locally led initiatives are essential.

NPSs need to be treated differently and with less analytical rigor than point sources. USEPA's proposal does not go far enough in recognizing that it is often impossible, given the data and resources available and the timeframes envisioned, to

precisely quantify pollutant loadings from NPS runoff or to predict with certainty specific load reductions that will result from a given management practice. Achieving WQS requires an iterative process in which management practices are applied in watersheds, progress is made and evaluated, programs are adjusted and necessary additional funding is secured.

It is not fair or realistic to expect that States could successfully implement a program that is beyond the plain reading of the Clean Water Act. States should not be used as surrogates to impose requirements that USEPA would have no authority to apply. Unless the broad array of stakeholders are willing to support the approach, partnerships States have worked very hard to achieve in the NPS arena will start to unravel and momentum will be lost.

Unintended consequences are also a concern. USEPA's proposal imposes significant barriers to environmentally beneficial projects and community revitalization as well as encourages urban sprawl—since new or significantly expanding sources could not locate in impaired watersheds. States would be required to make decisions based on information that they cannot scientifically or legally defend. RCRA and Superfund program experience indicates that once a water body is on a 303(d) list, a stigma attaches that makes it difficult to cooperatively solve problems. There are too many unanswered questions:

- What is USEPA prepared to do to assure they have the resources to administer the approach proposed?
- What sort of TMDL is approvable; will an approved 319, estuary or coastal zone management, habitat conservation or species recovery plan be acceptable?
- How can States control transboundary air deposition; what is USEPA willing to do under the Clean Air Act? Can a TMDL be approvable for abandoned mine drainage, when there is inadequate and unpredictable funding? What are Federal agencies willing to do for re-mining of abandoned mine lands?
- How will USEPA streamline its process to meet the deadlines? How will the 135 day Section 7 consultation under the Endangered Species Act be reconciled with a USEPA 30 day deadline to act on lists and TMDLs? What happens if USEPA does not act within their deadline?
- Will USEPA decisions be held to the same high standards as States? What will USEPA do if a State cannot provide reasonable assurance re: funding?
- Will affected Federal Agencies commit to complete their implementation plan responsibilities by the scheduled deadlines? What if they do not?
- How will TMDLs on interstate and regional waters be addressed? What happens when TMDL development cannot be synchronized with related activities (revision/consistency of WQS, USEPA nutrient criteria development, etc.)?
- What happens if a State's best efforts cannot bring a stream into compliance?

STATE RECOMMENDATIONS TO IMPROVE USEPA'S PROPOSED TMDL REGULATIONS

The plain reading of the statute leads the Association to conclude that:

TMDLs should be limited to a *credible* technical analysis which identifies the *maximum allowable pollutant load* (or other conditions) necessary to attain WQS for the *pollutant(s)* of concern.

Section 303(d) should apply only to *impaired waters* where TMDLs can make a *meaningful contribution* to solving the problem.

Resources: Funding for Section 106 (State water quality management) and Section 319 (nonpoint source control) must triple—with increases targeted to impaired waters. Major increases are also needed in the U.S. Department of Agriculture programs to provide needed technical assistance and support conservation practices in impaired watersheds.

MONITORING, LISTING AND DELISTING

- *List Cycle:* USEPA should establish a 5-year listing cycle and provide at least 2 years lead time after promulgation before the next list must meet new requirements.
- *Methodology and Use of Data:* States (not USEPA) should to determine what data are credible and appropriate for use in the listing process. Decisions must be based on credible and appropriate data (not anecdotal evidence or evaluated data) that indicate exceedance of State WQS. The mere presence of a listed species under the Endangered Species Act or exceedance of a maximum contaminant level (MCL) threshold under the Safe Drinking Water Act is inadequate.
- *Delisting:* States should be able to delist waterbodies using the same procedures and methodologies that apply to listings at any time when sufficient new data is available that indicates WQS are attained or a TMDL is approved by USEPA.

Scheduling and Priorities: USEPA should not mandate priorities or schedules. States should have discretion to set them, in consultation with the public, based on all relevant considerations. They should be able to adjust schedules beyond the 15-year deadline for good cause.

Implementation/Reasonable Assurance: States should be able to reference and if necessary update water quality management plans at the same time or following submission of a TMDL—implementation plans should not be a required TMDL element. For NPS, States should be able to implement a variety of controls as expeditiously as possible, as described in their upgraded NPS management programs or other recognized mechanisms (existing water resource management programs such as. estuary plans, 6217 programs, forest management plans, Federal land management plans and other effective programs in the States).

Public Involvement: The proposal needs to recognize the enormous effort, time and resources required throughout the process to achieve meaningful consultation and involvement. The public petition process proposed undermines that effort. Petitioners should be required to demonstrate to USEPA that they have exhausted their administrative remedies at the State level.

USEPA Action: It is the States' responsibility, in the first instance according to the Clean Water Act, to develop and propose TMDLs. USEPA has no authority to do so (absent their disapproval of a State's TMDL). USEPA should describe its methodology and approval process and use the State listing methodology when taking action. If USEPA does not act in 30 days, a State submittal should be deemed approved.

CHANGES TO THE NPDES PERMIT AND WATER QUALITY STANDARDS PROGRAMS

- *USEPA Actions in Delegated States:* Problems with State permit programs should be addressed under NPDES delegation agreements and current regulations. USEPA has no authority under the Act to issue an expired permit or to permit NPSs. Based on USEPA's track record, it does not seem realistic to assume that their proposal would ever work.
- *Interim Period Before TMDL Development and Approval/Offsets:* States should develop site-specific and/or watershed approaches that are consistent with current anti-degradation regulations and continued progress toward water quality goals. USEPA should delete the proposed offset provision.
- *General Permits:* Alternative sets of requirements should be allowable, depending on whether the discharge would be to a waterbody that is meeting WQS or impaired, with the goal of no-net increase in impaired waters. The TMDL program should not make the general permit process as resource intensive as issuing individual permits.

Summary: The Association, in conjunction with the Environmental Council of the States and the Coastal States Organization, has commented to USEPA that existing statutory authorities do not provide for the level and kind of requirements outlined in the proposed regulation. This is particularly true for the nonpoint sources of pollution. We have serious concerns that the proposed regulation inherently limits the policymaking discretion of the States.

We are convinced that this proposal is a significant rulemaking under Unfunded Mandates Reform Act which requires USEPA to hold the cost to States of new mandates as low as possible and to seek funds from Congress in the next fiscal year to offset those costs. It is also subject to the President's Executive Order 13132, issued in August 1999 which states: "Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means."

Congress has a critically important role in clarifying its intent and in contributing to the creation of an appropriate framework under which we all may proceed. We asked that the committee support State efforts to identify and further explore with the USEPA, other means to attain our collective water quality objectives, as envisioned in the above referenced authorities.

Congress will also have a significant role in determining the amount and kind of funding resources to be made available to the States, to local governments and to the USEPA and USDA for implementation of the overall TMDL program. We would like to enter into discussions with you and with the appropriating committees to secure the funds necessary to create, develop and implement a successful TMDL program.

The States would also like to enter into discussions with the Congress and the USEPA relative to the reauthorization of the Clean Water Act. Because several of the issues addressed in the proposed rule can be considered as statutory in nature,

we ask that the Congress be a leader in future dialogs relating to Clean Water Act authorities and any necessary amendments to achieve our overall water quality goals.

Mr. Chairman, we thank you for the opportunity to present the perspectives and recommendations of the State Environmental, Water Quality and Coastal program officials. We appreciate the leadership role the committee is demonstrating on TMDLS and the work of your staffs to assure that Congressional intent and interests are being incorporated into USEPA's rulemaking. We look forward to having the opportunity to continue to work together toward the achievement of cleaner water for all Americans.

Attachments: Comments on the USEPA proposed regulations, (Joint letter by the ASIWPCA/ECOS/CSO); Fact Sheet: State TMDL Resource Needs, Summary USEPA Cost Estimates; Excerpts of State Comments

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STATEMENT OF THE ASSOCIATION OF STATE AND INTERSTATE WATER POLLUTION CONTROL ADMINISTRATORS

January 19, 2000.

Hon. CAROL M. BROWNER, *Administrator,*
U.S. Environmental Protection Agency
Washington, DC.

DEAR MS. BROWNER: We write on behalf of the undersigned organizations concerning USEPA's proposed revisions to the agency's water quality regulations, 40 CFR parts 122, 123, 124, 130, and 131, published in the Federal Register on August 23, 1999.

These State organizations have worked together to develop the attached comments and may also submit individual comments reflecting media specific perspectives. We appreciate the opportunity to comment on the proposal, which represents one of the most important and sweeping initiatives in the nation's effort to protect its waters.

There are several points of overarching importance that we wish USEPA to keep in mind as it evaluates the detailed comments that follow.

(1) Congress provided in the Clean Water Act that the States should have "the primary responsibility and rights . . . to prevent, eliminate and reduce pollution, (Section 101(b)).

(2) States, having this authority, should be full partners with USEPA in the management, protection and restoration of water resources.

(3) States support the goal of the Clean Water Act and are empathetic as to the position in which the USEPA has been placed by the series of TMDL court cases.

(4) The Federal executive branch, through the President's Budget Request and its negotiations with the Congress, needs to secure significant additional Federal funding for the Clean Water Programs.

The Federal Water Pollution Control Act clearly identifies the States' lead role in developing and implementing water quality management programs. The States accept the responsibility to address important water quality problems and to be accountable for progress.

States should be considered by USEPA as full partners in the management, protection and restoration of water resources. USEPA may not as a matter of law or policy consider that States are merely an interest group or stakeholder in the implementation of the Clean Water Act.

The undersigned organizations represent those public servants on the front line in the efforts to protect our nation's water quality. It is the State and local governments that will be called upon to implement, substantially pay for, and defend the USEPA's final regulations in court. As USEPA has stated publicly . . . for USEPA to be successful its mission, the States must be successful in attaining their environmental goals.

States have from the outset, supported and worked toward the accomplishment of the goals of the Clean Water Act to restore and maintain water quality. The States understand the implications of the numerous court cases on this subject. Translating and transforming those court actions and different opinions into an operating program and regulations applicable throughout the country is a formidable task.

The proposed regulations are premised on a major and significant shift away from the historic point source focus toward a watershed based restoration approach. Yet, the proposed regulations reflect a pervasive top-down, command-and-control approach to water quality protection, which is unworkable where nonpoint source management is the primary challenge. While States support this shift to the water-

shed approach, the available scientific, financial and management tools are inadequate to assure successful implementation.

It is critical that the Federal executive branch commits to and works aggressively for significant Federal funding increases to address water quality problems and support State environmental agencies. In our judgment, the infusion of sufficient funding to existing programs and supporting mechanisms could greatly enhance State efforts to accomplish the majority of the Federal objectives underlying the proposed revisions. Moreover, the imposition of unfunded mandates on States, or mandates that are paid for at the expense of other State programs, is unacceptable.

In 1995 the Congress recognized this principle in the adoption of the Unfunded Mandates Reform Act. We believe this principle requires the USEPA to hold the cost to States of new mandates under the proposed regulations as low as possible, and also firmly commit to seek funds from Congress in the next fiscal year to offset these costs. We can document through the implementation of established TMDL's that the costs associated with the proposed regulations will far exceed the expenditures anticipated by USEPA.

Finally, there are significant uncertainties as to congressional intent in the Federal Water Pollution Control Act and the legal basis for several of the proposed new requirements. For example, the State organizations are not convinced that there is a statutory basis for (1) requiring the inclusion in 303(d) lists and TMDL development for waters impaired solely by nonpoint sources; (2) requiring that implementation plans be submitted as part of TMDL's; or (3) providing the USEPA with the authority to intervene in a State's development of a TMDL.

These concerns are raised in light of the President's Executive Order on federalism (August 1999).

> National action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance. Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means. (Executive Order 13132; Section 3(b)).

The Executive Order contemplates exactly the kinds of uncertain authority presented in the proposed regulations, inasmuch as the proposed regulation clearly limits the policymaking discretion of the States. The Executive Order thus requires the USEPA to explore with States whether there are other means to attain the Federal objectives—clean water for all Americans, which we share.

These "other means" would, at a minimum, require that USEPA incorporate the maximum degree of flexibility into the revised regulations. Water quality problems generally, and nonpoint source problems in particular, vary greatly from State to State, within a State (or States), and from watershed to watershed. Such problems can also vary significantly within the same watershed from season to season and from year to year.

Simply put, (1) States must have the authority, commensurate with their responsibility, to develop and establish water quality programs and remedies to solve site specific pollution problems, (2) a prescriptive, top down, command and control, national approach, is inappropriate and counter productive and, (3) significant funding increases will be necessary to implement the existing TMDL requirements, let alone any additional responsibilities.

The regulations must be crafted to accommodate a myriad of approaches and iterative management in moving toward attainment of water quality standards. States need the flexibility to set priorities, establish realistic schedules, use functionally equivalent State programs in lieu of USEPA's permit-based approach for some sources, adopt innovative programs, and rely on incentive-based and voluntary efforts.

These facts make it imperative that the USEPA and the States work cooperatively to ensure that any revisions to the TMDL and related programs are workable. We stand ready to assist the Agency in achieving a successful outcome.

Attached is a compendium of specific comments addressing specific concerns with the proposed regulatory revisions. We look forward to working with the USEPA to ensure that America honors its commitment to clean water in the most reasonable and effective way possible.

Sincerely,

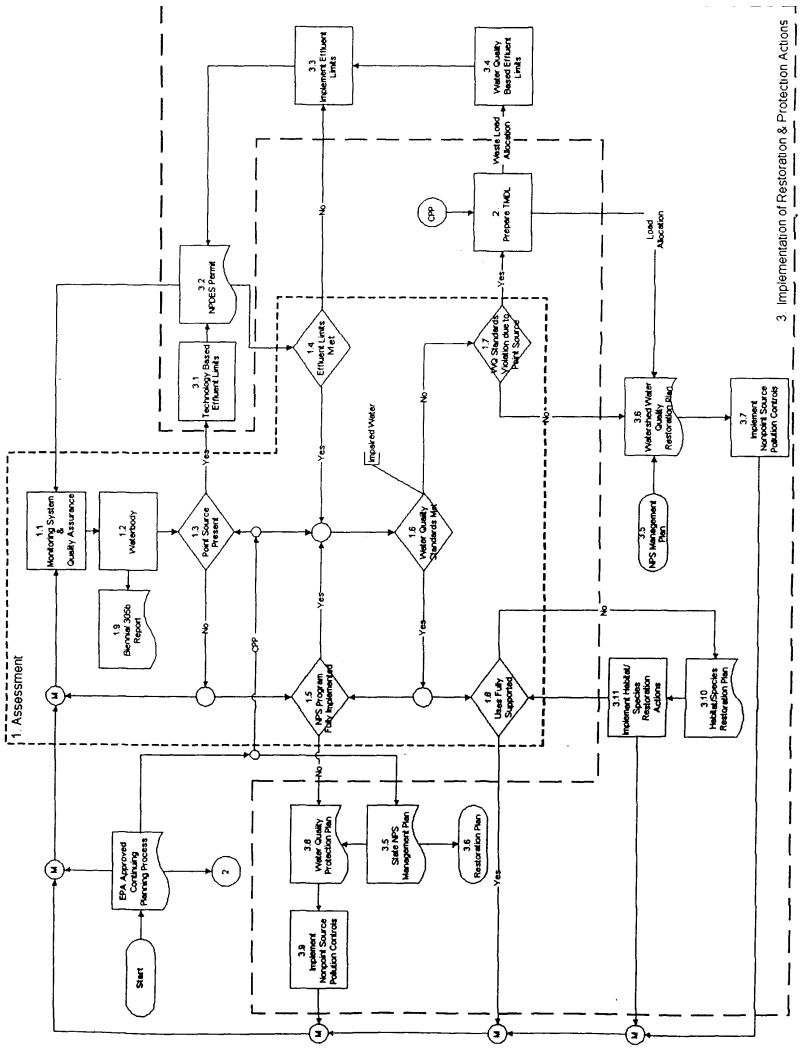
LEWIS SHAW,
ECOS President, Secretary of the South Carolina Department of Health and the Environment.

J. DALE GIVENS,
ECOS Water Committee Co-Chair, Secretary, Louisiana Department of Environmental Quality.
SARAH COOKSEY, CHAIR,
Coastal States Organization, State of Delaware.
J. DAVID HOLM,
ASIWPCA President, Director, Colorado Division of Water Quality.
JON. L. CRAIG,
ASIWPCA Vice President, Director, Oklahoma Division of Water Quality.

FOREWORD

The State managers of this nation's environmental, water quality and coastal programs have developed the attached comments on the proposed TMDL regulations. The comments have been reviewed and approved by the Environmental Council of the States (ECOS), the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) and the Coastal States Organization (CSO).

Attachment 1: States' Recommended Water Quality Assessment, Protection and Restoration Process



I. GENERAL RECOMMENDATIONS

The U.S. Congress, under the auspices of the 1972 Clean Water Act, gave States the lead role in the development and implementation of the water quality program. Because of this central role, States will be directly impacted by the proposed changes in the TMDL program.

States support the goal of the Clean Water Act to restore and maintain the nation's water quality. States also believe that the establishment of total maximum daily loads (TMDLs) is one of many important tools to be utilized in the pursuit of cleaner water.

States have been actively cleaning up the nation's waters for nearly half a century. The achievement of impressive results are clearly evident nationwide. The water is cleaner, in spite of the tremendous population growth, expanded urbanization, industrialization and recreational demands placed on limited water resources. States are very proud of the fact that the Clean Water Act is among the most successful environmental statutes in history.

With the initial passage of the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92–500), USEPA and their State partners set a course for addressing the highest priority pollution problems first. It is for this reason that the establishment of State water quality standards and permitting programs, the design and construction of municipal waste water treatment facilities and the development of Section 208 areawide planning and nonpoint source management programs, took precedence over the establishment of total maximum daily loads (TMDLs).

Tremendous strides have been made over the past several decades and significant water quality improvements have been achieved. It is now appropriate to focus priority attention on the requirements of Section 303(d) of the statute and to establish TMDL's as a meaningful and fundamental component of State water quality management programs.

To bring this about, USEPA and the States will need to place particular emphasis on three key fundamental challenges:

- The need for substantial additional funding to address nonpoint source related and other water quality problems,
- The presence of serious gaps in data, research and monitoring, and
- The lack of sufficient attention to multi-media and multijurisdictional water problems.

The States and their representative organizations (ASIWPCA, CSO and ECOS) have carefully reviewed the draft proposal and are supportive of its overall goal and intent. comments and recommendations, States emphasize the following principles.

1. *The States' lead role in the nation's clean water program must be maintained.*
2. *Requirements must be flexible and consistent with existing statutory authority, available resources and the jurisdiction of State water quality agencies.*
3. *Existing programs and initiatives should be used, wherever possible, to carry out our water quality objectives.* These include Sections 319, 305(b), 303(e), and 320 of the Clean Water Act, Section 6217 of the Coastal Zone Act Reauthorization Amendments, forestry management plans, habitat conservation plans and species recovery plans, as prepared pursuant to the Endangered Species Act, and other existing proven programs. (See attachment 1).
4. *Expectations need to be clearly and consistently focused on desired environmental outcomes.* TMDLs should promote stakeholder cooperation and not create disincentives for broad-based public participation.
5. *The iterative approach to solving problems, along with stakeholder involvement, has been and will continue to be crucial to successful water quality management, particularly for nonpoint sources.* Point and nonpoint sources should be dealt with equitably, in a manner that is sensitive to their different characteristics.

With these principles in mind, the States have the following concerns regarding the proposed regulations:

The proposal broadly expands the Federal role in water quality management, which would seriously undermine USEPA's relationship with State government. The pervasive tone is one of USEPA command and control in all aspects of the TMDL program, which is neither necessary nor desirable. Instead, the proposal should seek to collaboratively improve programs where Federal, State and Local entities are empowered to fulfill their respective roles.

- *The role of Section 303(d) is greatly enlarged without clear congressional mandates.* States do not believe, for example, that USEPA has clear statutory authority for proposed nonpoint source requirements. (See attachment 1)
- *The proposal is too prescriptive and certain details should be embodied in guidance.* States need maximum flexibility to achieve intended environmental outcomes. State functionally equivalent approaches should be supported and encouraged. Inconsistencies between the preamble and the regulations need to be eliminated so that it is clear what would be required.
- *The proposal adds burdensome new layers to the existing program for example requiring additional lists, and TMDL implementation plans.* USEPA and the States should work cooperatively together to address impaired waters and to improve the public's understanding of water quality (e.g. through program improvements to Section 305(b) and 319).
- *Where nonpoint sources are of significant concern, the proposed regulations would significantly restrict States' ability to take "adaptive management approaches" to TMDL development and implementation.* These approaches were discussed in detail at the State/EPA Wye Woods Forum on TMDLs (November 1999).
- *State water quality program officials cannot unilaterally develop TMDLs and implementation plans for problems that are beyond their jurisdiction* (e.g. air deposition). Impairments to interstate and international waters also present unique challenges and the regulations must provide a simpler framework under which States take the lead role.

• *Resources are not available to carry out the requirements as discussed below.* USEPA must be willing to request significant increases in funding for Federal and State activities for fiscal year 2000 and beyond.

The States provide the following detailed recommendations to resolve these concerns and achieve the intended environmental outcomes in a practicable and timely manner. USEPA should finalize the proposal with the full understanding that it will be expected to comply with the requirements to the same extent as their State counterparts.

II. RESOURCES

Since the passage of the Federal Water Pollution Control Act Amendments of 1972, tremendous emphasis has been placed on the control of point source discharges. Funds have been specifically targeted toward the design and construction of wastewater treatment facilities and the establishment of permitting and water quality standards programs. Relatively few Federal and/or State dollars have been targeted toward the planning and assessment components of the statute, nor have adequate funding levels been authorized and appropriated for the abatement of nonpoint sources of pollution.

Funding for water quality programs overall, and in this instance for total maximum daily loads (TMDLs) has been consistently inadequate. Even when assuming the adoption of the enhancements recommended by the States herein, the costs for water quality monitoring, assessment, TMDL development and implementation will experience a tremendous increase at every stage of the process.

No less than a tripling of the existing levels of funding will be needed to successfully implement the current TMDL program. The proposed regulations would greatly exacerbate the funding difficulties being experienced by the States. It is essential that the necessary additional funding for TMDL implementation not be siphoned off from existing programs or agencies currently providing program, technical and/or scientific assistance to State and Local governments. The Agency must also be mindful of the burdens being placed on point and nonpoint source dischargers and of the impacts relative to economic development, community revitalization, etc.

The costs of implementing the changes to Part 130 and 131 need to be examined in their totality. The discrepancies of funding needs must be examined by the Agency and funding projections modified to reflect an appropriate level of fiscal need. States and interested stakeholders have much to share with USEPA in this regard and we urge the Agency to carefully consider the financial input being provided during the course of the comment period. State TMDL development and implementation to date clearly demonstrates that the cost estimates developed by the USEPA are inadequate, incomplete and misleading. Far more will be required to develop a TMDL than the $25,000 USEPA envisions. For example:

• For Long Island Sound, over $20 million was expended from 1986–2000 for nitrogen based TMDLs alone.

• For Tallahala Creek in Jones County, Mississippi, the downstream TMDL for dissolved oxygen (beginning at the small city of Laurel) required approximately 5 FTEs over 2 years at a cost of $450,000.

• It has taken Texas 5 years, 8 FTEs and $2.2 million to develop one phosphorous TMDL for a waterbody impacted by both point and nonpoint sources in the Bosque watershed involving concentrated animal feeding operations—and the TMDL is not finished yet.

• In California, TMDLs of medium complexity now require an investment of $350,000 and complex TMDLs require approximately $ 1.1 million each. In fiscal year 2000, the water program estimates the total TMDL work to be $9.1 million.

• Florida has a new law on TMDLs. In fiscal year 2000, the State will allocate $1.2 million and 23.5 FTEs to TMDL development. They need annually an additional $700,000 for model development, contract work, lab analysis and equipment/maintenance and 12 more FTEs (approximately $ I million) for implementation plan development.

• The State of Washington needs about 84 FTEs annually to meet current requirements, but is able to provide less than 42. They face an over $69 million workload to complete 1130 TMDLs.

• In South Carolina, it has taken more than 3 FTEs and $ 1.9 million to develop a TMDL for the Waccamaw River/Intercoastal Waterway.

It must be emphasized that these funding levels were expended under the current program and do not take into consideration the costs associated with: (1) the proposed new requirements, (2) full development and implementation of TMDLs or (3) the new costs to be incurred by dischargers and other related stakeholders.

When coupled with the fact that the current program is grossly under-funded and that the new regulations will require more than 40,000 TMDLs to be developed, the regulatory changes proposed by USEPA are a significant rulemaking for the 50 States and Interstate Agencies.

Recommendation.—To address the impaired waters of the nation:

- At a minimum, funding for Section 106 and Section 319 assistance must triple—with the increase focused on the restoration of impaired waters. States should be able to pass through the level of effort requirement to local governments or other qualified entities that are willing to conduct needed activities, in accordance with State adopted procedures.
- States and USEPA need to work together to assure maximum flexibility on the use of those funds to support TMDL work. USEPA must not micro-manage State funding decisions.
- Major increases in USDA conservation programs for EQIP and technical assistance are also needed, again targeted to impaired waters.

USEPA and USDA must be willing to request the funding needed to carryout a credible program in fiscal year 2000 and future budget cycles. States are willing to work side-by-side with the Federal agencies to secure these additional resources from Congress.

III. MONITORING, LISTING AND DELISTING

States agree that Clean Water stakeholders need a readily accessible and understandable inventory of waters. However, the proposed expanded coverage under Section 303(d) does not accomplish that and exceeds statutory authority. The Agency needs to be cognizant of the fact that listing will engender intense scrutiny and opposition that can be counter-productive. An overly complex listing process will cause significant delays and divert scarce resources from State TMDL development and implementation on impaired waters. As co-regulators we should learn from the mistakes of the hazardous waste and superfund programs where the stigma attached to listing undermined overall objectives.

USEPA and the States need to build a better relationship between Sections 303(d), 305(b),319 and 303(e) of the Clean Water Act. (See attachment 1). The 305(b) Report should be the vehicle for developing information concerning the overall status of the quality of all State waters and for making that information available to the public. To this end, the States expect to work with USEPA to enhance the credibility and utility of the 305(b) process. The Section 303(d) list, then, should be developed as the portion of the 305(b) Report for which TMDLs should be completed for impaired waters.

Year 2000 List (§130.30(a)): States require substantial lead-time to make significant changes in the TMDL listing process. In many cases, States will be required to go through a rulemaking process to adopt their list. The proposed regulations do not recognize this State rulemaking process.

Recommendation.—USEPA should provide a minimum of 2 years lead-time after promulgation of the regulations before the next list is subject to the new requirements. However, if a State determines that it will submit its list, during this interim 2-year period, pursuant to existing regulations, USEPA should review and take action within the 30 days.

List Cycle (4130.30(a)): Listing should be compatible with the 5-year rotating watershed assessment approach being used by States. States agree that a short listing cycle tends to "over-emphasize the listing of waterbodies as opposed to establishing and implementing TMDLs" and is "inefficient because States generally do not find significant changes in water quality over . . . a short period."

Recommendation.—USEPA should establish a 5-year listing cycle under Section 303(d). States may want to tailor the process to allow for the submission of partial updates to accommodate listing and delisting decisions on a rotating cycle. USEPA should review and take regulatory action within the 30 days for such partial submittals. Section 305(b) Reports should be on a 5-year cycle with annual updates.

Methodology/Related Issues (5130.21, 130.23 and 130.24): The regulations should engender an interactive working relationship and it is important that decisionmaking methodologies are clearly documented and understood. States are operating under hectic schedules and need to know early in the process whether USEPA views their methodologies as acceptable. In interstate and international waters, lack of early and consistent feedback will hinder timely submittal by the States.

Recommendation.—States should have the discretion to consult with USEPA to ensure an acceptable methodology is used. USEPA should commit to providing feedback during the public comment period. Methodology should be discussed in a State's 303(e) continuing planning process (CPP), as directed by Section 303(e) of

the Act itself, rather than as a required element of the 303(d) list process. (See attachment 1). Accordingly, Sections 130.21(b), 130.23, and 130.24 should be revised to reflect this change and should be moved to the portion of the regulations that addresses the CPP. The States are willing to work with USEPA on developing public participation plans for CPP development.

Listing and Use of Data (§130.22): Any decision to list waters must be based on credible and appropriate data that indicate exceedance of State Water Quality Standards (WQS). The mere presence of a listed species under Endangered Species Act (ESA) or exceedance of a maximum contaminant level (MCL) under the Safe Drinking Water Act, is inadequate for the purposes of the Clean Water Act, because at issue for 303(d) purposes is the status of a segment's attainment of WQS criteria and uses.

As the preamble to the proposed regulations states, the FACA Committee "preferred basing listing decisions on monitored data," although evaluated data has sometimes been used in the listing process. The States agree with the FACA recommendation that "the best available data" should be used in the listing process. The States strongly disagree, however, that States should be required to list waters based on information that is not both credible and appropriate to the process. The experience of the States is that anecdotal evidence and evaluated data regarding water quality are neither credible nor appropriate for use in making a listing decision that may later impact permitting and planning decisions. If based principally on such anecdotal evidence, these listing decisions will not be judicially defensible final State administrative actions.

Recommendation.—The proposed Section 130.22 should be rewritten to allow States the flexibility to determine what data are credible and appropriate for use in the 303(d) listing process. This information should include, but not be limited to, data secured through Sections 106(e)(1) and 104(a)(5) of the Act and other data determined by the State to be credible and appropriate. The regulations should recognize that list development should be consistent with USEPA-approved State QA/QC plans and adopted State methodology.

Criteria for 303(d) Listing (4130.25): The relationship between the States' CPP, the 305(b) Report and the 303(d) lists must be recognized, clarified and consolidated. USEPA's proposed TMDL regulations should encourage integration of the States' monitoring, basin planning processes, and funding mechanisms. The proposed 303(d) listing process is too complex and further confuses the relationship between these existing processes. It is critical *not* to impede the TMDL process at the outset in listing disputes and unnecessary litigation.

The Clean Water Act envisions that the Section 305(b) Report will be inclusive of all waters of the State—(i.e., impaired as well as unimpaired). The addition of proposed Section 303(d) Parts 2, 3, and 4 listing categories exceeds the authority of the Clean Water Act. Furthermore, the requirement to include waterbodies solely impacted by nonpoint sources on the 303(d) list is a strained interpretation of Section 303(d)(1)(A). The Congress has examined these issues and determined that they should be addressed elsewhere in the statute. In fact, a Supreme Court case has made it clear that "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* (by its silence) to enact statutory language that it has earlier discarded."

Recommendation.—Consistent with the language of the Clean Water Act, States' 303(d) listings should identify those waters (extracted directly from the State's 305(b) Report or other appropriate data sources) for which effluent limitations required by Clean Water Act Sections 301(b)(1)(A) and 301(b)(1)(B) are not stringent enough to implement any WQSs applicable to such waters and for which TMDLs are the appropriate solution. Section 305(b)(1)(A) is the more logical basis for inventorying and reporting on the status of all waters and is particularly appropriate considering the practical and resource implications of USEPA's proposal.

States reserve the right to identify on the 303(d) list, waters where USEPA (or a regional authority) can provide a leadership role to address impairments caused by one or more pollutants, which are outside of the States' control. Examples of such TMDLs include: international waters, interstate waters, or those waters affected by atmospheric deposition.

The Section 303(d) list should not include:

- Threatened waterbodies,
- Waters affected by pollution, (not pollutants) or
- Waters where TMDLs or other effective control strategies have been developed.

Given the afore mentioned concerns about statutory authority, considerable controversy surrounds USEPA's requirement to include waters impaired solely by nonpoint source pollutants on the 303(d) list. If USEPA does require such waterbody listings, States should be able to list them separately from other listed waters.

States support USEPA's recognition at various points in the preamble that TMDLs for nonpoint sources may look quite different than for point sources.

For all other categories of impaired or threatened waterbodies, States should utilize their existing authorities (specifically the 305(b) Report) to itemize those waterbodies and associated water quality issues. They should be able to shift waters between listing categories whenever appropriate.

Delisting (§ 130.29): States are concerned about USEPA's lack of recognition of the need to establish a flexible mechanism for delisting waterbodies. States are also concerned about the potential impacts of the offset strictures outlined in the proposed NPDES regulations and the length of time it would take USEPA to approve State delisting of a waterbody. It is important to recognize that listing as well as delisting may be an ongoing (vs. every 5 year) process.

Recommendation.—Section 130.29(a) should be revised to allow waterbodies to be delisted upon approval of a TMDL by USEPA. In addition, Sections 130.29(c) and (d) should be deleted. This is in keeping with the States' recommendation that the 303(d) list be reformatted to move USEPA's proposed Part 3 waterbodies and threatened waterbodies to the 305(b) report.

States should be able to delist waterbodies using the same procedures and methodologies that apply to listings. States support the second option under Section 130.29(b), to allow the delisting of a waterbody if new data or information indicates the waterbody has attained WQSs. The proposed regulatory language ". . . when you [State] develop your [State] next list . . ." should be deleted:

- Delisting should be allowed at anytime that sufficient new data is available.
- USEPA must establish administrative procedures necessary to take action on any and all State requests for delisting within 30 days of State submittal (see also Section VIII).

IV. SCHEDULING AND PRIORITIES (§ 130.28 AND 130.31)

States are committed to restoring impaired waters within aggressive timeframes and recognize the value of deadlines and priorities. However, there are no statutory priorities or deadlines for TMDL development, and there are many uncertainties States will encounter along the way.

Many factors need to be considered in setting State priorities and schedules for TMDL development. The proposal should not prescribe criteria or confuse the priority of listed waters with the schedule for TMDL development.

In some States, the proposed regulations would result in virtually all listed waters becoming a high priority (especially if ESA and MCLs are significant factors). It is neither efficient nor appropriate to delay all other TMDL development until those for high priority waters are completed. TMDLs for high priority water bodies can be complex, time-consuming, and/or developed under court-ordered schedules.

Recommendation.—The proposed Section 130.28 (a) and (b) should not contain mandatory assignments of priorities. Rather, it should identify factors to be considered by States in developing their priorities. This is consistent with Section 303(d)(1) of the law, which provides that "States shall establish a priority ranking for such waters taking into account the severity of the pollution and the uses to be made of such waters." States should have discretion to set priorities and schedules, in consultation with the public, based on all relevant considerations (e.g., the priority of the water, complexity, available resources, time required, readiness to proceed, level of public support). The State water quality authority and State drinking water authority should be encouraged to communicate on priorities relating to TMDL development and source water protection, etc.

If USEPA includes a requirement for a schedule to be part of the 303(d) list proposed, Section 130.31 should be modified to authorize States to adjust schedules and USEPA to accept extensions beyond the 15-year timeframe for good cause demonstrated by a State.

V. ESTABLISHING TMDLS

There are a number of areas that are of major concern to the States relative to the establishment of TMDLs. Specifically:

(1) *The process of establishing TMDLs that rely, at least in part, on non-point source control must embrace and promote the watershed approach. States will need the flexibility to utilize phased control measures to restore water quality.* While the goals outlined in the Agency's proposal are laudable, the regulations as written are far too prescriptive and rely heavily on the historic approach to point source control. USEPA should focus on desired outcomes and discuss further details in guidance.

(2) *The Clean Water Act does not require the inclusion of implementation plans for TMDLs under Section 303(d).* States agree on the importance of State implemen-

tation plans. In fact, many States are required under State statutes to create such plans as a component of their water quality standards process. However, USEPA does not have such authority under Section 303(d) and should, therefore, rely on other established program authorities (e.g. Sections 319, 303(e) etc.).

(3) *The elements of TMDLs proposed in Section 130.33(4) and (6) and Section 130.34, requiring the identification of specific pollutant sources and a quantification of NPS pollutant loads, will be technically and legally challenged in the future.* It is essential that control measures for NPS pollutant impairments take the form of phased, incremental application of BMPs on a watershed basis. They will not result in clear and measurable improvements early in the process.

(4) *Available funding and scientific tools are inadequate* for USEPA or the States to effectively and successfully adhere to the expectations outlined in the proposed regulation, particularly as related to nonpoint sources of pollution.

TMDL Definition (4130.2(h) and 130.33): As outlined in Sections 130.2(h) and 130.33, the definition and ten elements of a TMDL are overly prescriptive and will result in significant complications for both the States and the USEPA in completing and approving TMDLs. More importantly, the CWA does not authorize USEPA to create a requirement that States submit and obtain USEPA approval of an implementation plan as an element of the TMDL. Not only is there no mention of implementation plans, there is no such authority in Section 303(d) for USEPA to determine how a State is to implement its TMDLs.

Most of the proposed requirements in Sections 130.2(h) and 130.33 have emanated from the historic point source approach for addressing water quality problems. Neither the States nor the USEPA will be successful in adhering to these prescriptive requirements given the complexities and uncertainties associated with nonpoint source pollutants and the lack of wet weather standards. States believe that the required elements proposed by the regulations may, in some cases, supplant elements a State deems necessary or more appropriate for a particular TMDL, based on the circumstances of the waterbody.

Recommendation.—The definition of a TMDL should be limited to "a credible technical analysis, which identifies the maximum allowable pollutant load (stressor) or other conditions necessary to attain and maintain water quality standards, for the pollutant or pollutants of concern." States should be allowed to express a TMDL as a mass per time, toxicity, or other appropriate water quality condition. To establish effective TMDLs, States recommend USEPA make the following changes to elements outlined in Sections 130.33(b)(1) through 130.33(b)(10) and offer these as guidance rather than regulation:

- The proposed Section 130.33 (b)(6) should be shortened to read as follows: "Load allocations, ranging from reasonably accurate estimates to gross allotments, to nonpoint sources of a pollutant." The additional details proposed require a level of specificity that will be difficult, if not impossible to provide with each TMDL.
- In Section 130.33(b)(9), the term "future allocation" should be used rather than "allowance for future growth". USEPA should recognize that future growth can occur despite a TMDL cap, thus USEPA's proposed term is imprecise and misleading. Second, the concept of "allowance for growth" in the context of State regulatory actions imparts the wrong connotation for TMDLs—as if the State is controlling growth, whereas it is often a Local government function.
- Under Section 130.33(b)(10), States should submit implementation plans, as provided under existing Sections 303(e), 319 and 402, as opposed to requiring an additional USEPA approvable plan under Section 303(d).
- The term "other appropriate measures" which can be found in the existing regulations under Section 1 30.2(i) should be retained to allow the States the flexibility needed to address nonpoint source pollutants. Section 130.34(1–4) should clarify that the loadfor NPSs can be broadly and generally expressed (e.g. estimated for agriculture, rather than broken down quantitatively for crop production *vs.* Animals or even being more specific as to quantifying loads for individual farmers).

Implementation Plans (§ 130.2 and 130.33(b)(10)): The States support implementation as a component of the TMDL program, and are committed to restoring and maintaining water quality in impaired waterbodies. The States have consistently emphasized that the submission of a detailed implementation plan is not authorized under section 303(d) of the statute and should, therefore, not be a required as an element of the TMDL, nor should the approval of a TMDL be contingent on the approval of an implementation plan.

The inclusion of a detailed implementation plan as a required element of the TMDL will likely delay TMDL approval because of the complex, subjective and often protracted dialog necessary for development and acceptance by the stakeholders of such plans. Dialogue with stakeholders on detailed implementation planning will be far more productive after TMDL approval by USEPA.

States agree that there is merit in moving expeditiously forward to implement Section 303(d). However, the expectations of the USEPA and of the public need to be realistic, recognizing that a step-wise, phased approach will often yield the most meaningful water quality improvements.

The prescriptive nature of Section 130.33 (b)(10) will significantly impede the flexibility States and USEPA need to establish and periodically adjust restoration plans, especially when dealing with NPS impaired waterbodies.

Where TMDLs are being developed for waterbodies impaired primarily by nonpoint sources, the States should be allowed to rely on their upgraded 319 programs, including CZARA elements, as the implementation plan for the nonpoint source component of such TMDLs. States have recently expended considerable effort and resources, including USEPA Section 319 funds, to develop these plans.

States understand the need for USEPA and the public to know specifically how water quality standards will be achieved, but we believe this can occur only after TMDL development, and as the iterative process for implementation begins. To expect this level of detail at the time of TMDL submission would unnecessarily delay submission and approval. Even with point sources, implementation requirements, as detailed in the NPDES permit, are approved separately and generally after TMDL approval. As was discussed at the Wye Woods Forum, it may be workable to include a generic outline as a component of the TMDL submission. This statement could be followed by an implementation plan, to be developed subsequent to TMDL approval by USEPA and relying existing authorities (e.g. 319, local watershed plans, etc).

In the preamble, USEPA requests comments on whether implementation plans should be required as:

1. An element of a TMDL,
2. A submission accompanying the TMDL, or
3. An update to a water quality management plan submitted at the same time as the TMDL.

Recommendation.—Because Section 303(d) does not require the submission of implementation plans, States recommend that the USEPA modify option 3 to clarify that an update or reference to a water quality management plan may be submitted, at the same time or following submission of the TMDL. This would maximize the use of existing authorities under Sections 303(e) and 319, as well as other existing water resource management programs (e.g. estuary plans, 6217 programs, forest management plans, Federal land management plans and other effective programs in the States). The accompanying implementation plan could be approved under a separate USEPA action or receive implicit approval based on prior USEPA acceptance of these other management plans.

States also strongly encourage USEPA to allow the flexibility to craft implementation plans in a manner that recognizes the differences associated with point and nonpoint source pollution and considers the various environmental, economic, social, and legal factors associated with a particular water body and type of impairment.

Reasonable Assurance (§130.33(b)(10)(iii)): Reasonable assurance for nonpoint sources, as defined in Sections 130.2(p) and 130.33 (b)(10)(iii), will be extremely difficult for States to provide. This is because of (1) the limited State authority to regulate nonpoint sources, (2) the lack of adequate Federal and State funding, and (3) the limitations of existing nonpoint source data and assessment technologies.

Recommendation.—The definition of reasonable assurance for nonpoint sources should be revised to indicate that it can be determined by the State's commitment to implement a variety of NPS controls as expeditiously as possible and as described in an upgraded NPS management program or other recognized mechanisms. Implementation of BMPs takes time and the water quality results are not always immediately apparent. In most States, they are voluntary, but NPS management plans describe in detail how States intend to achieve implementation.

Transitional TMDLs (§130.38): States strongly support the concept of transitional TMDLs. The proposed 12-month timeframe is, however, far too short.

Recommendation.—USEPA should approve TMDLs submitted within 18 months of final rule changes if the TMDL meets either the existing or the revised TMDL water quality requirements.

VI. PUBLIC INVOLVEMENT

Public participation is fundamental to successful TMDL development and implementation. TMDLs with broad-based support should be given great deference by the Agency. However, States are concerned about the proposal's failure to recognize the enormous effort, time and resources that will be required throughout the process to achieve meaningful consultation and involvement. The unreasonably high expecta-

tions, given the heavy TMDL workload and short deadlines, would not enable States to achieve that objective.

Public Petition Process (§130.65): The Agency should not encourage, or establish a petition system that implicitly encourages citizens to bypass State processes and go directly to USEPA. The USEPA should reinforce, not undermine, the States' primary role in TMDL development and encourage citizens to participate fully in State processes.

Recommendation.—Petitioners should be required under Section 130.65 to demonstrate that they have exhausted their administrative remedies in seeking the requested action in the State TMDL development process. Available information as to why a State has declined to take the requested action should be required as part of the petition submittal. USEPA needs to create a meaningful State consultation process.

VII. CIRCUMSTANCES UNDER WHICH USEPA ESTABLISHES TMDLS (§130.36)

Section 103(a) of the Clean Water Act states, "The Administrator shall encourage cooperative activities by the States for the prevention, reduction and elimination of pollution. . . ." States have the lead role and are the first line of authority. If after a fair and reasonable opportunity to make progress, they are unable to be successful and there is no legitimate reason for delay, the proposal should clearly articulate USEPA's intent to take a leadership role. USEPA should rely on the States for assistance in a collaborative process that makes maximum use of existing forums.

Recommendation.—Delete the language in Section 130.36, which gives USEPA the right "to establish TMDLs for waterbodies and pollutants identified on the 303(d) list . . . if USEPA determines that you [State] have not or are not likely to establish TMDLs consistent with your [State] schedule . . ." The Clean Water Act does not provide for such action by USEPA. It is the States' position that once a 303(d) list is completed and approved by USEPA, the Clean Water Act clearly provides that it is the States' responsibility, in the first instance, to develop and propose TMDLs.

VIII. USEPA REVIEW OF STATE LISTS AND TMDLS (§130.36)

USEPA has only 30 days to take approval action. States are concerned about USEPA's lack of resources, historic pattern of significantly delayed approval actions, and propensity to micro-manage. Any significant slippage in meeting deadlines would have serious detrimental effects on both State and USEPA credibility. Yet, the proposal does not recognize the need to address the problem.

Recommendation.—USEPA should describe its methodology and the approval process. The regulations should outline clear procedures that the Agency will follow, consistent with the State comments and recommendations relative to the definition and minimum elements of a TMDL in Section 130.2, 130.33, 130.35, etc. USEPA needs to address more clearly how the Agency intends to accommodate (within its 30-day deadline) the 135-day consultation period with the Fish and Wildlife Service required under the Endangered Species Act.

- USEPA should commit to using the State's list development methodology, when taking action on the list.
- If USEPA does not take action in 30 days, a State submittal should be deemed approved.
- USEPA needs to be much more forthright on the resources that will be required to assure the process goes as smoothly as possible and that issues are resolved as early as possible in order to avoid the need for disapproval action.

IX. CHANGES TO THE NPDES AND WATER QUALITY STANDARDS PROGRAMS

States believe that the existing regulatory framework is adequate. The issues of concern are so complicated and circumstances so diverse that they are more readily addressed through guidance and existing NPDES delegation agreements. Rather than taking a prescriptive approach, USEPA should work with the States to create an incentives-based framework that could achieve far more, in terms of better data and environmental results, than the proposal.

There are numerous areas where USEPA has exceeded its jurisdiction and gone well beyond statutory authorities—chief among them is the NPDES program. Where this is the case, State permit programs could face gridlock.

USEPA Actions in Delegated States (§122.23, 122.24, 122.26, and 122.27): Proposed Sections 122.23, 24, 26, and 27 are not necessary. Inclusion of these provisions would allow USEPA to intervene in a State whenever it deems appropriate (to develop a TMDL, issue an expired permit, or permit NPSs).There appears to be no statutory authority for this intervention. Furthermore, based on the track record

of USEPA relative to addressing water program issues in non-delegated States, it does not seem realistic to assume that this approach would ever work.

Recommendation.—If a problem exists regarding how a State is dealing with permit backlogs, wasteload allocations, offsets or NPS management, it should be addressed under NPDES permit delegation agreements and current regulations. If USEPA believes that some additional language is necessary, the existing regulations should be revised to clearly lay out a process that USEPA headquarters and regions will follow when these issues arise in States. This process should allow the States a clear, but timely, opportunity to discuss with USEPA the nature of the problem and to resolve a problem before USEPA would actually intervene.

Interim Period Before TMDL Development and Approval (§122.4): The proposal restricts the discharge from certain new or significantly expanded sources in impaired waters, unless a reasonable further progress objective is met. This basically means that affected discharges must obtain a 1.5: l offset of the new or expanded discharge loading. The offset becomes a permit condition and a point source is liable for third party failure to achieve an offset. This requirement would apply even though a project may have an important watershed benefit, which may not achieve the offset requirement (e.g. the construction of a municipal sewage treatment facility to eliminate existing septic systems, or combined sewer overflows, or where habitat restoration is undertaken for an aquatic life use impaired waterbody).

USEPA has no statutory authority in the Act to impose this restriction. The antidegradation policy relates to the maintenance, versus improvement, of water quality. The proposal strains an already overburdened NPDES program, significantly taxes point sources and requires new administratively complex accounting systems. State efforts to address this requirement would divert limited resources (with no commensurate environmental gain) from the core activities of developing and implementing TMDLs—which will do the most to reach the attainment of water quality goals. The proposal would likely encourage location of facilities in unimpaired waters, which may be less environmentally desirable and in conflict with other Agency initiatives such as brownfields and smart growth.

States agree that continued progress is needed toward achievement of WQS before TMDLs are approved and implemented. Trading between point and nonpoint sources of pollution may be a useful tool for some States. However, it is does not make sense to impose on all States the requirement of developing and implementing an offset system directly linked to each State's NPDES permit system.

Recommendation.—In lieu of the approach in Section 1 22.4(i), States should be required to develop site-specific and/or watershed-wide approaches that are consistent with current anti-degradation regulations and continued progress toward the achievement of water quality goals.

- The requirement for existing dischargers (provided the proposed expansion is greater than the "significant expansion" definition in Section 122.2) who seek to expand their operation should be no-net increase in mass-based loading for the pollutant(s) of concern in the receiving water.
- New dischargers (provided the discharge meets the "new discharger" definition in Section 122.2) must achieve instream criteria for the pollutant of concern measured at the end-of-the-pipe. In those instances where the pollutant is of concern from the standpoint of increased loading (e.g. a contributor to nutrient impairment, or a bio-accumulative contaminant of concern), there should be no-net increase in mass-based loading.

General Permits Before and After TMDLs Are Developed and Approved (§122.28): USEPA has proposed a few different options to address the issue of how offsets would be obtained from sources seeking coverage under a general permit. They are based upon different approaches for dealing with the notice of intent (NOI) requirement for dischargers seeking coverage under a general permit. There are three NOI related issues that USEPA addresses somewhat differently in the 3 general permit options: one relating to how a discharger would know if they were in an impaired receiving water area, the second relating to whether the discharge contains the pollutant of concern, and the third involving how discharge loading information would get from the source to the permitting authority. The ultimate question raised is: how could the permitting authority determine if an offset would be required to meet the reasonable further progress goal?

General permits are developed and used by States to achieve some reasonable administrative efficiency in the control of point source discharges. The TMDL program should not negate this goal by basically making the general permit process as resource intensive as the process of issuing individual permits for all discharges to impaired waters.

Recommendation.—The third option being considered by USEPA for general permittee offsets should be selected regarding potential amendments to the general per-

mit regulations, 40 CFR 122.28(b)(2) and modified to be consistent with the previous recommendation for individual point sources during the interim period. Under this option, the general permit would contain alternative sets of requirements depending on whether the discharge would be to a waterbody that is meeting WQS or is impaired. For discharges into impaired waterbodies, some form of requirements should be outlined in order for the general permitted source to meet the reasonable further progress objective. The overall goal should be to ensure *no-net* increase in impaired watersheds from all sources that could be eligible for coverage under a general permit.

Questions relating to this document should be directed to: Robbi Savage (ASIWPCA) r.savage@asiwpca.org 202–898–0905 or Linda Eichmiller (ASIWPCA) l.eichmiller@asiwpca.org; Robbie Roberts (ECOS) *rroberts@sso.org* 202–624–3660 or Tom Curtis (ECOS) tcurtis@sso.org; Tony MacDonald (CSO) tmacd@sso.org 202–508–3860 or Kerry Kehoe (CSO) cso.rkk@sso.org>.

ECOS Supplemental Comments and Recommendations

STATEMENT OF ASSOCIATION OF STATE AND INTERSTATE WATER POLLUTION CONTROL ADMINISTRATORS (ASIWPCA)

TMDLS AND RESOURCES NEEDS

There are currently 21,000 listed waters which, according to USEPA, will require 40,000 TMDLs. A waterbody can require several TMDLs (one for each pollutant of concern).

Assuming an even distribution and no additional TMDLs, one TMDL would need to be approved each workday by each of the 10 USEPA Regional offices in order to complete all of them within 15 years, as envisioned in the proposed USEPA regulation.

Assuming optimistically that "80 percent savings" could be achieved (by taking advantage of lessons learned, economies of scale, and delisting inappropriate waters), States would have to produce (and USEPA would have to approve) one TMDL per week in each of the 10 USEPA regional offices for the next 15 years. This does not consider the need to plan for implementation or conduct additional monitoring.

Funding for water quality programs overall, and in this instance for total maximum daily loads (TMDLs), has been consistently inadequate. To develop good defensible TMDLs, the costs for water quality monitoring, assessment, TMDL development and implementation will experience a tremendous increase at every stage of the process. The USEPA's propose regulations would greatly exacerbate the funding difficulties already being experienced by the States.

Because of the complexity of the TMDL process, the sheer number of TMDLs required and the intense public interest—to solve the nation's water quality problems States need:

- more and better monitoring information,
- increases in personnel,
- more technical capacity, and
- significant stakeholder support for implementation.

State experience is illustrative:

- For Long Island Sound, over $20 Million was expended between 1986–2000 for nitrogen based TMDLs.
- For one creek in Mississippi, the TMDL for dissolved oxygen required approximately 5 FTEs over 2 years at a cost of $450,000.
- It has taken Texas 5 years, 8 FTEs and $2.2 Million to develop one phosphorous TMDL for one waterbody—and the TMDL is not finished yet.
- In California, TMDLs of medium complexity require $350,000 each and complex TMDLs, $1.1 Million. In fiscal year 2000, the State estimates the total TMDL work to be $9.1 Million.
- Florida will allocate $1.2 Million and 23.5 FTEs to TMDL development and annually needs 12 more FTEs (approximately $1 Million) and an additional $700,000.
- Washington needs about 84 FTEs annually to meet current requirements, but is able to Provide less than 42.

Mid-Range Estimate of Costs to Develop 40,000 TMDLS Over 15 years

	Simpler	Moderate Difficulty	Complex	Total
Percent of TMDLs (Number).	20–30 percent (8,000–12,000).	60–70 percent (24,000–28,000).	10 percent (4,000) ..	100 percent (40,000)

Mid-Range Estimate of Costs to Develop 40,000 TMDLS Over 15 years—Continued

	Simpler	Moderate Difficulty	Complex	Total
Cost Per TMDL	$50,000-$200,000 ...	$300,000-$400,000 $600,000-$1,000,000.		
Total	$400,000,000-$2,400,000,000.	$7,200,000,000-$11,200,000,000.	$2,400,000,000-$4,000,000,000.	$10,000,000-$17,600,000,000
Annual Average (over 15 years).	.....	.....	.....	$670,000,000-$1,170,000,000
Average per State Annually.	.....	.....	.....	$13,400,000–423,400,000

These estimates *do not* take into consideration the costs associated with:

(1) any new Federal TMDL requirements,

(2) additional data collection or monitoring to identify impairments and evaluate progress,

(3) full implementation of TMDLs at the State level,

(4) other stakeholders who will need to be involved or

(5) likely event that more than 40,000 TMDLs will be required.

Recommendation.—To make a meaningful contribution to TMDL development: (A) Federal funding under the Clean Water Act needs to at least triple, (B) funding for USDA programs would need to increase significantly and (C) a higher level of commitment would be needed at the State and Local level. For example:

	Current Federal Funding For All State Water Quality Management [In millions of dollars]	Minimum Amount Need Annually Considering TMDL Needs [In millions of dollars]
Section 106	$115	$345
Section 319	200	600

SUMMARY OF USEPA COSTING ESTIMATES FOR PROPOSED TMDL RULES

According to USEPA documents assessing the incremental cost of the proposed revisions to the water quality management, NPDES Permit and Water Quality Standards programs regarding TMDLs, the following costs would be incurred to meet requirements. The funding gap in the States' ability to carry out the existing TMDL program at a basic level of service is not addressed.

	Total Annualized Incremental Costs	Allocation Per State
Listing: State costs*	$230,000.00	$4,600.00
TMDL Development and Content: State Cost **.	10.1–23.8 Million	202,000–476,000
USEPA burden for the above***	$18,000 (450 hours)	360.00 (9 hours)
Offset Requirements	11.54–42.28 Million	230,800–845.600
Designation of NPS as Point Sources in NPDES Delegated States****.	5.67–22.96 Million	138,300–560,000
Total	27.56–89.28 Million	576,060–1,886,560

* USEPA assumes these requirements have no incremental cost: identifying threatened waters (determining any adverse water quality trend), listing impaired/threatened waters, listing for air deposition, listing until standards are attained, developing the listing methodology, carrying out the administrative and rulemaking process, and undertaking the monitoring and analysis to make and defend these determinations.

** Of the 9 elements USEPA defines as the TMDL, they think that only the implementation plan will have an incremental cost.

*** Excluding USEPA development of implementation plan, which USEPA states is covered below.

**** For the 41 States delegated at the time of the analysis.

EXCERPTS OF STATE COMMENTS RE: USEPA PROPOSED REGULATIONS ON TOTAL MAXIMUM DAILY LOADS [TDMLS]

OVERVIEW

The role of Section 303(d) has been greatly expanded in the proposed Regulation. . . . DEP believes that EPA's proposal is over-inclusive and questions not only the need for expansion but whether or not EPA has statutory authority for proposed non-point source requirements. . . . Although DEP supports proactive approaches to resource protection, it is our opinion that TMDLs are a clumsy tool for the protection of habitat and important resources from undetermined future impacts. [MA]

[E]ach time EPA proceeds down this path, it ends up in litigation and we all end up at the original starting point. [SD]

[T]he rule impedes a State's watershed approach rather than complements it . . . the Clean Water Action Plan envisions a new, collaborative effort to restore and sustain the health of watersheds in the nation. . . . [DE]

[W]e are greatly concerned that EPA's TMDL regulations do not, as presently written or as proposed, provide sufficient flexibility (or TMDL equivalency) for equating the massive effort of developing the Long Island Sound (LIS) comprehensive control management plan with the LIS TMDL requirement. Some major lessons have been learned. . . . EPA needs to recognize there are very legitimate means to obtain the same water quality result that do not involve a formal TMDL process. [CT]

Changes to the proposal are necessary so that the regulatory tools of the Clean Water Act (CWA) can be used effectively and as expeditiously as possible to continue the progress that has already been accomplished. It sometimes happens that Federal regulations, in attempting to clarify and strengthen, impede progress by force fitting a particular solution to all problems. [NY]

There are many pollutants that are not conducive to modeling and loading analyses. . . . In these cases, management strategies or an adaptive management approach would be a much more effective use of Federal, State, and local resources. [NC]

The degree and detail of the prescribed remedies suggested . . . will negate effective TMDL establishment and implementation. . . . EPA has the right and duty to expect TMDLs to be developed. . . . However, its right to describe the specific details within the TMDL must be limited. Effective implementation is a State and local role in directing resources on a priority basis to certain geographic areas and activities. [KA]

[The proposed revisions] are needlessly bureaucratic, trapped in an archaic regulatory framework, loaded with unrealistic demands, and completely unfunded. . . . [They] add many unrealistic expectations to the TMDL program, the rationale for which is not clear . . . the proposed revisions create a process-laden TMDL program that is not workable, goes well beyond the requirements of Section 303(d), and will impede ours and other States' efforts to improve water quality. [FL]

The EPA and the States should work together to refine and enhance tools, methods and commitments associated with existing regulations and guidance which support the Clean Water Act [e.g., 301, 303, 305(b), 106, 319], rather than significantly expanding regulations. [TX]

Point sources are concerned that they will ultimately be responsible for any needed reductions because they are regulated, and NPS fear they will become regulated. The rules must allow flexibility and innovation to bring them together as partners to solve water quality problems. [MI]

No single agency will be capable of achieving water quality protection by relying on only its own authorities. . . . What is more, to achieve sustainable management will likely require the creativity of the private sector in concert with government programs It is the outcome that needs to be expressed in the Rule, not the details of the programmatic approaches. [CA] EPA has consistently failed to meet . . . mandatory timeframes. Consequently, neither States nor dischargers have certainty even though they have met all of the requirements of the Act. [PA]

[T]he short timeframes contained in the CWA show the clear Congressional intent for a streamlined approval process. . . . If EPA adopts an even more prescriptive approach, it is likely to face many more situations of itself having to prepare the TMDLs and demonstrate compliance with its own rules [WA]

POLLUTION VS. POLLUTANT

The definitions of pollutants and pollution are ambiguous and do not specifically address many typical nonpoint source pollutants, such as nutrients and sediment. [PA]

[T]he distinction between pollution and pollutants is confusing and raises at least as many issues as it resolves (including conflicts with section 101 of the Act). [CA]

One of the major issues . . . is the implication that "low flows or no flow conditions" that are clearly acceptable under State water right appropriation could or would result in a re-appropriation of existing water rights. [UT]

A definition of natural sources/causes should be provided. [NE]

[T]he creation of this list which does not provide for followup action creates a potential for future litigation. [KA]

[T]he Preamble . . . describes "low flow," and "degraded aquatic or riparian habitat" as "causes of impairment from pollution." [this] has a significant impact on the scope of the 303(d) list and, as such, raises two key concerns: (1) opening an endless round of legal debates on the definition of "pollutants" and "pollution" and (2) potential conflicts with Section 101 (g). [OR]

EPA should . . . exempt the listing of water bodies impaired by natural sources of a pollutant, or pollutants from a catastrophic event especially when no conceivable water quality program could prevent or substantially remediate the effects of nature [TX]

LISTING

DEP believes that the proposed 303(d) listing process is too complex and could lead to significant disputes and potentially unnecessary litigation thus delaying the implementation measures intended by this rule. [MA]

[Mississippi] fears that EPA will subsequently change the interpretation of its regulations to require TMDLs or other permitting restrictions on the waters contained in the other, non-statutory sections of the proposed 303(d) list. [MS]

[T]he listing of segments not requiring TMDLs would cause unnecessary confusion for the public. [NY]

EPA is still working . . . to determine the relationship between air emissions and mercury accumulation in fish. States should not be expected to list and develop TMDLs for these impaired waters until EPA provides an approach for doing so. Most likely these TMDLs will be multi-State or multi-regional and will require great coordination and cooperation. [SC]

[T]he Chowan River estuary was declared as nutrient sensitive waters in 1979, . . . and a plan . . . was enacted in 1982 . . . [and] . . . resulted in significant . . . reductions [and] fisheries have improved . . . there are questionable benefits about doing a formal TMDL in this system. . . . Waters where the proper technical conditions do not exist and may be better addressed by a management strategy can be placed on another part of the 303(d) list. [NC]

The draft rule requires States to include the pollutant that is causing the impairment, and if the pollutant is unknown, the class of pollutant must be included. . . . [This] penalizes States that have strong biological monitoring programs. . . . Until we can verify a pollutant or class of pollutants with data, we cannot include a problem parameter on the 303(d) list. It is important that the proper cause of impairment be noted or States will expend many resources developing TMDLs for pollutants that will not restore water quality. [NC]

By including a category on the list of impaired waters called "expected to meet WQS . . . for ESA recovery plans and other long-term enforceable State, Federal and local water recovery efforts, States would be able to provide certainty without first completing a TMDL. [WA]

To consider potential sources of contamination alone as a basis for listing a waterbody as impaired or threatened is overkill. . . . The reliability of these data bases is unknown. Furthermore, Source Water Assessments are potential sources of contamination, not sources of contamination." [LA]

[The proposal] would only allow delisting of waters where new data indicate the water now meets water quality standards . . . [it does not include existing provision that] allow[s] States to delist based on administrative errors or flaws in the original analysis. This text is extremely important because many waters have been included in previous lists without sufficient data. . . . EPA needs to acknowledge that States will undoubtedly establish new data sufficiency criteria for both listing and delisting. [FL]

[For biologically impaired waters] . . . developing a TMDL may not be the most efficient or effective tool. The preamble . . . indicates that States should be able to determine the pollutant within 1 year. Without considerable resources put into States monitoring and laboratory programs, this cannot be achieved. [NC]

We expect that the increasingly litigious nature of TMDLs will drive the listing process toward more constrained and defined limits. . . . The manner in which we deal with impaired waters using TMDLs needs to be as efficient as possible so that

resource limitations do not starve our ability to pursue early intervention and prevention alternatives in watersheds that are threatened but not yet impaired The Rule should acknowledge that delisting based on alternative or functionally equivalent management processes is acceptable. [CA]

[A] documented decline in water quality in Tier 3 waters should trigger an investigation into the cause of the decline rather than the development of a TMDL. [NY]

In light of naturally occurring variation in water quality as a result of seasonable and annual variations in hydrologic conditions, substantial data would be needed to ascertain that a "declining trend that will result in nonattainment of standards" exists . . . we anticipate that the expansion of the listing requirement [to include threatened waters] . . . will lead to numerous debates about what constitutes adequate data In view of the overall resource challenge . . . it is not appropriate to mandate the listing and development of TMDLs for threatened waters. [UT]

DATA QUALITY

Past situations have arisen where EPA has sided with the public regarding perceived pollution problems without requiring the public to produce any "real" data to back-up these claims. This is contrary to the more stringent quality assurance/control requirements that are imposed upon States. [NE]

Without clearer guidance, the TMDLs will be challenged from a scientific standpoint. States simply cannot maintain mandated timelines if they are required to collect additional data or follow elaborate protocols for TMDL development that will not be put to some use. [MA]

T]he proposed rules require the State's water monitoring program to be responsible for collecting and analyzing all data, which we do not have the resources to do. [It] does not allow discretion to weight data based upon quality. Data of poor quality or based upon subjective methods could undermine the credibility of listings. [OR]

PRIORITIZATION AND SCHEDULING

We agree that States must be committed to developing and implementing TMDLs in order to improve water quality, but it is unreasonable for EPA to force States to speculate on schedules for a 15-year time period when so much is dependent on availability of resources and tools. . . . [It] is very unrealistic to expect that States can develop all high priority TMDLs in 5 years." [SC]

The remaining waters on our list have a nonpoint source component, and are on waters/parameters that will be difficult to address such as shellfish closures in our estuaries, nutrient issues in our lakes and estuaries, and sediment and fecal coliform loading and biological impairment throughout the State Imposing this 15-year timeframe for TMDL development may harm States' overall water quality programs. . . . [It] also does not provide States with an incentive to expand their monitoring program. [NC]

We believe completing TMDLs to address impaired waters in a timely and efficient manner is the goal. . . . The large number of required TMDLs and the long schedule ensure unknown problems that will not be amenable to inflexible regulatory deadlines. [PA]

[T]here is . . . a very real potential for conflicts in determining 303(d)/TMDL priorities, Unified Watershed Assessment priorities, Clean Water Act §319 priorities, and other Federal and State priorities, while being expected to share very limited funding for all. [SC]

Congress intended the TMDL listing process to be a public process. . . . EPA is prescribing what is important to the States, exclusive of public input. . . . EPA [is] asserting that the public cannot arrive at reasonable ranking criteria. [SD]

[T]he practical implication of giving higher priority to waters affecting threatened species or human health is that almost all listed waters would require TMDLs within the first 5 years, clearly an impossibility. [WA]

The lack of flexibility afforded the States in assigning priorities may mean that efficiencies in grouping TMDLs may be overlooked, or the State's ability to develop TMDLs on a watershed basis may be impeded. . . . The EPA should allow themselves and the States some justifiable relief from certain future litigation for factors that are unpredictable at the time the schedules are prepared. [TX]

The purpose of the schedule should . . . not be considered to be a contract with EPA to deliver the specified TMDLs. [CA]

COVERAGE OF NONPOINT SOURCES

"The proposed revisions represent a significant, unwarranted expansion of the *regulatory* approach to [the nonpoint source] problem. . . . There are simply too many

potential nonpoint sources of pollution to address using traditional regulatory techniques. Furthermore, there is too much uncertainty in the relationship between individual nonpoint sources and their specific impact on downstream receiving water quality to support a water quality-based approach. States certainly will not be able to allocate loading to individual nonpoint source discharges or monitor the effectiveness of individual pollution control activities. . . . Securing industry cooperation is not easy but it is the only way we will be able to deal effectively with nonpoint source pollution—and it is bearing fruit. . . . The prescriptive approach . . . would prove ineffective and serve only to discourage partnerships and cooperation [and] seriously undermine the roles of State and local governments in watershed management. [FL]

EPA has no more authority than States do to regulate nonpoint sources." [SC]

Watershed management . . . is the appropriate mechanism. . . . Unfortunately, the proposed regulations reject this philosophy and attempt to impose a Federal mandate on States and by extension, point sources, to fix nonpoint issues. This approach is doomed to failure, legally, logistically and pragmatically. [KA]

[T]he nature of NPS pollution together with the problems of legacy pollution and episodic climatic events makes the application of treatment technologies difficult if not impossible as a solution to NPS problems. Relying too heavily on NPDES type solutions creates huge inequities in cost and responsibility. The threat of pursuing an unbalanced program is that the entire management structure is diminished. . . . This is a different role for EPA. . . . It is from this role of partner and collaborator that EPA must craft the Rule, not from a perspective of overseer. [CA]

IMPLEMENTATION PLANS AS A COMPONENT OF TMDLS

EPA is taking the extremely tenuous position that a Federal law that *does not* authorize EPA to conduct command-and-control regulation of certain activities and entities somehow *requires* the States to conduct that regulation. This is federalism in reverse. . . . Mississippi does not need 2,257 implementation plans. [MS]

DEP is concerned that by requiring the implementation plan within the context of the TMDL technical analysis . . ., disputes about the implementation plan could bring the technical analysis to a grinding halt. [It] should be incorporated into the State's watershed management plans and be considered within the context of other watershed problems and priorities. [MA]

An implementation plan is often a complex product following extended interactions among many stakeholders in a watershed. Direct Federal Government interference will seriously impede the process by reducing or removing the commitment of a locality to steward its watershed. In short, local creativity and motivation will be permanently stymied, and water quality improvement will be delayed. [PA]

[In] some cases, TMDLs may be complete, yet no source of funding is available to implement the NPS reductions needed. States will have two choices at this point, do not submit the TMDL to EPA or submit it without the implementation plan. Either way, progress toward TMDL completion is halted. . . . We suggest EPA acceptance of other management plans or strategies such as upgraded § 319 Management Plans, National Estuary Management Plans, or State Watershed Strategies. [SC]

Requiring the implementation plan as part of the TMDL can significantly lengthen the time it takes States to submit TMDLs. If EPA does not approve the TMDL, significant State and local resources would have been expended that might not meet the requirements of the final approved TMDL. Having an approved TMDL in place will ensure that the proper goals are established for the implementation plan . . . there will be increased flexibility to States and local stakeholders in carrying out the plan. [NC]

To assume that any given TMDL will describe an immediate solution to an impaired situation is erroneous. [KA]

TNRCC understands the need for the EPA and the public to know specifically how water quality standards will be achieved, but [e]ven with point sources, implementation as detailed in the NPDES permit is approved separately and after TMDL approval. [TX]

Considering the fact that the implementation plan is dependent on the load reduction targets set by the TMDL, the concurrent development of the TMDL and the implementation plan is not possible . . . implementation plans are being developed on a separate schedule according to Delaware's Whole Basin Management process. [DE]

[W]e believe it is appropriate for EPA to request that implementation plans be developed. We believe it is beyond EPA's authority to specify the content of these plans. [CA]

REQUIRED ELEMENTS OF A TMDL

[M]any of the minimum elements required by the proposed rule are unreasonable for the State to define in the course of developing the TMDL. . . . it is simply not realistic to require States to identify timelines for activities and implementation efforts which are outside our jurisdiction, to identify legal or regulatory controls applicable at the local level, or to provide reasonable assurances for activities and efforts outside our jurisdiction . . . it is simply not possible to mandate nonpoint source controls beyond existing statutory authority. The imposition of rigid requirements is antithetical to our desire to partner with local stakeholders in an iterative process through the watershed approach. DEP recommends that EPA reevaluate the reasonableness of each proposed element. [MA]

TMDLs should be used to establish a relative level of responsibility in pollution reduction, but not craft hard and fast numeric levels which are to be allocated between point and nonpoint sources, or among subcategories of sources. [KS]

Every pollutant and every waterbody is not going to fall into the "l0 element box" provided in the regulations. Examples include interstate or border waters which have pollutant criteria and time schedules that differ between neighboring States, or complex pollutants such as mercury, which may require a phased approach to TMDL development. [MS]

In many situations a management plan that would not include all 10 elements may allow improvement in water quality to the point where standards are met. This would allow savings of time and effort while focusing on improving water quality. [SC]

TMDL implementation, particularly the decisionmaking on the allocation of loads and the burden of non-point source pollution reduction among known (and possibly unknown) sources from local land uses is appropriately a local or State task, not a matter for involvement by the Federal Government. [MA]

Neither the TNRCC nor the EPA will be successful in adhering to the prescriptive requirements given the complexities and uncertainties associated with nonpoint source pollutants and the lack of wet weather standards [TX]

The TMDL process must be structured to support defining expectations on a watershed scale. In contrast, the proposed Rule moves us further toward the notion that "load limits" for individual chemicals is the basis of TMDL work. [CA]

REASONABLE ASSURANCES

The State may be able to outline the actions required to meet or make progress toward meeting the water quality standards . . . but some of the required actions may exceed the authority of the Department . . . (e.g. land use management and the reduction atmospheric deposition). The State may also have difficulty in describing the effectiveness of some of the unproven Best Management Practices or other unproven actions. . . . A time line for actions beyond the [Department's] scope of authority will be difficult to predict. . . . The Department may also have a difficult time guaranteeing adequate funding for the implementation actions because of uncertainty associated with projecting future budgets [NY]

The expectation of EPA for reasonable assurances to implement and achieve TMDL endpoints relies on a clairvoyance never seen in water quality management. [KS]

[There is] not enough flexibility. . . . Reasonable assurance should allow for the identification of implementing mechanisms such as Oregon's Forest Practices Act, Federal land management plans, State agricultural statutes and rules, urban planning requirements, etc., and how and when (specific timeframes identified in the TMDL) these mechanisms will be modified to meet load allocations . . . we see no merit in identifying adequate funding of total cost of implementation, since it is nearly impossible to do and is not necessary for EPA approval of a TMDL. [OR]

LDEQ cannot assure that local governments will pass ordinances to require management measures for nonpoint source controls. Nor can LDEQ assure that any new State laws or regulations will be passed. . . . If the State outlines within the NPS Management Plan a step-by-step process that it will follow in the implementation of the TMDL at the watershed level, does that not constitute a reasonable assurance? [LA]

[S]tates cannot assure that fecal coliform standards in urban areas will be met after all possible controls are put in place. . . . Since all States will soon have EPA-approved updated Nonpoint Management Plans, we believe this plan should serve as the reasonable assurance as well as the implementation plan for TMDLs for waters affected by nonpoint sources." [SC]

[T]he State cannot provide the necessary reasonable assurance that the control measures will be implemented nor could EPA provide the reasonable assurance in

the event a TMDL is disapproved and redeveloped by EPA. The language in the regulations needs to be toned down to match that of the preamble which indicates voluntary measures are suitable and can be considered sufficient reasonable assurance. [NE]

Note that there is no comparable requirement of point sources to ensure adequate funding for implementing controls consistent with wasteload allocations despite the fact that advanced treatment can be extremely expensive. The NPS assurances that include a demonstration of adequate funding are not feasible. . . . The best the agencies could do is provide assurance that they will strive to maintain funding. [CA]

USEPA PERMITTING OF NPS

[T]he silviculture industry . . . has already made a real commitment to the protection of State surface waters through the development and implementation of a Silviculture Best Management Practices Manual. Given the multitude of individual forestry operations, we believe that management of stormwater from silviculture activities is best addressed through continued refinement of this manual, rather than through the NPDES program. [FL]

The State fears that the mere threat of a possible NPDES permit will discourage private landowners from practicing forest management. The threat of a permit could turn hundreds of thousands away from the simple and beneficial act of tree planting and reforestation. [[NY]

[W]e have serious concerns with the potential impact of the proposed regulations on the State's Forests and Fish Agreement, which was painstakingly negotiated throughout the past 2 years and is now State law. . . . EPA's proposal could cause the Agreement to collapse. . . . The listing and TMDL programs must allow EPA and the State to incorporate this Agreement . . . the application of point source controls to silviculture does not need to occur if there is a viable and effective State program. [WA]

If permits were to be issued it would create significant overlaps and redundancy and require a very large additional administrative cost. It would cloud and confuse the management process and potentially lead to significant new litigation. [CA]

ANTIDEGRADATION POLICY/OFFSETS

[I]t is likely that protracted litigation will result, wasting precious private, local, State and Federal resources. [NE]

[T]he States and EPA are clearly not in a position to take on this expanded role at this time. [WA]

The proposed TMDL regulations make no provision for pollutant trading. . . . [It] should be universally allowed as a mechanisum to promote progress toward meeting an aggregate water quality-based pollutant cap. [CT]

[The] proposal to require offsets *in addition* to requiring permittees to demonstrate that their discharge will not cause or contribute to the documented impairment is overly burdensome to permitters. LFL]

[For NPS it] is very difficult to quantify and monitor, and may take a number of years to accomplish. . . . Development could be halted for years in an area with impaired waters, depending on the weather, particularly if a flood occurs which destroys years of successful BMP implementation work. This is an untenable situation . . . discharges associated with cleanups undertaken as part of the Superfund program or otherwise could be precluded in an area of impaired waters.'' [PA]

This could necessitate monitoring for compliance and having alternative limits in place to deal with potential [NPS] failures which could significantly slow permit issuance. Requirements of this type seem premature until there are more specific regulatory programs for nonpoint sources in addition to a better understanding of the effectiveness of BMPs.'' [SC]

By dictating to such large numbers of dischargers that every offset must be memorialized in each NPDES permit, the EPA is making such trading associations unappealing and unnecessarily rigid. . . . It is old school thinking that we must remain command and control regulatory agencies [and] it becomes undesirable for our permit writers to modify multiple permits many times during the course of a permit cycle. [A] legally binding agreement . . . could be referenced by the NPDES permit but would not require modification of each permit document. [NC]

This complex and prescriptive approach will likely conflict with existing State antidegradation regulations and trading programs . . . the offset provision . . . is inconsistent with the shift toward a more comprehensive and equitable approach to improvement of impaired waterbodies. . . . The benefits in terms of water quality improvement anticipated from the new offset requirement are likely to be small . . .

permitting agencies would face the challenge . . . in determining what constitutes an acceptable offset. [MI]

EXPIRED PERMITS

We believe that EPA review of expired permits is more appropriately addressed through the Performance Partnership Agreement. [OR]

[C]reating expectations in the NPDES rule that EPA will assume more permitting responsibilities in Washington will result in less overall environmental benefit, not more . . . and delay TMDL implementation. [WA]

The proposed regulation . . . would force the State to abandon a reissuance schedule that is effective and works extremely well on a watershed basis. . . . Preparing permits for a wasteload allocation is complex, and the time needed to prepare draft permits could easily exceed the proposed 90-day grace period. . . . Implementing the USEPA review within the 90-day window would force the State to draft permits without adequate time to establish the allocation process. [MI]

MIXING ZONES

"The draft regulations eliminate the use of mixing zones in impaired waters. This shifts a disproportionate amount of responsibility to the permitted discharges to improve the water quality of the receiving stream. The policy of utilizing mixing zones should be a State decision based on the totality of circumstances." [MS]

STATEMENT OF MR. WARREN E. ARCHEY, MASSACHUSETTS STATE FORESTER, CHIEF OF THE MASSACHUSETTS BUREAU OF FORESTRY, AND CHAIR OF THE NASF WATER RESOURCES COMMITTEE

The National Association of State Foresters appreciates the opportunity to submit testimony on the U.S. Environmental Protection Agency's (EPA) proposed revisions to the National Pollution Discharge Elimination System (NPDES) Program and Federal Antidegradation Policy in Support of Proposed Revisions to the Water Quality Planning and Management Regulation (NPDES rule). The proposed changes in the Total Maximum Daily Load and NPDES rules have significant potential to disrupt silviculture and forest management on the nation's 337 million acres of non-industrial private forest (NIPF) land. The proposal represents a fundamental change in the approach EPA has historically taken to reducing threats to water quality from nonpoint sources. We feel this fundamental change in approach is not justified either by statutory authority or the scope of water quality impairments caused by silviculture.

The State Foresters are strongly opposed to the proposed rules on three major grounds:

1. The proposal is a major departure from the historical interpretation and implementation of the Clean Water Act, and is not supported by statutory authority.
2. The proposal ignores the relatively minor contribution made by forest management to water quality problems nationwide, and threatens to disrupt the effective approach taken by the State Foresters and our Federal partners to achieve these results.
3. The proposal will be extraordinarily difficult to implement in practice and will result in drastically higher costs for both States that must develop TMDL's and landowners and operators who might become subject to NPDES permitting requirements.

The National Association of State Foresters represents the directors of the State Forestry agencies from all 50 States, seven U.S. territories, and the District of Columbia. We believe that forest management is vital to the protection of the nation's water resources, and are committed to the goals of the Clean Water Act and to preventing water quality impairments of all kinds. We believe that forests, and the active management of forests, contribute much more to water quality improvement than to water quality impairments. Forestry is part of the solution and, in most cases, is not a source of the problem.

The original Water Pollution Control Act (Federal Clean Water Act) and subsequent amendments have consistently recognized and preserved the "primary responsibilities and rights of the States in controlling water pollution." The redefinition of silvicultural activities as point sources of pollution and the removal of the silvicultural regulatory exemption under the proposed NPDES rule, thus allowing silviculture to be permitted under the NPDES, are open and unjustified attempts on the part of the EPA to usurp control from the States. Further, and without good

reason, the proposed change suggests that silvicultural activities represent a substantial nationwide NPS problem. EPA's own figures tell a much different story.

The State Foresters are opposed to EPA's proposal to remove the categorical exclusion of silvicultural activities from the definition of point source pollution. EPA's attempts to regulate silviculture activities under the NPDES permitting are scientifically unjustified, highly disproportionate with regard to other land uses, and a radical departure from the historical interpretation and implementation of the Federal Clean Water Act. In short, State Foresters recommend a retraction of EPA's proposed rule.

SHIFT FROM HISTORICAL INTERPRETATION

The re-designation of all silvicultural activities as point sources of pollution, making all forestry practices potentially subject to NPDES permitting, is a drastic departure from 27 years of statutory interpretation, case law, and regulatory implementation.

EPA's claim of authority to regulate silviculture in the proposed rule does not withstand the scrutiny of historical interpretation. Congress specifically created the provisions under Section 319, through the 1987 amendments to the Clean Water Act, to address nonpoint source water quality concerns. State Foresters believe that Section 319 contains the proper and intended authority granted to EPA for NPS controls, not the thin rationale EPA is claiming under the stormwater provisions (40 CFR 122.26(b)(14)(x). Programs and assistance available under Section 319 enable the States to proactively address NPS problems in a flexible framework and timely manner that a permitting process would not allow.

We want to stress that efforts to fully fund the Section 319 program have only recently been stepped up and that precious little Section 319 money has been made available for control of silvicultural NPS pollution. We strongly support EPA's proposed increases in funding for Section 319, and we would hope that a concerted effort would be made by EPA to work more proactively with the State Foresters and the Forest Service to ensure that prevention of silvicultural NPS pollution is emphasized in that program. We also urge the committee to review our proposal for a Watershed Forestry Initiative within the USDA Forest Service to accelerate the progress being made on forestry NPS control (attached).

BENEFITS OF FOREST MANAGEMENT

Forestry can contribute more to water pollution prevention and clean up, than to water pollution problems. Besides helping to mitigate and reduce NPS water quality impairment from other land use practices, active forest management actually encourages beneficial land uses and activities that can improve water quality such as reforestation and afforestation. Simply stated, getting more trees into the ground will be better for water quality. Getting landowners to reforest and/or aforest their land should be a primary mechanism in improving water quality. The proposed NPDES rule acts as a disincentive for landowners to get involved in forest management. It increases the likelihood that the landowner will choose another land use activity with increased water pollution characteristics such as agriculture or development. Positive incentives need to be provided for landowners to reforest and/or aforest their lands, not create regulations and programs that push the landowner away from planting trees.

Energies should be put into programs and services that are voluntary and incentive based, the kinds that State Foresters have been delivering to the more than nine million non-industrial private forest landowners for over 80 years with proven success. This is reflected in the National Water Quality Inventory reports [Clean Water Act 305(b) lists] that are delivered to Congress every 2 years. They show a diminishing role for silviculture in impairments of rivers and streams over the past decade. Silviculture does not even appear on the list of seven contributors to river and stream impairments in the EPA's latest release of the biennial report (1996).

Best Management Practices.—State Foresters are, and have been for many years, involved in the development of nonpoint source (NPS) water pollution controls and plans. We have led by taking a preventive and proactive, rather than a restorative or reactive, role to water quality impairments from silviculture activities. This involvement has led to developing practices and procedures for both preventing and reducing NPS risks, commonly referred to as Best Management Practices (BMPs). All States with significant forest operations have silvicultural NPS control programs that rely on BMPs for results.

Forestry BMPs are continually being refined in many ways to help make them more effective and enforceable. Refinements include making BMPs directly enforceable in connection with required plans and permits; utilizing "bad actor" designa-

tions; making compliance with BMPs a defense to a regulatory violation; making BMPs the basis for an exemption from a regulatory program; and making BMPs a defense to nuisance or liability actions. Continual refinements include logger licensing and certification programs which train field operators about BMP implementation. The crux is that States are already working to make existing laws and standards more consistent and comprehensive (Stuart, 1996).

These types of creative BMP revisions have helped to improve implementation to levels of 85–95 percent and above (Ice/Shepard, 1999). Implementation rates should only improve as time passes. This is particularly true as more and more logger/landowner monitoring, education, and training sessions come online, and forest certification and performance standard systems such as those set up by the Forest Stewardship Council and the American Forest & Paper Association (Sustainable Forestry Initiative) become more accepted and mainstream. State Foresters believe that BMP implementation accomplished by an informed and willing audience is the key to successful reduction of silvicultural NPS water pollution. We are already seeing evidence of this.

Proof lies in the 305(b) reports. Report trends show that silviculture is contributing to a diminishing fraction of polluted miles along rivers and streams. In fact, silviculture did not even show up on the list of water pollutant contributors in the latest version of the 305(b) reports (EPA, 1996). With forests covering 737 million acres of the United States (National Research Council, 1998), it is important to note that forest management is reported in the 305(b) reports to contribute to only a small fraction of the impaired rivers and streams. The logical conclusion is that the use of BMPs in forestry operations is having a positive impact on water quality. Our own studies bear this out. Whereas 40 States reported localized pollution problems from silviculture in 1982, only twenty-four reported the same in 1996 (Stuart, 1996).

IMPLEMENTATION: MORE COSTLY AND CUMBERSOME THAN EPA THINKS

The EPA claims that they are seeking a regulatory "backstop" through the NPDES rule, so that bad actors in impaired watersheds will come under a regulatory framework. However, as written, the proposed rules lead us to believe that it would lead, in many cases, to a patchwork regulatory framework, where EPA field offices would have discretion to set up regulatory programs in some watersheds, while States would retain authority over voluntary programs in others. We believe that most States have adequate bad actor provisions and enforcement mechanisms, and we are reviewing our own State programs to confirm this. However, it is interesting to note that the States with the highest number of impaired stream miles (Washington, Oregon, and California) due to silviculture, forest practices are already regulated through State forest practices acts. We have serious reservations about what the proposed rule will mean in States such as these and in other States where the legislatures have acted to mitigate the impact of silviculture on water quality. Will EPA demand more than is currently required under State law?

This sends the message that the EPA does not believe that States are doing a good job, or they will not be able to do a good job to reduce silvicultural related NPS pollution in the future. As a result, the "backstop" undermines State good faith efforts. There is good reason to believe that this EPA action might divert resources that will limit State capability and potentially refocus State efforts into activities with unproven results. A "top-down" approach, like the one being proposed by the EPA, will only alienate the partners needed to achieve this continued success.

Below is the summary table taken from the EPA's cost analysis related to implementation of the silvicultural provisions of the proposed NPDES rule (Environomics, 1999).

Proposed Provision	Annualized Cost ($ Million)	No. of Entities Affected Annually
Designating Silvicultural Operations Under NPDES:.		
Cost for the silviculture industry	3.45—12.93	
Administrative costs to Federal and State governments.	0.27–0.28	
Subtotal	3.72—13.22	613–1,225
Annualized compliance costs for small logging firms.	0.36 percent to 0.67 percent of their annual revenues.	368–735
Annualized compliance costs for small entity timber owners.	0.27–0.50 percent of their timber revenues.	<18,000

State Foresters believe the above estimates are far too low and the proposed NPDES rule will affect a far greater number of entities than the EPA has envisioned.

First and foremost, the authors of the cost analysis admit the final reported costs are vague, misleading and uncertain. In their proposal, EPA states: "This paper presents some *rather uncertain estimates* of how often the proposed designation authority might be invoked, and, if so, the costs that will likely ensue" (p. 52, Environomics, 1999, emphasis added). This analysis must then be assumed to represent a low end-cost estimate. We believe it would be more appropriate to include a high-end estimate to better prepare potentially affected entities. We believe such a high-end estimate is justified by the fact that EPA will likely be pressured, through additional litigation, to expand their use of regulatory authority under NPDES if the proposed rules are implemented. The final result will be significantly greater costs than anticipated by the Environomics report.

Reinforcing our belief that EPA cost estimates are far too low, the authors utilize ownership and business data that is seriously out-of-date. The 1978 data source quoted by the authors indicate only 7.8 million ownership units holding 333.1 million acres of private forest land in the U.S. That same survey was updated in 1994. The 1978 data source underestimates the number of private forest landowners by 2.1 million, and the number of acres owned by these landowners by 60 million acres (National Research Council, 1998). Furthermore, the estimated number of affected logging entities is underestimated nearly three-fold. While the authors report only 14,278 logging entities nationwide, that number is closer to 37,000 according to the Forest Resources Association (formerly the American Pulpwood Association). These numbers will substantially raise the estimated costs of the proposed NPDES rule.

Even if we assume, however, that the Environomics report is accurate, we would be forced to question the need for the rule if the number of effected landowners and forest management operations that would be impacted is so small. Their cumulative impact on water quality would be nearly immeasurable.

Again, we believe the EPA's cost estimates for the proposed NPDES rule are far too low and the true cost impacts will greatly outweigh any potential benefits, especially when considering the small amount of sediment pollution silviculture contributes to the NPS water pollution problem. The proposed NPDES rule is simply another disincentive for landowners to actively engage in forest management. We believe that the higher costs associated with these rules raises the question of an unfunded mandate which would be well above the $100 million threshold. This question should be revisited.

CONCLUSION

On October 22, 1999, USDA Undersecretary for Natural Resources and Environment sent a letter addressed to EPA Administrator Carol Browner on the proposed revisions to the Total Maximum Daily Load and NPDES systems. This commentary provides a very telling and accurate story of the affects the proposed rules would have. From the letter, "In general, we (USDA) feel that if the proposed rules are implemented they will likely cause disruption to existing NPS control programs that have proven to be effective and will unnecessary divert scarce resources to a top-down, process oriented approach that may not work for NPS pollution control." We could not agree more.

The fact is forest management is dispersed in both space and time. State Foresters believe that (1) nonpoint source pollution from forestry activities are usually a result of extreme weather or operational malfeasance; (2) pollution can best be controlled through prevention; and (3) forest management has the least impact of land-use alternatives. Therefore, the EPA should retain its current NPS treatment of silvicultural practices. The idea that a tracking, permitting and monitoring system for nonpoint sources, let alone forestry, could be established to pinpoint offenders in a timely manner is simply illusory. If anything, we feel that other land uses should be brought up to the level of protection evident on forest lands, particularly when taking into account their relative contributions to the NPS pollution problem.

For these reasons, NASF recommends that the EPA retract the proposed NPDES and TMDL rules. We would encourage the agency to seriously revisit the NPS pollution issue to determine what is needed to further improve the quality of water coming off of our forested landscapes; already considered to be the source of the cleanest waters in the United States (USDA Forest Service, 2000). If the EPA is simply looking for reasonable assurances that silviculture does not significantly contribute to water pollution, the answer does not lie in Federal regulation. We suggest the answer lies in stronger commitments to BMP implementation at all levels of government within a voluntary and incentive-based context that prevent water quality

problems before they happen. The Federal Government has a vested interest in this public good which justifies boosting Federal resources and investments that will be needed to see such commitments through.

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ATTACHMENT—NASF WATERSHED FORESTRY INITIATIVE

WATERSHED FORESTRY INITIATIVE (USDA FOREST SERVICE—STATE & PRIVATE FORESTRY—COOPERATIVE FORESTRY)

Background

Forests are essential to clean water our most precious resource. Well managed forests absorb rainfall, filter pollutants from air and water, and recharge underground water supplies. They protect streams and wetlands and reduce flooding—keeping our environment healthy. Forests provide critical habitat for fish, wildlife and rare plants. Many communities rely on their forests to support the local economy and improve the quality of their everyday lives. Clearly an investment in trees and forests is an investment in clean water, clean air, and clean communities.

Issues Facing Our Watershed Forests

Non-point source pollution on private forestlands has been addressed primarily through State Forestry Agencies in cooperation with the USDA Forest Service. Nationwide, nearly 70 percent of our forestlands are privately owned. In the Eastern US, that figure rises to over 90 percent. These forests produce ⅔ of the clean water we need for recreation and support of fish and wildlife habitats as well as the drinking water supply for millions of Americans. In addition to environmental benefits, these private forestlands also produce over 50 percent of the nation's wood and paper products.

Forests are increasingly being removed and fragmented by land-use changes, placing stress on forests and their watersheds. These losses of forest affect more than our quality of life. In the Baltimore-Washington region alone, tree loss over the last 25 years has increased runoff nearly 20 percent, causing flooding and eroding streams and costing local governments over $1 billion in treatment costs. Increasingly, the conservation, restoration and stewardship of private forestlands is viewed as crucial to securing watershed health and sustaining it in the future.

A Watershed Forestry Initiative

Recent national actions such as the Clean Water Action Plan, the USDA Forest Service Natural Resource Agenda, and EPA's proposed Total Maximum Daily Load program revisions have brought new focus on the need to work at the watershed level, create opportunities for partnerships and encourage greater community participation in solving water and natural resource problems.

Historic funding levels for water related work through Cooperative Forestry programs have not met this challenge. An initiative is proposed to expand stewardship activities to prevent and address water quality and watershed issues in forested watersheds. The Initiative would implement activities in two main areas:

Program Components

Watershed and Clean Water Grants.—Through grants to States, communities, non-profit groups and landowners, the Forest Service and State Foresters will implement critical watershed protection, restoration and stewardship projects.

- use trees and forests as solutions to water quality problems in urban and agricultural areas
- protect drinking water supplies
- demonstrate the value of trees and forests to watershed health and condition
- restore fisheries and enhance waterfowl and other wildlife habitat
- promote forest and watershed protection through community-based planning and action
- build new partnerships with State, local and non-profit organizations
- complete watershed scale water quality improvement and forest conservation plans
- restore stream side forests and establish riparian vegetative buffers to improve water quality

Watershed Coordinators/Enhanced Forest Resource & Watershed Planning.—Successful watershed planning and management depends on good information and the ability to deliver. Coordinators would be a focal point for integrating forestry programs across mixed ownerships and building Federal and State capacity to deliver existing cooperative programs on a priority watershed basis. The bottom line is that groups involved in assessing watershed condition and developing solutions need better forest resource information. Coordinators would help to:

- build new partnerships, while nurturing and strengthening existing partnerships, at the State and local level,
- provide technical guidance for water quality protection and restoration,
- develop collaborative watershed projects which can address critical conservation, restoration or stewardship needs in priority areas,
- provide enhanced forest resource data and support for State and local watershed planning efforts,
- work directly with the non-industrial private forest landowner on-the-ground to improve water quality,
- support information needs for State Unified Watershed Assessments, water quality standards development, impaired water lists (303(d) lists), National Water Quality Inventory data (305(b) list), Total Maximum Daily Load calculation and nonpoint source pollution control plans,
- provide forest resource information to local watershed councils, and
- support Sustainable Forestry Criteria and Indicators and Index of Watershed Indicators.

Partners

Moving forests and forestry into a more proactive role in the protection and restoration of watersheds, water quality, and important habitats like riparian areas and wetlands, provides the opportunity for a wide range of partnerships. Cooperative Forestry has the established delivery system and partnerships with States to effectively deliver this program and nurture partnerships that are needed to effectively improve the water quality of forested runoff. Potential supporting partners, amongst others, include: National Association of State Foresters, National Association of Conservation Districts, Western, and Southern Governor's Associations, Issak Walton League, Ducks Unlimited, The Nature Conservancy, Defenders of Wildlife, Wildlife Management Institute and Environmental Protection Agency.

Outcomes

Maintaining water quality and restoring degraded streams and watersheds on private lands requires new and expanded roles for State Foresters and Cooperative Forestry. Millions of private forest landowners and thousands of communities are ready to take action. Through this initiative new partnerships between Federal and State officials, forest managers, and local communities and organizations can be realized. These efforts will result in:

- restoration of thousands of miles of stream and critical fish habitat,
- protection of the drinking water supply for millions of Americans,
- rehabilitation of degraded urban and agricultural watersheds, and
- appreciation of the full value of trees and forests in maintaining healthy watersheds and clean water in the future.

Budget

Program Actions	Budget (In millions of dollars)
Watershed and Clean Water Grants	15.0
Watershed Coordinators/Planning	5.0
Total Budget	20.00

STATEMENT OF RICHARD A. PARRISH, SOUTHERN ENVIRONMENTAL LAW CENTER

INTRODUCTION

Good afternoon, Mr. Chairman and members of the subcommittee. My name is Rick Parrish. I am an attorney with the Southern Environmental Law Center, a non-profit environmental advocacy group that works to protect public health and the environment in a six-State portion of the Southeast. I appreciate the opportunity to discuss with you today EPA's recent efforts to revitalize the Clean Water Act's watershed restoration or "Total Maximum Daily Load" (TMDL) program, especially the impacts and costs of proposed rules on State and local governments and communities.

EPA's proposed TMDL rules will certainly have an impact on State and local governments and communities. There will undoubtedly be some additional costs imposed upon State and local governments by the proposed rules, but I believe the vast majority of costs attributed to these rules would more accurately be assigned to the TMDL rules that have been in place for the last 15 years and almost universally ignored by State and local governments, which raises the interesting question whether we have learned anything from that history of conscious disregard of the TMDL program. More importantly from my point of view, the proposed rules would have an enormous beneficial impact on communities across the country, financial and otherwise, as we begin to take the steps that are necessary to restore the worst polluted waters in the nation. Before looking at some of the costs and benefits of the proposed rule, I would like to highlight the following fundamental areas of general agreement about the TMDL program.

- Clean water and healthy aquatic ecosystems are of vital concern to the American public, now as in 1972 when the Clean Water Act was passed.
- Almost 28 years after passage of the Clean Water Act, nearly 40 percent of the waters that are assessed nationwide remain impaired, that is, too polluted for fishing, swimming, and other designated or actual uses, including aquatic habitat.
- States and EPA estimate that more than 20,000 water body segments are impaired, often by more than one pollutant, with the result that 40,000 TMDL-based clean-up plans will be required.
- State monitoring programs cover only about one-third of our nation's waters. Even though new or better data will likely show that some currently listed waters do not, in fact, need TMDLs, the number of impaired waters nationwide is likely to increase as water quality monitoring programs expand in coverage.
- The watershed approach to water quality planning and management is generally recognized as the most equitable and efficient method of protecting and restoring water quality, and the TMDL process is generally considered the technical backbone of that watershed approach.
- The TMDL program as currently designed is not succeeding in restoring water quality in impaired waters.
- We cannot afford to wait for perfect data and a perfect understanding of the interaction between pollutants and the aquatic ecosystem before taking steps to correct serious water pollution problems.
- The States and EPA generally agree that non-point source activities are responsible for a majority of the impaired waters nationwide.
- There is general agreement that additional funding will be required at the local, State, and Federal level for the TMDL program to succeed nationwide. At the same time, there will likely be added costs if cleanups are delayed further, both in terms of the eventual expense of restoring water quality and the opportunity costs associated with reduced use, enjoyment and productivity of polluted waters.

The overriding goal of the Clean Water Act was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." While much

progress has been made, especially with regard to the discharge of pollution from pipes and other point sources, the sad truth is that 40 percent of our nation's waters are still considered too polluted to be used for their intended purposes, including fishing, swimming, drinking, or as aquatic habitat. Section 303(d) of the Clean Water Act contains the one program specifically designed to deal with these impaired waters, the TMDL program. Section 303(d) requires States to identify their worst polluted waters and develop cleanup plans based on the calculation of the Total Maximum Daily Loads of particular pollutants that the water can accommodate. If States fail in these tasks, the duties revert to EPA. Designed to give States the primary role in cleaning up polluted waters, the TMDL program was largely ignored by States and EPA alike for over 20 years. In recent years, partly as a result of a wave of lawsuits filed by environmental groups, EPA has begun taking steps to implement the TMDL program to clean up the worst polluted waters in the country.

In my view, the single most significant step EPA has taken to revitalize the TMDL program is the proposal of rules that, for the most part, clarify and strengthen the requirements of the TMDL program. I believe that the heart of the proposed rules, the requirement that an implementation plan be developed as part of the TMDL itself, has the best chance of converting this watershed restoration initiative from a program marked by neglect and wasted effort to one marked by productivity and accomplishment over the years to come.

EARLY FAILURE OF TMDL PROGRAM

The TMDL program lay dormant until the late 1980's when environmentalists starting filing citizen suits against EPA for allowing States to ignore their obligations to prepare lists of impaired waters and TMDL-based watershed recovery plans under § 303(d). An Illinois case, *Scott* v. *City of Hammond*, established the principle that the State's failure to submit lists and TMDLs triggered EPA's mandatory duty to step into the void. At this point, EPA has been sued in over half the States in the country for allowing the TMDL program to languish. In all but one such case (Minnesota), environmentalists have either won in court or negotiated a favorable settlement.

At the same time the litigation was occurring, State and Federal regulators were moving toward a watershed approach to water quality planning and management. EPA had issued TMDL regulations in 1985, modified them in 1992 to require State submittal of 303(d) lists every other year, and produced a series of programmatic guidance documents and policy statements throughout the 1990's to clarify how States should compile their 303(d) lists and develop their TMDL programs. Finally, in 1996, EPA convened a formal advisory committee to recommend ways to strengthen the TMDL program generally.

ADVISORY COMMITTEE RECOMMENDATIONS

In 1996, EPA formed an advisory committee under the Federal Advisory Committee Act (FACA) composed of 20 members representing point source and non-point source industries, State, local, and tribal governments, the environmental community and others. This TMDL advisory committee, on which I served, issued a report in the summer of 1998 containing over 150 recommendations on ways to strengthen and improve the TMDL program. Most of those recommendations were based on consensus agreement among the members of the committee, but others did not receive the support of the full committee, and there were several important issues on which the committee could not agree at all.

Foremost among the issues with the full support of the advisory committee was the notion that implementation was the key to the eventual success of the TMDL-based watershed restoration program. The advisory committee was unanimous in the sense that without implementation, TMDLs were hardly worth the time and effort.

I believe the most important lesson to be derived from the efforts of EPA's TMDL advisory committee was that representatives of the various constituencies most affected by and concerned with the TMDL program agreed, for the most part, on a series of recommendations for strengthening that program. No single member agreed with all recommendations, and there were important issues left unresolved. But this was an important demonstration of how government, industry, environmentalists and others could work together to develop better ways of solving long-standing and important environmental problems.

SOME COSTS AND BENEFITS OF THE PROPOSED RULES

In August of last year, EPA finally published in the Federal Register proposed rules intended to clarify and strengthen the TMDL program. The proposed rules retain the fundamental approaches of the TMDL program—especially the primary role reserved to the States—but add significant detail about how States should manage the program. The one change that has brought the most attention is the proposed requirement of an implementation plan as part of the TMDL-based watershed recovery plan that States submit to EPA for review and approval. While the environmental community is not of one mind about the merits of the proposed rules, I believe the inclusion of an implementation plan alone could have the effect of converting what has largely been a paper exercise to one that has some chance of actually succeeding in cleaning up the nation's worst polluted waters.

In light of intense criticism from virtually all quarters, I think it's safe to say that no constituency is satisfied with EPA's proposed rules. Indeed, some consider that a sign that EPA has struck a reasonable balance among competing interests, though the only real measure of these rules is whether they would speed the clean-up our nation's polluted waters. Environmentalists generally are concerned that the schedules are too long and contain no deadlines; that the offset provision, despite some strengths, contains loopholes that could render it meaningless and ineffective; that the failure to require TMDLs for waters impaired only by "pollution," such as conditions of reduced instream flow, condemns such waters to continued degradation; and that the petition process is unnecessary and destructive of what little trust has been earned on this issue. State governments, even those with sincere commitments to cleaning up polluted waters, are concerned about the resources necessary to develop and implement TMDLs, including for increased monitoring and other data collection. Point source industries and municipalities are concerned that they will have to shoulder an unfair burden by reducing their discharges even further than they have already, and with the potential impact that limiting new or additional discharges might have on economic growth and development. Non-point sources fear the introduction of Federal regulatory controls, though EPA has gone to great lengths to explain that no such additional controls are proposed, with the possible exception for previously unregulated point source discharges from forestry operations.

It is understandable that State and local governments are concerned with the cost of complying with EPA's proposed rules. Yet, if States had taken seriously their responsibility to restore polluted waters under the TMDL program over the past 15–20 years, they would not be facing the burden of developing and implementing cleanup plans for all such waters over the coming 10–15 years. Even now, the problem may be more an issue of priorities than availability of funding. Indeed, if States paid as much attention to restoring polluted waters as they do to permitting additional discharges, we would be significantly farther down the path to cleanup.

Despite this resistance from most States, EPA is proposing significant increases in Federal funding for State TMDL programs (additional $45 million) and State non-point source pollution control programs (additional $50 million) in its fiscal year 2001 budget primarily to meet these new obligations. This is a considerable boost to a program that would still allow up to 15 years for States to develop watershed recovery plans.

While the cost of restoring polluted waters may be high, the cost of further inaction and additional delay—cost to the economy, cost to the resource—will be even higher. And we should not ignore the equally real, if more difficult to determine, benefits of cleaning up polluted waters—again, benefits to the economy and to the resource. In the end, however, we are left with many more questions than answers about the fiscal impact of water pollution and the proposed TMDL rules, questions such as the following:

- What is the cost to State and local governments of restricting development on polluted waterways?
- What are the costs of polluted waters to the tourism and recreation industries?
- What is the cost to the multi-billion dollar sport fishing industry in the upper Midwest of fisheries contaminated by mercury and other pollutants?
- What is the cost in terms of public health of drinking water contaminated with cryptosporidium, swimming in waters contaminated with fecal coliform bacteria, or consuming fish contaminated with persistent bioaccumulative chemicals?
- What is the value of an endangered salmon species in the northwest, or an endangered freshwater mussel in the southeast, that might be saved through steps taken partly as a result of the TMDL program?
- What is clean water worth?

Virtually all parties, including EPA, are concerned about having the resources to develop and implement TMDLs across the nation. Proposed increases in EPA's TMDL budget and other Federal funds for non-point source programs will certainly help. I believe, however, that Congress will have to recognize that the restoration of water quality across this country, so strongly supported by the American people, is unlikely to be achieved without this additional funding and perhaps more.

We can be absolutely certain of one thing, however. If we wait until adequate resources are identified and committed to the task of restoring our worst polluted waters, we will never succeed. And that, Mr. Chairman, is simply unacceptable to the vast majority of Americans who still want our dirtiest waters cleaned up and maintained as clean, healthy rivers, lakes and streams.

CONCLUSION

I believe that EPA's proposed rules represent the best chance of moving this program forward. Without implementation plans, TMDLs have proven largely to be a waste of taxpayer money. More importantly, they have been largely ineffective in restoring our most polluted waters to healthy condition. Our best hope for attaining the lofty goals of the 1972 Clean Water Act, restoring the chemical, physical, and biological integrity of our nation's waters, is in moving forward with a TMDL program that has some chance of actually succeeding. EPA's proposed rules represent a significant step in that direction.

STATEMENT OF AMERICAN SOCIETY OF CIVIL ENGINEERS

Mr. Chairman and members of the subcommittee: The American Society of Civil Engineers (ASCE) is pleased to submit this statement for the record on the projected revisions to the water quality planning and management regulation governing Total Maximum Daily Loads (TMDLs) that was proposed by the Environmental Protection Agency (EPA) last year. See Proposed Revisions to the Water Quality Planning and Management Regulation, 64 Fed. Reg. 46,011 (Aug. 23, 1999) (to be codified at 40 C.F.R. Part 130). ASCE remains deeply concerned about the protracted implementation schedule in the proposed regulation, believing it to be in violation of the Clean Water Act.

ASCE was founded in 1852 and is the country's oldest national civil engineering organization. It represents more than 123,000 civil engineers in private practice, government, industry and academia who are dedicated to the advancement of the science and profession of civil engineering.

The Society's diverse members are directly concerned with the proposed changes to the water quality planning and management regulations in their professional practice areas. Among those areas are environmental engineering, water resources engineering and water resources planning and management. ASCE is a non-profit educational and professional society organized under part 1.501 (c)(3) of the Internal Revenue Service rules.

A. STATUTORY AND REGULATORY BACKGROUND

The Federal Water Pollution Control Act, or Clean Water Act, is the principal law governing pollution in the nation's streams, lakes, and estuaries. 33 U.S.C.A. 1251–1387 (West 2000). The Act has three major elements. First, States must set water quality standards to protect "designated uses" of certain bodies of water; the standards then are used to effluent limits for individual sources. Next, the Federal Government is required to set industrywide, technology-based effluent standards for dischargers. Finally, all dischargers must obtain a permit issued by the Federal Government or authorized States that specifies discharge limits under the National Pollutant Discharge Elimination System (NPDES) program. The discharge limits essentially are the stricter of the water-quality-based limit and the technology-based limit.

The Act's regulatory provisions impose progressively more stringent requirements on industries and cities in order to meet the statutory goal of zero discharge of pollutants, and it authorizes Federal financial assistance for municipal wastewater treatment construction.

Industries were to meet pollution control limits first by use of "Best Practicable Technology" and later by improved "Best Available Technology" (BAT). Cities were to achieve secondary treatment of municipal wastewater (roughly 85 percent removal of conventional wastes), or better if needed to meet water quality standards. Sometimes, however, the use of BATs does not result in the reduction of pollutant

loads in a body of water. In those cases, the Act requires the EPA and the States to establish the "total maximum daily load" for a body of water.

All of the Act's programs are administered by the EPA, while State and local governments have major day-to-day responsibility for implementing the law. More than 40 States currently are authorized to issue NPDES permits. Nevertheless, various Federal agencies continue to invest heavily in the pollution-control programs under the Clean Water Act. "[T]otal Federal annual spending for nonpoint-related programs remained relatively constant from fiscal year 1994 through fiscal year 1998 at about $3 billion, although obligations among some programs increased significantly during this period." U.S. General Accounting Office, Water Quality: Federal Role in Addressing and Contributing to Nonpoint Source Pollution (1999).

Section 303(d) of the Act, 33 U.S.C.A. 1313(d), requires States to identify pollution-impaired water segments and develop "total maximum daily loads" (TMDLs) that set the maximum amount of pollution that a water body can receive without violating water quality standards. The Act imposes a mandate on the States to identify waters that cannot meet Federal effluent limitations and to establish TMDLs for pollutants identified by the EPA. If a State fails to identify its impaired waters or establish the required TMDLs, the EPA must do so. The first listed waters and TMDLs were due to the EPA in mid-1979, or 180 days after the Agency published the first list of pollutants regulated under section 303(d).

A TMDL includes a quantitative assessment of water quality problems, pollution sources, and pollution reductions needed to restore and protect a river, stream, or lake. TMDLs may address all pollution sources, including point sources such as sewage or industrial plant discharges, nonpoint sources, such as runoff from roads, farm fields, and forests, and naturally occurring sources, such as runoff from undisturbed lands. If a State fails to develop TMDLs, the EPA is required under section 303(d) to develop a priority list for the State and establish a Federal TMDL for the impaired body of water.

The TMDL program, in effect, helps the various government agencies to identify impaired waters and, after the application of BATs fails to control pollutants, establish priorities for their protection through the formation of plans to manage excess pollutants entering the affected bodies of water. The EPA's water programs and their State counterparts are increasingly emphasizing watershed and water quality-based assessment and integrated analysis of point and nonpoint sources. Better Assessment Science Integrating Point and Nonpoint Sources (BASINS) is a [modeling] system developed to meet the needs of . . . agencies. It integrates a geographic information system (GIS), national watershed data, and state-of-the-art environmental assessment and modeling tools into one convenient package. Originally released in September 1996, BASINS addresses three objectives: (1) to facilitate examination of environmental information, (2) to provide an integrated watershed and modeling framework, and (3) to support analysis of point and nonpoint source management alternatives. It supports the development of TMDLs, which require a watershed-based approach that integrates both point and nonpoint sources.

U.S. EPA, BASINS 2.0

Section 305(b) requires States to prepare a water quality inventory every 2 years to document the status of water bodies that have been assessed. Under section 304(1), States identified all surface waters adversely affected by toxic (65 classes of compounds), conventional (such as BOD, total suspended solids, fecal coliform, and oil and grease), and nonconventional (such as ammonia, chlorine, and iron) pollutants from both point and nonpoint sources. Under section 314(a), States identify publicly owned lakes for which uses are known to be impaired by point and nonpoint sources.

The TMDL program is technically complex and largely dependent upon the States for implementation. When TMDLs are established, wastewater treatment plants for communities and industry may need new technology. States and EPA enforce the TMDLs through permits which include the pollutant limits and a schedule for compliance. For waters impaired by nonpoint source runoff, because there are no Federal controls over these sources under the Clean Water Act, the primary implementation measures will be State-run nonpoint source management programs coupled with State, local, and Federal land management programs and authorities. See 33 U.S.C.A. 1329.

Most States have lacked the money to do TMDL analyses, which involve a complex assessment of point and nonpoint sources and mathematical modeling. Moreover, the cost of reducing the pollutants may become a factor. " [A] large number of the nation's waters cannot meet water quality standards with point-source control alone. In some cases, it may be cost prohibitive to reduce point-source loading fur-

ther." Carl W. Chen et al., Decision Support System for Total Maximum Daily Load, 125 J. of Envtl. Engineering 653 (1999).

Meanwhile, the EPA has been reluctant to interfere with the States to move the TMDL program along The Agency also appears to have lacked the resources to do the TMDL analyses itself. Congressional commentators therefore have noted critically that there has been little implementation by the EPA or the States of the TMDL provision since 1979.

Illustrative of this point is the fact that in recent years, national and local environmental groups have filed more than 20 lawsuits against EPA, claiming the Agency has failed to fulfill its Clean Water Act requirements. The EPA is concerned about diverting agency resources from other high-priority water quality activities in order to meet the courts' orders, especially if other lawsuits yield similar results. In October 1996, the EPA created an advisory committee to solicit advice on the TMDL implementation problem. Recommendations from the advisory committee, received in July 1998, form much of the basis for the current TMDL rulemaking.

In 1997, the EPA Office of Water issued guidelines to the Agency's regional administrators in an effort to give greater impetus to the TMDL program. According to those guidelines, "If a State fails to meet its obligations under section 303(d), [the EPA regional offices] will need to step in. However, it is my goal that every State will succeed in fully meeting the requirements of section 303(d) and taking the needed action to implement approved TMDLs." Memorandum from Robert Perciasepe, Assistant Administrator for Water, to Regional Administrators, New Policies for Establishing and Implementing Total Maximum Daily Loads (TMDLs) (Aug. 8, 1997) (emphasis in original) .

Despite the issues and lack of progress in implementing the 1972 requirements, it is not clear at this point whether Congress will reauthorize the Clean Water Act in the 106th Congress in order to address the TMDL matters. But it is, of course, entirely up to Congress to determine which changes, if any, are needed in the current TMDL program.

B. PROPOSED REVISIONS TO THE PART 130 REGULATIONS

The EPA carries out the TMDL program under the Part 130 regulations (Water Quality Planning and Management). 40 C.F.R. Part 130. The overall purpose of the current water quality management program is to establish Federal policy requirements for water quality planning, management and implementation under the Clean Water Act. The Agency intends the management process is to be "a dynamic one, in which requirements and emphases vary over time." The TMDL program creates a process for identifying water-quality limited segments that require waste-load allocations under the NPDES permit program.

"A TMDL is established to attain or maintain the water quality standard for a specific pollutant that has been identified as the cause of an impairment or threat to a water body." See 64 Fed. Reg. at 46,030. States must set their TMDLs "at levels necessary to meet water quality standards[,] with seasonal variations and a margin of safety that takes into account any lack of knowledge concerning the relationship between pollutant loads and water quality." See id.

In the proposed rule, the EPA announces nine major changes to the current regulatory scheme under Part 130. The proposal would:

- Revise definitions of "TMDL," "wasteload allocation," and "load allocation."
- Amend definitions of "impaired water body," "threatened water body," "pollution," "pollutant," "reasonable assurance" and "water body" that clarify EPA's existing interpretation of these terms.
- Add a new requirement for a more comprehensive list and a new format for the list.
- Add a new requirement that States, territories and authorized Tribes establish and submit schedules for establishing TMDLs for all water bodies impaired or threatened by pollutants.
- Establish a new requirement that the listing methodologies developed by States, territories and authorized Tribes be more specific, subject to public review, and submitted to EPA on January 31 of every second, fourth or fifth year.
- Create a possible change in the listing cycle so that States, territories and authorized Tribes submit lists to EPA on October 1 of every second, fourth or fifth year beginning in the year 2000.
- Make it clear that TMDLs include 10 specific elements.
- Create a new requirement for an implementation plan as a required element of a TMDL.
- Establish new public participation requirements.

On the same date that the Agency proposed to amend the TMDL regulation, the EPA proposed a regulation to revise the National Pollutant Discharge Elimination System (NPDES) program to strengthen the overall Federal water quality management program. See Revisions to the National Pollutant Discharge Elimination System Program and Federal Antidegradation Policy in Support of Revisions to the Water Quality Planning and Management Regulation, 64 Fed. Reg. 46,058 (Aug. 23, 1999) (to be codified at 40 C.F.R. parts 122, 123, 124 and 131). This regulation would allow the Agency to object to a State's decision to allow an NPDES permit to lapse for discharges into impaired bodies of water with or without TMDLs. Specifically, the rule would spell out the Agency's "discretionary authority to object to, and reissue, if necessary, State-issued expired and administratively continued permits authorizing discharges into water bodies in the absence of an EPA[-]approved or [-]established TMDL." Likewise, it also would grant the Agency the discretion to issue NPDES permits for discharges into impaired bodies of water with established TMDLs. It needs to be stressed that the second proposed rule would not mandate a particular EPA regulatory response under the first proposed rule in the absence of specific TMDLs for discrete bodies of water in any State, regardless of the legal status of a discharge permit for given pollutants, however.

Additionally, the EPA has attempted in the August 23 proposed rulemaking to get at the remaining sources of pollution under the Act's section 319 management program for Nonpoint sources of pollution. These sources include agricultural runoff, which the Agency has identified in its most recent 305(b) report to Congress as one of the last remaining sources of unregulated pollution in the nation's lakes and rivers. See U.S. Environmental Protection Agency, The Quality of Our Nation's Waters: Water Quality Report to Congress (1998).

Critical to this effort to move TMDLs into the area of watershed protection is section 304(f), which requires the EPA to issue guidelines on how to identify and evaluate the extent of Nonpoint sources of pollutants and methods to control them, including pollution resulting from "agricultural and silvicultural activities, including run off from fields and crop and forest lands; . . ." See 33 U.S.C.A. 1314(f) (emphasis added). Thus, farmers, ranchers and other sources of Nonpoint discharges may be asked to use alternative methods in their operations to prevent fertilizers and pesticides from reaching rivers. See Congressional Research Service, Clean Water Act and TMDLs (1997). It is for this reason that "[t]he TMDL issue has been controversial, in part because of requirements and costs now facing States to implement this provision of the law. Industries, cities, farmers, and others may be required to use new pollution controls to meet TMDL requirements." See Congressional Research Service, Clean Water Act Reauthorization (1999).

C. THE PROPOSED TMDL RULE WOULD DELAY THE COMPLETION OF THE TMDL PROCESS FOR MANY YEARS IN VIOLATION OF THE CLEAN WATER ACT

One of ASCE's principal criticisms of the current TMDL program is the slowness with which States have developed their TMDLs. ASCE believes that the August 23 proposed rule on TMDLs would exacerbate the problem of long delays in the implementation of the program. The fact that the EPA might invoke the requirements of the second proposed rulemaking of August 23 and issue NPDES permits for those impaired waters where no TMDLs have been established in effect bypassing the requirements of section 303(d) could not solve the Agency's long-term problem caused by the lack of the lawful TMDLs, which are required by the Act. Nor could it provide any greater protection for human health and the environment. From a purely environmental perspective, the TMDLs are designed to help identify impaired waters in the first place: if there are no TMDLs, how is the EPA to know where to begin to issue or reissue permits? Without TMDLs there is no way for Federal or State regulators to set priorities or even to know which water bodies are most seriously impaired.

The EPA, then, must return to section 303(d) to establish rational answers to the national problem of impaired water bodies. We wish to stress that the requirements of section 303(d) are imperative, not discretionary; the section creates a positive duty which the States and, in their failure to act, the EPA were bound to obey expeditiously. The passage of nearly 30 years does not lessen the force of the mandate.

Although a great many routine administrative matters are committed to an agency's discretion, including a limited power to not enforce existing regulations, "Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers." *Heckler* v. *Chaney*, 470 U.S. 821, 833 (1985). A reviewing court, moreover, will uphold the deadlines established in an act of Congress absent specific language in the law granting an agency the flexibility to postpone a congressionally mandated regulatory requirement.

The mandatory nature of the TMDL requirements is beyond dispute. See, e.g., *Scott* v. *Hammond*, 741 F.2d 992, 998 (7th Cir. 1984) (holding that the Clean Water Act "undoubtedly imposes mandatory duties on both the States and the EPA"); *Alaska Center for the Environment* v. *Reilly*, 762 F. Supp. 1422, 1429 (1991) ("Section 303(d) expressly requires the EPA to step into the States' shoes if their TMDL submissions or lists of water quality limited segments are inadequate") aff'd sub nom. *Alaska Center for the Environment* v. *Browner*, 20 F.3d 981 (9th Cir. 1994); *Defenders of Wildlife* v. *Browner*, 909 F. Supp. 1342 (1995) (same); *Natural Resources Defense Council* v. *Fox*, 909 F. Supp. 153 (1995) (same); *Sierra Club* v. *Hankinson*, 939 F. Supp. 865 (1996) (same); *Raymond Profitt Foundation* v. *EPA*, 930 F. Supp. 1088 (1996) (same); and *Idaho Conservation League* v. *Browner*, 968 F. Supp. 546 (1997) (same). See also *Idaho Sportsmen's Coalition* v. *Browner*, 951 F. Supp. 962 (1996) (the "extreme slowness" of the EPA's proposed 25-year schedule for implementing TMDLs in Idaho would violate the Clean Water Act). EPA is under court order via consent decrees in at least 18 cases to complete TMDLs in 16 States. See U.S. Environmental Protection Agency, Total Maximum Daily Load Program, Overview of TMDL Cases (9/1/99).

The failure of the States to complete the program has been the subject of protracted litigation in Georgia, New York, California, Alaska and other States. Ironically, it was the States that urged adoption of the TMDL requirements, see Oliver A. Houck, TMDLs IV: The Final Frontier, 29 envtl. l. rep. 10,469 (1999). In addition, as one critic has noted,

> "[T]he States have badly breached their responsibilities to identify waters that remain polluted and then to promulgate total maximum daily loads (TMDLs) for these waters under 303(d) of the Act. The TMDL process is a crucial mechanism for ratcheting down levels of pollution in watercourses that fail to meet water quality standards despite the application of technology-based controls to point sources. The goal of the TMDL process is the central goal of the Clean Water Act to deliver truly clean water to Americans by identifying the additional controls that must yet be made to point and nonpoint sources in order to render waters suitable for uses such as fishing and swimming. Despite the importance of the TMDL process and the plain obligations it imposes on the States, the States have generally sought to avoid their duties in this area in an ignoble way. As one recent commentator put it, 'The States have been all in favor of the responsibility for regulating water pollution through their water quality standards, right up to the point that they had to do it.'"

Drew Caputo, A Job Half Finished: the Clean Water Act After 25 Years, 27 Envtl. L. Rep. 10,574 (1997) (emphasis added).

Moreover, the States' failure to carry out the TMDL program regardless of the reasons for their dereliction does not free the EPA from the responsibility of filling the gap left by the States in the regulatory scheme established by Congress. To fail to do so would be to allow the States the power to invalidate an act of Congress through inaction. Yet despite the abundant case law, the unambiguous mandate of section 303(d) and the fact that the EPA knows the TMDL program has moved at a "historically low" pace, the Agency's 1997 guidelines and proposed rule can only delay things further. The guidelines could well push the completion of the program even farther into the future by asking not requiring the States to develop their TMDLs over the next 13 years, beginning with program submissions in 1998. See Perciasepe Memorandum, supra ("These State schedules should be expeditious and normally extend from eight to 13 years in length, but could be shorter or slightly longer depending on State-specific factors.").

The TMDL rulemaking may well compound the problem of implementation for the future in other ways as well. Significantly, the proposed rule would remove from the Part 130 regulations the current EPA-imposed requirement that States identify the bodies of water for which TMDLs will be established in the 2 years immediately following a decision to set priority rankings for their impaired waters. Instead, the Agency would substitute a requirement that the States establish TMDL schedules "as expeditious[ly] as practicable," but not less than 15 years after the August 23 rule is promulgated. 64 Fed. Reg. at 46,027. Finally, the EPA "recommends" that States should make it their "goal" to establish TMDLs for their impaired waters within 5 years of the effective date of the revised Part 130 standards. Taken together, these steps do not appear to be picking up the TMDL program pace appreciably.

Therefore, despite the States' admittedly poor showing over the past 20 years, we continue to believe that the Agency should keep strict compliance deadlines in the Part 130 regulations. We are concerned that by eliminating the current deadlines in Part 130 and by authorizing a further slowdown of up to 13 years (as in the 1997

guidance) the EPA is sending the wrong signal to the States, potentially letting them off the Act's strict water-quality hook for many years and providing them with a legal excuse for additional, wholly unnecessary regulatory delays. Assuming that all States were to take until 2011 to complete their TMDL calculations, that would mean the program would not be in place nationwide until nearly 40 years after the TMDL requirement was enacted in 1972 and more than 30 years after the 1979 deadline triggered under section 303(d)(2).

Nothing in the Clean Water Act supports the proposition that Congress authorized or intended for the EPA or the States to delay the implementation of the TMDL program for decades after enactment. Indeed, the language of section 303 requires the States to adopt water quality standards, which must precede the adoption of TMDLs, 6 months after enactment, i.e., no later than April 1973. 33 U.S.C.A. 1313(a)(3)(A). With the science and engineering readily available to complete the program rapidly, there is no technical reason for continued delays.

For the foregoing reasons, we believe that Congress must make certain that the Agency establishes and enforces a strict schedule for the States to complete the implementation of their TMDL programs. We suggest that Congress amend the Clean Water Act to ensure that the Agency's recommended 5-year "goal" proposed on August 23 be in the form of a new, mandatory TMDL deadline. At the same time, we believe that Congress must conduct vigorous oversight of the TMDL program to guarantee that the EPA moves expeditiously to adopt State TMDLs in the absence of rapid Federal or State implementation of the proposed rulemaking.

D. THE EPA IS CORRECTLY ATTEMPTING TO USE THE TMDL PROGRAM TO REDUCE THE DISCHARGE OF POLLUTANTS INTO WATERSHEDS FROM NONPOINT SOURCES

The goal of the Clean Water Act is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C.A. 1251(a) (West 1999). One of the Act's stated objectives is to eliminate "the discharge of toxic pollutants in toxic amounts." Id. 1251(a)(3). Significantly for the present rulemaking, the Act specifically authorizes "programs for the control of nonpoint sources of pollution" and requires them to be developed as expeditiously as possible. Id. 125(a)(7).

As noted above, the EPA intends to use the TMDL program to focus on the management of point and nonpoint sources of pollution throughout a given watershed. The TMDL specifies the amount of a pollutant that needs to be reduced so that the waterbody will achieve State water quality standards, allocates reductions in the pollutant or pollutants among the sources in a watershed, and provides a guide to taking on-the-ground actions needed to restore a waterbody. TMDLs can focus on a small segment of a waterbody or on a group of waters in a larger watershed.

See Review of the Environmental Protection Agency's New Agricultural and Silvicultural Regulatory Programs: Hearing Before the Subcomm. on Department Operations, Oversight, Nutrition and Forestry of the House Comm. on Agriculture, 106th Congress 83 (1999) (statement of J. Charles Fox, Assistant Administrator for Water, Environmental Protection Agency) (emphasis added) (hereinafter House Agriculture Oversight Hearing).

Indeed, the Agency makes it clear that all potential pollutant sources already are subject to the TMDL program under current EPA Part 130 regulations. "TMDLs are established [under current rules] for water body and pollutant combinations for water bodies impaired by point sources, nonpoint sources, or a combination of point and nonpoint sources." 64 Fed. Reg. at 46,013 (emphasis added). To date, no nonpoint sources have been regulated as point sources under the National Pollutant Discharge Elimination System (NPDES). The August 23 proposal merely would extend some wasteload allocations for impaired water bodies to apply to a single point source or group of point sources that already are subject to a general NPDES permit. Id. at 46,016. These aggregate allocations covering permitted point sources are a sensible solution to the problem of managing runoff from multiple sources, none of which is easily identifiable by itself. This is a long way from saying that nonpoint sources would themselves be subject to an NPDES permit, however. Indeed, nonpoint sources will be subject to nothing more stringent than nonregulatory, cost-effective "best management practices" (BMPs) to prevent runoff in the first place, according to the Agency's August 23 proposed revisions to water quality management plans. See 64 Fed. Reg. at 46,052–46,053. Possible BMP prevention measures could include curbs, dikes, water bars, vegetative ground cover to prevent erosion, rotational grazing, crop rotation, in-paddock livestock feeding and watering, better calculation of fertilizer and pesticide needs, ditch stabilization and a number of other affordable runoff control means.

Nevertheless, critics in Congress, the States and industry have attacked this BMP approach as wrong, arguing that the EPA may not extend the TMDL program under

the State-delegated powers in section 319 to reach any nonpoint sources in order to moderate the impact of runoff from farms and forests, no matter how indirect or benign the proposed regulatory regime. See, e.g., House Agriculture Oversight Hearing at 7 (statement of Rep. Goodlatte) ("I sincerely doubt that the EPA will be able to prove . . . that they have [sic] the statutory authority to implement the regulations we are reviewing today."); at 18 (statement of John Barrett, Texas cotton farmer); and at 25 (statement of Arthur R. Nash Jr., Deputy Director, Michigan Department of Environmental Quality) (criticizing the TMDL proposal for failing to establish a Federal-State partnership). It has even been argued that the EPA may not identify those waters that have been impaired by nonpoint sources. Id. at 106.

Such criticisms are unwarranted. One of the central purposes of the Act is to control nonpoint sources of pollution from whatever source. To be sure, section 319 of the Act, added by Congress in 1987, requires the States to implement management programs for nonpoint sources of pollution. The Federal presence under section 319 is weak and almost entirely passive. To make matters worse, Congress chronically has underfunded the section 319 programs. See Note, Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future, 20 harv. envtl. l. rev. 515, 526 (1996). Nevertheless, Congress recognized the need for some action to regulate nonpoint sources. Thus, a key element of the section 319 management program is the information developed under the water quality standards provisions of section 303. And of course the law requires the Agency not the States to issue guidelines on the best way to identify nonpoint sources of pollution. See 33 U.S.C.A. 1314(f). One type of pollutant that is specifically to be regulated under the Act is "agricultural waste discharged into water." Id. at 1362(6).

ASCE believes that one should not read section 319 in isolation in order to shield nonpoint sources from BMPs or to prevent the EPA from otherwise seeking to ease the worst effects of nonpoint sources of pollution based upon a watershedwide approach under the section 303(d) TMDL program. It is a well-established maxim of statutory interpretation that every act of Congress must be read in its entirety in order to give effect to a coherent regulatory scheme. Acts of Congress "should not be read as a series of unrelated and isolated provisions." *Gustafson* v. *Alloyd Co.* 513 U.S. 561, 570 (1995). Read in their entirety, the provisions of the Act require the EPA to oversee the implementation of State pollution control measures for nonpoint sources and to intervene aggressively in their absence.

In any case, the States cannot now plausibly argue that their failure over the past 30 years to adopt the protective watershed protection measures required under section 303 somehow entitles them to greater deference to deal with agricultural runoff and other nonpoint pollution sources under their section 319 authority. The State management programs under section 319 are highly dependent upon the information developed in the section 303 planning process. If the Federal-State partnership has been threatened at all, it has been jeopardized by the States' delinquency in implementing the TMDL program enacted in 1972.

E. THE EPA SHOULD IMPROVE THE SCIENTIFIC VALIDITY OF TMDLS BY ADOPTING A NEW METHOD OF CALCULATING THE LOADS IN ORDER TO PROMOTE THEIR USE ON A WATERSHED BASIS

ASCE supports the use of a watershed management program to protect critical water bodies. The Society believes the EPA should consider the adoption of a decision support system to calculate total maximum daily loads and agrees that the Agency should redefine them in order to identify what a TMDL is and what it must contain. We believe these changes would provide greater regulatory clarity, encourage the use of TMDLs and ensure greater consistency among States, territories and authorized Tribes in the use of TMDLs so that the program may protect entire watersheds where necessary and possible. See Michael M. Wenig, How "Total" Are "Total Maximum Daily Loads"? Legal Issues Regarding the Scope of Watershed-Based Pollution Control Under the Clean Water Act, 12 Nl. Envtl. 1.j. 87 (1998) (concluding that the TMDLs process "should be pursued to the fullest practical extent because it provides a technical, flexible framework for addressing cumulative sources of watershed harm; in short, it promotes an ecosystem approach").

ASCE strongly supports basin-wide water resources management. The Society encourages all government agencies charged with implementing the Clean Water Act to manage and regulate water on a watershed basis. ASCE further supports integrating programs and goals across political boundaries. Any Federal regulations defining the goals and standards for watershed management should permit flexibility and accommodate regional needs, however.

In order to provide greater scientific certainty, ASCE strongly recommends that the Agency consider the adoption of a new method for calculating TMDLs. We be-

lieve that EPA and the States ought to follow a decision support system that goes beyond the established watershed modeling program the BASINS model now used by the government to analyze a watershed approach to TMDL development.

BASINS is strictly a simulation model, which provides no guidance on how to calculate TMDLs. Following the traditional command and control approach, BASINS is used by regulatory agencies to make analyses and decisions on TMDLs. The new environmental policy, however, requires a change in the way TMDLs are determined and implemented. . . . As an alternative to BASINS, a decision support system has been developed hat goes beyond a watershed model. It includes a road map for stakeholders to follow and provides scientific information along the way. Chen, supra, at 653 (emphasis added).

A dynamic watershed simulation model such as is contained in the Watershed Analysis Risk Management Framework (WARMF) described in the recent literature accounts for meteorology, point-source loads, reservoir flow release, flow diversion data and, significantly for this rulemaking, air quality. Integration of the effects of air pollution in the calculation of TMDLS for impaired water bodies is important, given the EPA's acknowledged lack of hard data on this problem. See 64 Fed. Reg. at 46,022 ("EPA recognizes that data, analytical approaches and models to establish TMDLs for pollutants originating from air deposition may not be immediately available, especially for pollutants subject to long range transport in the atmosphere.")

The dynamic watershed simulation model within the WARMF is superior to the BASINS model. It is easy to adapt the model to any "real" river basin and check the results against observed data because all observed data were collected under dynamic conditions. WARMF allows its users to specify the intended use and the criteria to be met. It then calculates the TMDL to protect the intended use of the water body. The model's graphical user interface makes it easy for stakeholders, not just technical experts, to run and to understand. In addition, WARMF can calculate multiple possible TMDL solutions, allowing stakeholders to negotiate the most acceptable solution. The model has an algorithm to evaluate pollution trading between point and nonpoint source loads. Each of these features is necessary in order to calculate the proper TMDLs under the EPA's guidelines.

In addition to its scientific and engineering capabilities, the WARMF would aid in the calculation of TMDLs to a greater degree of certainty and ensure the adoption of a consensus watershed management plan.

Mr. Chairman, that concludes our prepared remarks. We would be pleased to answer questions from the subcommittee. If you have any questions, please contact Michael Charles of our Washington Office at (202) 789–2200 or by E-mail at mcharles@asce.org.

STATEMENT OF THE INTERSTATE COUNCIL ON WATER POLICY

On behalf of the Interstate Council on Water Policy (ICWP), an organization representing States and interstate water resource management organizations across the country, we would like to submit the following testimony for the record for the March 1, 2000 Fisheries, Wildlife and Water Subcommittee hearing on the Total Maximum Daily Load regulations proposed on August 23, 1999.

ICWP is committed to seeking more comprehensive and coordinated approaches to water management that integrate quality and quantity concerns, ground as well as surface water management, and economic and environmental values. It is within this context that the following testimony and comments on the rulemaking have been developed.

FLEXIBILITY AND THE STATE ROLE IN IMPLEMENTING THE PROGRAM MUST BE STRENGTHENED

In order for the TMDL program to be effective, flexibility and consistency with existing statutory authority is critical in the nonpoint source arena and must be provided in the final TMDL regulations. The final rulemaking needs to adequately reflect the partnership established with the States under the 1972 Clean Water Act. It is important to note that the Federal Water Pollution Control Act (section 101(b) gave States "the primary responsibility and rights . . . to prevent, eliminate, and reduce pollution." As proposed, the regulations do not reflect this leadership role for States outlined by Congress. State and interstate organizations must be afforded greater flexibility and resources to support their important role in implementing this critical program.

If the TMDL program, in fact, utilizes a watershed approach to reduce pollution, then State and interstate organizations need to have the primary role in implementing this program. Since those entities are better suited to that role than the Federal

Government, it is critical that sufficient flexibility be granted to States and interstate organizations, in order to account for and address local site-specific factors which deviate from the national perspective.

CURRENT FUNDING IS INADEQUATE TO CARRY OUT THE PROGRAM

ICWP is very concerned about the lack of sufficient funding to support the far-reaching efforts required in the proposed rule. Resources are already strained at the State, interstate and local levels with the onset of new water quality regulations, with the most recent being the NPDES Phase II stormwater program.

ICWP supports the conclusions reached by other State organizations that funding for Section 106 and 319 program assistance must triple to carry out the proposed TMDL effort. If this program is to be a national priority, then adequate funding must be provided at the Federal level for implementation. There also needs to be a strong recognition of the important role that interstate river basin organizations will assume in this program and EPA should direct adequate funding to such organizations so they may carry out this role.

FLEXIBILITY NEEDS TO BE PROVIDED FOR TMDLS ON INTERSTATE WATERS

Lack of flexibility provided to the States to develop TMDLs is particularly evident in the rulemaking's approach to addressing interstate waterbodies.

ICWP urges U.S. EPA to recognize the role that interstate organizations can play in implementing the TMDL program. Most existing interstate river basin commissions are set up on a watershed basis and provide an excellent means for coordinating water quality efforts among political jurisdictions sharing the watershed. The TMDL rulemaking provides an opportunity for EPA to urge States to work through interstate river basin organizations to secure agreement on management approaches and maintain consistency across State lines. Interstates provide a good forum for conflict resolution.

Although EPA notes that it considered a variety of options for establishing TMDLs on interstate waterbodies, the proposed rulemaking simply states that EPA may establish TMDLs for such waterbodies. ICWP instead urges that the agency take a more flexible approach to the issue, which urges interstate cooperation which will ultimately make the program more successful in such waters.

The States should decide whether or not EPA should become directly involved in the development of TMDLs on interstate waters. Some interstate water issues may be relatively simple and could easily be resolved by the neighbor States. In more complex situations, States should have the option of requesting EPA's involvement or utilizing interstate river basin organizations to develop the TMDLs. This flexibility for interstate water issues needs to be an integral part of the TMDL regulations.

States and interstate organizations are ready and willing to take up the challenge of implementing Section 303(d). However, their ability to establish and implement TMDLs is threatened by the heavily prescriptive process expected by EPA and espoused by these regulations. If the Federal Government expects restoration of water quality in impaired waters over the next decade, it would be better served by directing sufficient financial resources to the States and interstate organizations, maintaining a flexible framework in addressing complex pollutant impairments and investing time to learn the variations in water and water quality across the nation, rather than expect conformity to a Federal template.

ICWP's membership includes many interstate river basin organizations, who would be prepared to discuss this issue in further detail with subcommittee staff.

ICWP appreciates this opportunity to submit this testimony and urges that you contact Executive Director Susan Gilson at 202–218–4133 if you would like further clarification on any of these issues.

STATEMENT OF THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES

The National Association of Flood and Stormwater Management Agencies (NAFSMA) appreciates the opportunity to provide testimony on the Total Maximum Daily Load rulemaking proposed by the U.S. Environmental Protection Agency on August 23, 1999. NAFSMA represents more than 100 local and State flood control and stormwater management agencies and has a strong interest in the development of this program. Our membership has been committed over the last two decades to provide for recognition of the unique nature of municipal stormwater discharges.

NAFSMA appreciates the subcommittee's interest in this broad-reaching national program.

Rainwater falling on cities and flowing through the local storm drainage system and eventually into streams, rivers and lakes is a non-point source pollution problem that differs fundamentally from point sources of discharge such as public sewage treatment plant effluent. EPA officials have made it clear to NAFSMA members that the proposed TMDL regulations address storm water because storm water is regulated as a point source and permitted under the National Pollutant Discharge Elimination System (NPDES).

NAFSMA is very concerned that this proposed TMDL regulation fails to recognize the original intent of Congress to address stormwater differently than traditional point sources. The existing Clean Water Act requires the reduction of pollutants in municipal stormwater to the maximum extent practicable. The law does not require numeric effluent limitations for stormwater, an issue recently upheld in stormwater litigation in the Ninth Circuit Court of Appeals (see below).

LACK OF STATUTORY AUTHORITY FOR KEY ELEMENTS OF THE PROPOSED REGULATION

We support the goals of the Clean Water Act which have led and will continue to lead to improvement of the nation's waters and acknowledge the position in which U.S. EPA has been placed by litigation to publish these regulations. However, our membership is concerned about a number of key provisions in this regulatory proposal and questions whether the agency has the statutory authority to issue some of these requirements. Among these questionable requirements is the listing of threatened and impaired waterbodies and the requirement for offsets included in the NPDES section of the rulemaking.

NEED FOR INCLUSION OF APPROPRIATE LOCAL GOVERNMENTS IN THE PROCESS

States must have the dominant role in the TMDL program and must involve local governments in the TMDL process at the option of the appropriate local jurisdiction. NAFSMA urges that the final regulations outline a role for local officials or their representatives in the review of the methodologies and ultimately the TMDLs affecting waterbodies within their jurisdictions. This being said, however, NAFSMA members do support the States' role in setting the TMDLs and feel that EPA's authority to approve the TMDLs should be limited. CWA Section 303(d)(2) only requires EPA to approve or disapprove the State's list and load; it does not provide for a detailed review of the State's implementation process.

LACK OF RECOGNITION OF THE UNIQUE NATURE OF STORMWATER DISCHARGES

In general, there appears to be a lack of recognition in the TMDL regulations that stormwater discharges are by their nature different than point source discharges. EPA representatives have asserted that under the TMDL program, municipal stormwater discharges are considered a point source. This issue in itself leads to a number of technical issues related to the stormwater regulation. For example, the question of how to determine load reductions for stormwater will be critical and extremely complex.

Another related technical issue is the need to allow beneficial use attainability analyses (UAA) as a requirement of the TMDL process and submittal when requested by the appropriate local jurisdictions. Specifically the UAAs should be added as an element in Section 130.33(b)(1) of the proposed rule (which addresses the minimum elements of a TMDL submittal to EPA). The inclusion of the UAA analyses will help to ensure that TMDLs are based on best available science, consistent with community values and are historically sustainable. The inappropriate identification of attainable uses would have a severe impact on the success of the TMDL program and will lead to unachievable allocations.

TMDLS NEED TO BE BASED ON SOUND SCIENCE

Although NAFSMA supports State primacy in the TMDL program, our membership supports regulations leading to thorough scientific/peer review of the methodologies used by the States in developing the TMDLs. The TMDLs developed by the States must be based on sound science and must meet acceptable scientific standards.

LANGUAGE NEEDS TO BE INCLUDED TO REFLECT THE NINTH CIRCUIT COURT DECISION ON STORMWATER PERMITS

As proposed in August 1999, the regulation fails to include language reflecting the September 15, 1999 court opinion issued by the U.S. Court of Appeals for the Ninth Circuit on a case involving five Arizona NPDES stormwater permits (Case No. 98–71080). In this case the Ninth Circuit ruled that by statute, stormwater discharges

are to be subject to the maximum extent practicable goal, rather than strictly being subject to numeric effluent limits which apply to traditional point sources. Under this court ruling, the application of a TMDL with a numeric effluent limit for stormwater discharges would be inappropriate. The NAFSMA membership urges that municipal stormwater systems be classified as nonpoint sources subject to best management practices as called for by Congress under section 402(p) of the Clean Water Act.

LOCAL DISPROPORTIONATE SHARE

If EPA continues to consider urban runoff as a point source, NAFSMA is very concerned that municipalities will be allocated a disproportionate amount of TMDLs. Atmospheric deposition issues will lead to an even greater burden for the TMDL program being placed on localities. Local governments shouldn't be held responsible for atmospheric deposition over which they have no control. This approach, as well as holding the local governments responsible for other nonpoint sources out of their control, will lead to an even greater burden on municipalities.

It is also important to note that the cost for stormwater discharges to attempt to meet water quality standards, rather than maximum extent practicable (MEP), would be astronomical. Unfortunately, the cost for requiring stormwater discharges to meet water quality standards was not even reflected in EPA's cost estimates of the TMDL program. According to an American Public Works Association Southern California Chapter study from May 1992, the nationwide capital cost for construction to meet numerical discharge limits to achieve water quality standards was $407 billion (1992 dollars). The associated annual operating and maintenance cost would be $542 billion (1992 dollars).

STATUTORY INCONSISTENCY WITH TMDL DEFINITION

It's important to note that EPA's definition of a total maximum daily load differs from the Clean Water Act definition. The CWA definition states that "such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." The definition proposed by U.S. EPA in August states that a TMDL is "a written analysis of an impaired waterbody established to ensure that water quality standards will be attained and maintained throughout the waterbody in the event of reasonably foreseeable increases in pollutant loads." The agency's definition is inconsistent with the law. NAFSMA supports the use of the statutory definition of TMDLs, which does not create speculation and limitations related to growth in the watershed.

LISTING OF THREATENED AND IMPAIRED WATERS

NAFSMA is opposed to the listing of threatened waterbodies and waterbodies impaired only by pollution. The proposed rules go beyond the statutory authority provided for listing requirements under Section 303(d)(1)(A). By law, TMDLs establish the maximum amounts of pollutants a waterbody can tolerate without impairing designated uses. As proposed, this rulemaking extends the TMDL program authority to waterbodies that are not in fact impaired by pollutants. The requirements of 130.27 should only include waterbodies impaired by pollutants that are known. Threatened waterbodies should be excluded from the State's TMDL list. Placing threatened waterbodies on the TMDL list can lead to a legally enforceable lawsuit to develop a TMDL for a waterbody that is not impaired. Threatened waterbodies can be placed on the State's 305 (b) report where they can be tracked if required. It is also suggested that waterbodies listed on the TMDL list be allowed to be removed at any time not just during the next listing cycle as required by 130.29. Failure to remove a listed waterbody may lead to a TMDL which may not be required.

NAFSMA is opposed to listing of waters solely impaired by pollution. Section 303(d) does not authorize EPA to require listing only for pollution. The CWA only provides for listing based on pollutants.

NPDES PROGRAM AND FEDERAL ANTIDEGRADATION POLICY—OFFSETS

NAFSMA members are concerned that the proposed regulations would create unauthorized Federal restrictions on development and growth. Our members are opposed to the requirement for offsets for new storm drainage outfalls. There is no legislative authority for this program and NAFSMA believes this runs counter to Congressional intent. Any expansion of Federal authority over local land use deci-

sions must be established through Federal legislation, not through regulatory rulemakings.

NAFSMA urges that NPDES permits for municipal stormwater discharges be specifically excluded from the 150 percent offset requirement for new dischargers and significantly expanding discharges. This action would be appropriate since there is no basis in the Clean Water Act for restrictions on new or expanding municipal stormwater discharges.

NAFSMA believes that the proposed policy on antidegradation at Section 131.12 also goes beyond, and runs counter to, existing statutory authority. States are currently granted full authority over the adoption of their antidegradation policies under the Clean Water Act. Once again, this change would need to be made legislatively, not by regulation.

The proposed requirements would also potentially require all new construction sites to be classified as new dischargers requiring offsets. It is suggested that the definition of new discharger be revised to be consistent with CWA Section 306 for new source which does not include outfalls and pipelines. Under that definition, new source pertains to industrial sources subject to a "standard of performance." Failure to revise the definition will effectively stop construction projects unless offsets can be obtained.

LACK OF ADEQUATE CONGRESSIONAL REVIEW OF THE TMDL PROGRAM

In closing, the NAFSMA membership is extremely concerned that the full impact of the TMDL program has not been properly analyzed and reviewed by Congress. TMDLs were created to be one of the tools for attaining water quality, not the primary tool, and are not appropriate for all sources in the watershed. As we understand from our discussions with EPA staff, the cost of the inclusion of stormwater discharges in the program was not reflected in the cost estimates to date. We feel that the costs of including stormwater discharges in the TMDL program will be astronomical.

NAFSMA is concerned that the funding that will be directed to this program to address stormwater would be spent more cost-effectively in areas where we have the science and technical capability to tackle significant water quality issues. We are asking that there be a thorough Congressional review of the proposed regulations and their expected impacts before the program moves forward. To finalize a program of this scope by summer 2000, without adequate congressional review of its impacts on States and local governments, would be inappropriate.

Please feel free to contact NAFSMA Executive Director Susan Gilson at 202–218–4133 or Stormwater Committee Chairman Scott Tucker at 303–455–6277 if you have any questions on this testimony.

STATEMENT OF HON. BOB GRAHAM, U.S. SENATOR FROM THE STATE OF FLORIDA

Mr. Chairman, thank you for the opportunity to speak to you regarding the EPA's proposed Total Maximum Daily Loads (TMDL) regulations.

I am also pleased to extend a welcome to Mr. Jeff Pardue, of Florida, who is the Director of the Environmental Services Department for Florida Power Corporation. Mr. Pardue will be presenting testimony to the subcommittee on behalf of Florida Power Corporation, the Edison Electric Institute and the Clean Water Industry Coalition.

Mr. Chairman, if I look back over the past several decades it is incredible how far we have come in achieving real progress on environmental protection with respect to air, water, solid and hazardous waste matters.

I am concerned, however, with the proposed TMDL regulations. In a letter to the EPA Administrator dated January 19, 2000, Florida Secretary of Environmental Protection David Struhs identified several issues of concern with the proposed TMDL regulations.

Mr. Struhs expressed the view that the responsibility for development of non-point source controls rested with the States and that the proposed regulations represented a significant, unwarranted expansion of the regulatory approach to control such sources.

He also noted that EPA should reconsider its proposed regulatory approach, if only for practical reasons in view of the large number of non-point sources that would need to be regulated.

For these reasons, and others discussed in the letter to the EPA Administrator, Mr. Struhs suggests that EPA adopt a voluntary, technology based approach to non-point source control.

Finally, Mr. Struhs notes that the State of Florida adopted its own TMDL related legislation which prescribes a comprehensive voluntary strategy for the non-point source component of waterbody TMDL's.

The Florida TMDL legislation establishes incentives for non-point source sources implementing best management practices.

I urge the EPA to review the State of Florida comments on the proposed TMDL regulation.

Thank you Mr. Chairman. I look forward to working with the subcommittee on this important issue.

STATEMENT OF HON. GORDON SMITH, U.S. SENATOR FROM THE STATE OF OREGON

Mr. Chairman, I appreciate the opportunity to appear before the subcommittee today to discuss the Environmental Protection Agency's proposed rules regarding the Total Maximum Daily Load (TMDL) program under Section 303(d) of the Clean Water Act. These rules, proposed last August, would be a radical rewrite of the TMDL program, and would affect how States implement the entire Clean Water Act.

I also appreciate your leadership on this issue, Mr. Chairman. I think that the Environmental Protection Agency (EPA) has exceeded its statutory charge in proposing these rules, and congressional oversight is therefore required. As you know, last session I led the fight to extend the comment period on these proposed rules. Initially, EPA was only going to provide a 60-day comment period for this complex rulemaking that seeks to regulate a number of industries and activities not previously regulated under the TMDL program.

I authored an amendment, accepted by the managers of the VA/HUD and Independent Agencies Appropriations bill, that extended the comment period by 90 days.

Given the 30,000 comments the agency received, I think that the additional time Congress mandated for the comment period was definitely warranted. It is my understanding that EPA heard from a wide range of interests that were critical of the proposed rules, including: other Federal agencies, State and local governments, manufacturing interests, landowners and others.

In sum, these comments point out that EPA is proposing to use a sledge hammer when a fly swatter would do.

I know that a broad range of stakeholders are testifying before the subcommittee today. Therefore, I want to focus my comments on the concerns raised by private forest landowners in my State, who are already required to operate using best management practices under the landmark Oregon Forest Practices Act.

Under these proposed rules, a number of nursery and forestry practices would no longer be categorically excluded from the definition of "point source." These activities include: nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance.

Instead of being categorically excluded, selected sources could—on a case-by-case basis—be designated as point sources for regulation under the National Pollution Discharge Elimination System (NPDES) permit program for storm water discharges.

This is a complete reversal from the treatment for the last 27 years of forestry practices as non-point sources under the Clean Water Act. The implications of this reversal are staggering for the millions of private forest landowners in my State and across the nation.

I believe that EPA has significantly underestimated both the costs to the landowner and the time that it would take to obtain permits under this proposal.

The specter of a State or Federal permitting system for each management action needed on a stand of trees throughout its rotation is truly frightening. EPA reserves the right to take over any State's TMDL program, which would mean that landowners would then need to obtain a Federal permit, potentially subjecting those permits to consultations under the Endangered Species Act.

Further, under the Act, landowners could be subject to fines of up to $27,500 a day, as well as to citizen lawsuits, for alleged permit violations.

A number of State agencies have raised concerns about the high cost of implementing and administering this program. It is unlikely that sufficient State resources would exist to administer such a permit program in a timely manner. Currently, on the average, it takes several years from the time of making application for an NPDES permit before a landowner receives a permit.

Adding forestry activities to the NPDES pipeline will only exacerbate this problem and reduce effective forest management, since many forestry activities are extremely time sensitive and weather dependent. For example, insect infestations,

wildfires, and blowdowns are unpredictable occurrences that must be dealt with in a timely manner.

We all share the goal of clean water, and our Nation has made great strides in cleaning up polluted waterways since the passage of the Clean Water Act.

However, the EPA has failed to demonstrate that changing the treatment of everyday forestry activities to point sources of pollution is warranted. In fact, EPA has recognized forestry activities to be a consistently minor source of water quality impairment, as cited in EPA's 1996 National 503(b) Report.

In my State of Oregon, there are about 28 million acres of forestland, representing 45 percent of Oregon's land base. Sixty percent of Oregon's forestland is publicly owned, while 40 percent is privately owned.

Oregon's private forestland is regulated under the 1972 Oregon Forest Practices Act, which established a visionary new standard for forest management. Public forestland in Oregon is protected at a level at least equal to that provided by the Oregon Forest Practices Act. As a result, all of Oregon's forestlands are already required to provide protection to streams, lakes and wetlands. These regulations are unnecessary and will ultimately be detrimental to forest health.

In closing, let me State that I have concerns about these proposed rules both substantively and procedurally. I have summarized my substantive concerns above. But I am also concerned that EPA has failed to fulfill a number of the requirements for promulgating a major rule such as this.

I am not sure EPA has accurately assessed the costs of these proposed rules on State and local governments, as required under the Unfunded Mandates Act of 1995.

Further, that Act requires the agency to consider reasonable alternatives and to select the least costly, most cost-effective or least burdensome of the alternatives, or explain why such alternatives were not chosen. I am not confident that any alternatives will be considered.

I am not sure the Administration has adequately examined the cost of these rules on small businesses, as required by the Treasury and General Government Appropriations Act for fiscal year 2000.

The arrogance with which EPA initially proposed only a 60-day comment period is exceeded only by the arrogance of claiming it will finalize these rules by the end of June. EPA's statutory authority to promulgate these rules is questionable at best, and too many issues have been raised by the comments to be addressed so quickly.

I believe there is another agenda here at work. The issue isn't clean water, it is the Federal regulation of private lands, which has historically been the purview of State and local authorities.

Every Member of Congress should be concerned about the proposed regulation of forestry under these rules, because if they are successful in regulating nursery and forestry activities, the regulation of agricultural practices is not far behind.

PROPOSED RULE CHANGES TO THE TMDL AND NPDES PERMIT PROGRAMS

THURSDAY, MARCH 23, 2000

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON FISHERIES, WILDLIFE, AND DRINKING WATER,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 406, Senate Dirksen Building, Hon. Michael D. Crapo (chairman of the subcommittee) presiding.

IMPACT ON THE STATES

Present: Senators Crapo, Thomas, Wyden, and Bob Smith [ex officio].

OPENING STATEMENT OF HON. MICHAEL D. CRAPO, U.S. SENATOR FROM THE STATE OF IDAHO

Senator CRAPO. The hearing on the proposed rule regarding total maximum daily loads, the TMDL Program, impacts on the regulated community by the Subcommittee on Fisheries, Wildlife, and Water is formally started.

Today the Subcommittee on Fisheries, Wildlife, and Water is holding its second hearing in a series to examine the proposed changes to the total maximum daily load and NPDES programs under the Clean Water Act.

Today, we will examine impacts on the regulated community. In addition to representatives of the regulated community, I am pleased that a number of my colleagues have joined us to offer their thoughts on the proposed rule.

The General Accounting Office will offer their testimony on their recently published report describing the lack of data available for the establishment of TMDLs as well as the unreliability of the data. We will also hear perspectives from members of the environmental community.

Earlier this month we heard concerns expressed by representatives of State agencies charged with implementing the TMDL program. Despite the very serious concerns of those State agency officials, we heard the EPA State very clearly that the agency intended to publish its final rule by June 30 of this year.

In fact, in our last hearing it was clear that if necessary the EPA would request that OMB expedite review of the final rule which would short-circuit OMB's standard 90-day timeframe for reviewing major rules.

I am deeply disturbed by this. Fast-tracking the proposed TMDL disregards both the stakeholders most effected by this rule and the authority of Congress.

Because of the magnitude of this issue, we have more witnesses testifying today than is the norm. In the interest of time I am going to make my remarks brief, but I believe that it is important to reiterate that the EPA is without question fast-tracking the final publication of this rule.

After the rule was proposed in August of last year the EPA provided a 60-day public comment period on the proposed rule. Sixty days for an extremely complex rule with enormous implications for States, communities, industries, and stakeholders to absorb, understand and respond.

The comment period was finally extended and by the time the comment period ended on January 20, the agency had received 30,000 public comments. In the time since the proposed rule was published, five congressional hearings have been held. At each of these hearings, witnesses have expressed serious concerns with regard to the rule being proposed.

They have indicated that the rule would force States to bear enormous costs if implemented; that imposing a top-down program with little flexibility for local initiatives and consideration of complex site-specific conditions would impede rather than improve water quality; and that a major limiting factor in cleaning up our Nation's waters is a lack of resources.

In looking over the testimony for today's hearing, I cannot say that I was surprised to see that the concerns with this rule are very consistent.

What I fail to see is the demonstrated need for fast-tracking this rule.

In order to be successful in our goal of cleaning up our Nation's water, it is absolutely essential that we consider the concerns and recommendations of stakeholders and act accordingly.

I appreciate our witnesses who are here with us today and look forward to understanding their concerns in greater detail.

With that, Senator Wyden, do you have any comments?

OPENING STATEMENT OF HON. RON WYDEN, U.S. SENATOR FROM THE STATE OF OREGON

Senator WYDEN. Thank you, Mr. Chairman. Mr. Chairman, I commend you for holding another hearing on this. I think we are making it clear that on a bipartisan basis we do want an alternative to EPA's approach.

I am very much looking forward to our colleagues, both of whom know a lot about these issues and particularly about the forestry field.

I would just have a couple of comments. As you know, Mr. Chairman, on March first I proposed a three-part alternative to the approach advanced by the Environmental Protection Agency and I was very pleased that Governor Roscoe, representing the Western Governor's Association, essentially said that he would support that three-part alternative.

It seems to me the first thing we ought to focus on is increased support, increased funding for the best management practices approach to control pollution.

I note that a number of the sites in Arkansas, for example, have essentially the same problem that we have in Oregon. We have problems in Arkansas, in Oregon associated with sediment.

Now, best management practices, the forestry folks tell us that controlling of sediment isn't rocket science. It involves approaches like leaving tree buffers along the side of the streams, but this can be very expensive for the small landowner to do.

It seems to me one of the things that we could go forward with is a part of a bipartisan alternative to what EPA is talking about, that is, additional funding for the best management practices approach.

My sense is that it would do a lot for Oregon and Idaho and Arkansas and places where forestry is driving this debate and Governor Roscoe was very comfortable with that approach.

Second, it seems to me that we ought to be looking at watershed management approaches, particularly allowing landowners to meet their obligations under the Clean Water Act and the Endangered Species Act, both of which our subcommittee has jurisdiction over, using a single land management plan.

It is going to be increasingly important to coordinate what these various agencies do. This is another area where Governor Roscoe would support it.

Finally, it seems to me that we ought to have a flexible approach to pollution budgets so that plans can be revised as more scientific data becomes available.

In effect, the General Accounting Office report made clear to us that we will be required, as time goes forward, to revise pollution budgets as more data becomes available. Oregon is now using this kind of approach, what is called a "phased approach," to in effect work on trying to come up with constructive solutions now while working to go forward to implement additional approaches as more data becomes available.

I am looking forward to hearing from our two colleagues who do know an awful lot about it. As I was looking over those Arkansas sites and their problems, it certainly resonated to me because it was essentially the same thing we are hearing from small landowners in the forestry sector at home in Oregon.

We have a bipartisan front on that side of the dais and a bipartisan front on this side of the dais. So, we ought to be able to get something done here to come up with a constructive alternative to the EPA program that does improve water quality, provides benefits for endangered species, but also minimizes the burden and some of this bureaucratic water torture on the small landowner on whom we all have a lot of them in our States.

Mr. Chairman, I look forward to working with you and our colleagues.

Senator CRAPO. Thank you very much, Senator Wyden. I appreciate your notice of the fact that this is bipartisan on both sides of the dais here. As you know, we have spoken together about how we can work to find a bipartisan solution to this problem.

I also find your analysis of it as "water torture" very appropriate.

Our first panel today is Senator Tim Hutchinson from Arkansas and Senator Blanche Lambert Lincoln from Arkansas. Joining us later will be Senator Gordon Smith of Oregon.

We welcome you here today. Senator Gordon Smith from Oregon was going to be with us, but his schedule has precluded that. I am sure that he will submit some written testimony for the record.

Let us begin immediately. Senator Hutchinson, would you proceed?

STATEMENT OF HON. TIM HUTCHINSON, U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator HUTCHINSON. Thank you. Thank you, Mr. Chairman and Senator Wyden. I want to thank both of you for your opening statements and your strong concern about this issue.

Senator Crapo, thank you for calling the hearing today and the series of hearings that you have had. I want to thank the subcommittee for allowing me to speak on behalf of my Arkansas constituency.

I am here because of an unprecedented outcry from my State in response to the EPA's August 1999 proposal to expand the total maximum daily load and the National Pollutant Discharge Elimination System Permitting Programs.

In my years in the House and Senate, I have never experienced the kind of public involvement, public outcry as I have seen and evidenced in recent weeks in the State of Arkansas.

I believe it is the intent of the EPA to treat traditional agriculture and forestry activities as potential point source polluters. I think if you look at their web page on the TMDL Program there can be no mistaking what the intent is, where they say:

> The proposed regulations would accomplish this goal by revising the existing regulations to provide EPA the authority to designate certain operations such as concentrated animal feeding operations, concentrated aquatic animal production facilities and certain silviculture operations as point sources and require them to obtain NPDES permits after completion of the TMDL.

That, to me, is very clear. It is very ominous, to think that such a rule is not only being proposed, but as you said, Mr. Chairman, fast-tracked in light of an unprecedented public outcry is unthinkable and inexplicable.

I believe it is a deliberate attempt to circumvent the Clean Water Act and legislate through regulation, directly contradicting Congress's intent when it debated and passed legislation on nonpoint source pollution.

We were in the House, and the Environment and Public Works Committee, as it was called in those days. We had a year of hearings on the Clean Water Act in which this very issue was debated thoroughly and at great length, and the Congress, in the Clean Water Act, specifically rejected the approach that EPA is now proposing to take.

I participated in that debate and recall specifically that the State would be granted the ability to define and enforce this matter absent the intrusion of EPA. That is why we have a Congressional Record. That is why we have committee records. I hope EPA will crack open its copy and take a look before launching its next overriding initiative.

Mr. Chairman, farmers, foresters, private landowner and community leaders from across Arkansas are deeply worried that requiring States to enforce stricter TMDL standards will stretch State, local and private resources to the breaking point.

In January I spoke at a public meeting in Eldorado, AR which drew 1,500 concerned citizens. I never had a town meeting I could get 1,500 at. Weeks later, a meeting in Texarkana, AR attracted 3,000 landowners. Last week I spoke to a crowd, along with Senator Lincoln in Fayetteville, AR in which there were 3,300 constituents there. That is an unprecedented public turnout.

It begs the question as to who is driving this policy. It is clear that implementing the EPA's new proposal would only divert already limited funds and resources away from successful State implementation programs and hand them over to bureaucratic Federal procedures and oversight.

While testifying before the House Appropriations Committee, Administrator Browner said she felt the EPA was forced to act in response to lawsuits brought by environmental groups like the Sierra Club who were dissatisfied with the agency's lack of enforcement at the State level.

The fact that special interest groups are driving Federal policy by intimidating States and the EPA with litigation runs completely contrary to how I believe our government should be run. It is not democratic. It is not fair to Arkansans who work very hard to manage their land and manage it properly and carefully.

Thousands of people who attended these meetings have families. They have busy schedules as we do. They have many other responsibilities, but they are willing to sacrifice their time, learn more about this proposed regulation, how it will effect their livelihood and express their own alarm about it.

One of the core issues motivating Arkansans to attend public meetings by the thousands is trust. Ultimately, the people of my State do not trust the EPA. In other words, the EPA has not earned the trust of my constituents.

The EPA has done an incredibly poor job communicating their proposal to those who it will affect the most. During my time in public service, I simply have never seen this kind of public outcry.

In terms of States handling this matter, Arkansas alone has put forth a tremendous effort to implement statewide best management practices, as Senator Wyden expressed, to other water quality regulations.

I think the idea of providing resources and incentives for them to continue that effort is a good idea. Our poultry litter management plan is a model for other State-level plans.

Arkansas's forest industry has reduced its impact on local watersheds by 85 percent through voluntary best management practices. Simply put, the States are getting the job done and must continue to have the freedom to handle this matter on the local level, not from Washington, as we intended when we passed the Clean Water Act.

That is why I have introduced legislation and Senator Lincoln has introduced legislation to prevent this proposed rule from impacting two of our State's most important industries, agriculture and timber.

My bill, S. 2139, consists of two simple parts. First, it restores the exemption for silviculture operations and exempts agriculture storm water discharges from EPA's NPDES permitting requirements.

Second, it defines non-point source pollution relating to both agriculture storm water and silviculture operations. It is great to look at alternatives, but the first thing we have to do is put the brakes on the EPA.

EPA, under the current Administration, has never ceased in its efforts to impose stricter, more expensive Federal environmental regulations on hardworking Americans and hardworking Arkansans.

In the end, I feel that this proposal will not only harm agriculture and forestry, but impede the water quality gains being made by States and private landowners.

I think our founding fathers had great foresight in establishing a system of government based upon three branches and many, many checks and balances.

One of the dangers to our form of government today is that nonelected agencies, not responsive because they don't stand for election, have in effect acceded to themselves the power to be a fourth branch of government.

In this case, I think the EPA has been unresponsive to the people they serve and to the Congress that established the statutory legislation for the actions that they propose to take.

I think it is time that we did something about it. I want to thank you for holding these hearings on this important issue. I look forward to working with Senator Lincoln, with Senator Smith and with your subcommittee on assuring that EPA does not implement these burdensome and, I think, unnecessary, regulations.

Senator CRAPO. Thank you very much, Senator Hutchinson.

Before I turn to Senator Lincoln I wanted to tell Senator Wyden and Senator Smith that in effect the three of us have them outnumbered because we were all elected to the House at the same time as part of what I think may have been the largest freshman class, 110 Members, if I remember correctly, new freshman Members, and we were pretty rowdy and we began to rock and roll over there in the House pretty heavily and here we are now, all of us, sitting over here in the Senate trying to solve another problem.

Senator Lincoln and I ended up being the most junior members on the Commerce Committee and it wrapped all around and we sat by each other on the front row.

Anyway, Senator Lincoln, it is a pleasure to have you here with us. Would you please begin?

STATEMENT OF HON. BLANCHE LAMBERT LINCOLN, U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator LINCOLN. Well, thank you, Mr. Chairman. It sounds great, like you said to reminisce and say that we were all over there, the three of us on the Commerce Committee together and here we are back again. There is a good comfort level in that and I appreciate it.

I thank you, Mr. Chairman, for allowing me to testify this morning and I would like to submit my full remarks for the record.

Senator CRAPO. Certainly.

Senator LINCOLN. I will try very hard to be brief and summarize my statement. I do want to extend my thanks to you for your leadership on this issue, your willingness to devote the time and energy that you have in the subcommittee on this and focusing in on an issue that is very important to us in Arkansas, as my colleague has mentioned.

I also want to thank my colleague from Arkansas. I have enjoyed working with him on this issue and this is important for us to work together for our constituents. I appreciate it very much.

I hope I won't be too redundant on the issues for Arkansans. He has touched on a great deal that is important to us.

The Environmental Protection Agency's new extension of the Total Maximum Daily Load regulations, if enacted, would affect thousands of our constituents, directly and immediately.

In Arkansas, as my colleague has mentioned, we have held several public meetings where literally thousands of concerned foresters and farmers have voiced their opinions on how the new Total Maximum Daily Load regulations could affect them.

My colleague was absolutely correct in his explanation of a public outcry. The numbers were phenomenal. We only wish that we could get those numbers to some of our town hall meetings and the other things that we try to do.

But I think it is obvious from those outcries and certainly from those numbers that the new TMDL regulations are definitely on the minds of Arkansans. They are very interested in learning more about it and understanding what they can do about the new regulations.

I have met with Administrator Browner personally on this issue to let her and the Administration know the devastating effects this regulation would have on the State of Arkansas.

I had hoped to work for an administrative solution on the problem because sometimes it is quicker as opposed to going the legislative route with a new regulation. But a compromise doesn't appear to be reachable.

I was left with no other option but to pursue legislative remedies. That is why we are here today.

Mr. Chairman, Arkansas is commonly called "The Natural State." This motto reflects our dedication to preserving the unique, natural landscape that we have in Arkansas.

We have one of the most diverse forest systems in the United States. Most streams and rivers in Arkansas originate or run through these timberlands and are sources for water supplies, prime recreation and countless other uses for Arkansans.

In Arkansas we also enjoy a healthy and sustainable private forestry industry. Private forestry is an important part of the economy and infrastructure of Arkansas and our Nation. My home State of Arkansas has a total land area of 33.3 million acres. That sounds like peanuts to you guys, I realize that. But over 50 percent of this land area, 18.4 million acres, is forested.

Our private forestry industry preserves our forests lands and the streams that surround them and come through them to ensure that the forestry can continue in Arkansas.

I come from a seventh generation Arkansas farm family and I was always taught to respect the land. As families whose livelihood depends on our natural resources, it is in our best interest to protect our most valuable resources, the land and the water.

We have instituted best management practices and sustainable forestry initiatives to ensure that proper techniques are used to protect our water quality. These plans are voluntarily adhered to by over 85 percent of our private timberland owners. That is phenomenal participation in a voluntary program.

In fact, Arkansas has been recognized nationally for having some of the most successful BMP plans in the Nation. I could talk for hours about the timber industry in Arkansas and why the EPA's new regulations are unreasonable and unnecessary. But in the interest of time and certainly my colleagues' patience, I will refer you to my written remarks and make a brief statement about the legislation I have introduced regarding this issue.

As stated in the announcement of the new EPA rule, this extension of the TMDL regulations could have an economic effect of over $100 million in the silviculture industry.

The EPA says it does not expect the rules to affect small business, but Mr. Chairman, the majority of Arkansas and the Nation's private timber industry are considered to be small business. Many of Arkansas's private timberland owners consider themselves tree farmers, just like my father. In addition, officials at the Arkansas Department of Environmental Quality have said they do not have the manpower or the resources to enforce the proposed rule.

Responding to these concerns, on February 7, I introduced legislation to statutorily classify silviculture sources of water pollution as nonpoint sources. This legislation is not intended to undermine the EPA's ability to ensure that our Nation maintains a clean water supply.

In fact, it accomplishes quite the opposite. It is an effort to reinforce the fact that many forestry-related activities are already adequately policed at the State level so that water supplies do not become impaired.

Many silviculture activities that benefit the environment such as conducting responsible harvesting and best management practices will actually be discouraged by the proposed rule and regulation.

My bill, very simply, follows the lead from the 1977 and the 1987 Clean Water Act amendments where agriculture storm water and irrigation flows were exempted from the TMDL regulations and will statutorily exempt forestry nonpoint sources of water pollution from being covered by TMDL point source permitting regulations just as was done in those 1977 and 1987 amendments.

My bill will statutorily designate the forestry activities of site preparation, reforestation, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, road construction and maintenance, and nursery operations as nonpoint sources.

My colleagues have stated time and time again, Congress has always intended rainwater runoff from agriculture, forestry and small animal feeding operations to be considered as nonpoint sources of water pollution.

It was never congressional intent for the EPA to regulate nonpoint sources of water pollution. It was the same in 1972 when

Congress passed the Clean Water Act as it is today. We must ensure that the original congressional intent remains in place as far as the authority of the EPA over point and nonpoint sources of water pollution.

Mr. Chairman, I believe we can find ways to ensure that Congress, the EPA, the States and our private property owners can continue to improve clean water throughout the Nation, just as they have been doing much on the local and State level.

We should be promoting what works; voluntary best management practices, responsible care of our land, and each State's current ability to enforce nonpoint source pollution control through the appropriate measures.

It works. It has worked in the past and it is continuing to work today. None of us here seek to inhibit the goal of cleaning up and maintaining this Nation's clean water supply. But merely requiring a point source permit for traditional nonpoint sources of water pollution is not the best answer to the problem of cleaning up our Nation's rivers, lakes and streams.

In other words these new regulations would require permits on the very things that we want to promote in forestry: responsible harvesting and thinning operations, best management practices and reforestation, all of the things that are helping us right now to clean up our rivers and streams and maintain them.

I am committed to working with this committee, the Administration and the Senate to find the right approach to assisting the State in their effort to address diverse sources of water pollution.

I appreciate your leadership once again, Mr. Chairman. To all of my colleagues who are serious about working on a very important issue to the people of Arkansas and the people of this Nation, we should enhance the work that is done in the States and not simply overburden them with a Federal regulatory approach that does little to achieve the objective that we all have, and that is clean water.

Thank you, Mr. Chairman.

Senator CRAPO. Thank you very much.

We have been joined by Senator Gordon Smith of Oregon. Do the two of you need to leave?

Senator HUTCHINSON. Mr. Chairman, I would beg your indulgence and apologize to Senator Smith if I might be excused.

Senator CRAPO. We will let you read his statement later.

Senator HUTCHINSON. I promise.

Senator CRAPO. Any of you are welcome to come and join us throughout the hearing as well as up here on the dais after your testimony.

We have been joined now by Senator Gordon Smith from Oregon.

Senator Smith, we welcome you here. Would you like to make a statement?

STATEMENT OF HON. GORDON SMITH, U.S. SENATOR FROM THE STATE OF OREGON

Senator SMITH of Oregon. I would. Thank you, Mr. Chairman and Senator Wyden. It is good to be here in this committee. I am pleased to be joined by other colleagues who have said what I will say in different ways.

I will go ahead and present this statement and then have a few comments, Mr. Chairman. I appreciate this chance to appear before the subcommittee to discuss the Environmental Protection Agency's proposed rules regarding TMDL under section 303(d) of the Clean Water Act. These rules proposed last August would be a radical rewrite of the TMDL program and would affect how States implement the entire Clean Water Act.

I also appreciate your leadership, Mr. Chairman. I think that the Environmental Protection Agency has exceeded its statutory authority in proposing these rules.

Frankly, if we in the Congress do not do our job I have every reason to believe that the courts will prevent this from ever occurring, because this is not a monarchy. There are three branches of government and we each have a role to play.

As you may recall last session, I led the fight to extend the comment period on these proposed rules. Initially EPA was only going to provide a 60-day comment period for this complex rulemaking that seeks to regulate a number of industries and activities not previously regulated under the TMDL program.

I offered an amendment accepted by the managers of the VA-HUD-Independent Agencies Appropriations bill that extended the period for comment by an additional 90 days. Given that 30,000 comments the agency received, I think that the additional time Congress mandated for the comment period was definitely warranted.

It is my understanding that EPA heard from a wide range of interests that were critical of the proposed rule. These included other Federal agencies, State and local governments, manufacturing interests, landowners and others. Some of these comments point out that EPA is proposing to use a sledge hammer when a fly swatter would do.

I know that a broad range of stakeholders are testifying before the subcommittee today. Therefore, I want to discuss my comments on the concerns raised by private forest landowners in my State who are already required to operate using best management practices under the Landmark Forest Practices Act.

Under these proposed rules a number of nursery and forestry practices would no longer be categorically excluded from the definition of point source. These activities include nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage or road construction and maintenance.

I think it is clear, Mr. Chairman, that while we have essentially ended harvest on public lands, this is an effort to end them on private lands as well.

Instead of being categorically excluded, sources could on a case-by-case basis be designated as point source pollution for regulation under the National Pollutant Discharge Elimination System, called an NPDES permit program for storm water discharges.

This is a complete reversal from the treatment for the last 27 years of forestry practices as a nonpoint source under the Clean Water Act. The implications of this reversal are staggering for millions of private forest landowners in my State and across the Nation.

I believe that EPA has significantly under-estimated both the cost to the landowner and the time that it would take to obtain permits under this proposal.

The specter of a State or Federal permitting system for each management action needed on a stand of trees throughout its rotation is truly a frightening prospect.

EPA reserves the right to take over any State's TMDL program which would mean that landowners would then need to obtain a Federal permit, potentially subjecting those permits to consultations under the Endangered Species Act as well. You can just count on that Mr. Chairman. That is what this is all about.

Further, under the act landowners could be subject to fines of up to $27,500 a day as well as to citizen lawsuits for alleged permit violations. These would surely add to an already enormous backlog in our Federal courts.

A number of State agencies have raised concerns about the high cost of implementing and administering this program. It is unlikely that sufficient State resources would exist to administer such a program in a timely manner. I can tell you that is true in my own State's budget.

Currently, on the average it takes several years from the time of making applications for an NPDES permit before a landowner receives that permit. Adding forestry activities to the NPDES pipeline will only exacerbate this problem and reduce effective forest management because many forestry activities are extremely time-sensitive and weather-dependent.

For example, insect infestation, wildfires and blow-downs are unpredictable occurrences that must be dealt with in a timely manner. We all share the goal of clean water. Our Nation has made enormous strides in cleaning up polluted waterways since the passage of the Clean Water Act.

However, the EPA has failed to demonstrate that changing the treatment of everyday forestry activities to point sources of pollution is warranted. In fact EPA has recognized forestry activities to be a consistently minor source of water quality impairment as cited in EPA's own 1996 national 503(b) report.

In my State of Oregon there are about 28 million acres of forest land representing 45 percent of Oregon's land base. Sixty percent of Oregon's forest land is publicly owned while 40 percent is privately owned.

Again, Mr. Chairman, this is to shut down the other 40 percent. Oregon's private forest land is regulated under the 1972 Oregon Forest Practices Act which established a visionary new standard for forest management.

Public forest land in Oregon is protected at a level at least equal to that provided by the Oregon Forest Practices Act. As a result, all of Oregon's forest lands are already required to provide protection to streams, lakes and wetlands.

These regulations, therefore, are unnecessary and will ultimately be detrimental to forest health. It is just bureaucracy on top of bureaucracy.

Let me state that I have concerns about these proposals, both substantively and procedurally. I have summarized my substantive concerns above, but I am also concerned that EPA has failed to ful-

fill a number of requirements for promulgating a major rule such as this.

I am not sure EPA has accurately assessed the cost of these proposed rules on State and local governments as required under the Unfunded Mandates Act of 1995.

Further, that act requires the agency to consider reasonable alternatives and to select the least costly, most cost effective or least burdensome of the alternatives or explain why such alternatives were not chosen. I am not confident that any alternatives will be considered.

I am also not sure that the Administration has adequately examined the cost of these rules on small businesses as required by the Treasury and General Government Appropriations Act for fiscal year 2000.

The way the EPA initially proposed only a 60-day comment period is incredible to me. They need to do better by us. They need to stop acting like, "peasants, get out of the forest."

They have done that on the public lands. They should not be allowed to do that on the private lands.

Mr. Chairman, that concludes my testimony.

Senator CRAPO. Thank you very much, Senator Smith.

Senator Smith and Senator Lincoln, if you have time either now or throughout the time that the hearing is underway, you are welcome to join us on the dais at any time.

We will now proceed to the second panel. I should say we have been joined by Senator Craig Thomas from Wyoming. In the interest of time he has indicated that he will forego an opening statement.

We thank you very much for that, Senator.

Mr. Peter Guerrero, Director of Environmental Protection Issues at the General Accounting Office.

Mr. Guerrero, we thank you for appearing before us today. You may proceed.

STATEMENT OF PETER GUERRERO, DIRECTOR, ENVIRONMENTAL PROTECTION ISSUES, GENERAL ACCOUNTING OFFICE

Mr. GUERRERO. Thank you, Mr. Chairman.

Senator CRAPO. I should say, we ask you to try to keep your testimony to 5 minutes. I think you know the rule on the clock. We have a very long witness list today, so I am going to remind all the witnesses of that. Thank you very much.

Mr. GUERRERO. Mr. Chairman, I will summarize my written statement in the interest of time. I also would like to mention that with me today are two staff members who worked on the report that was recently released, Trish McClure and Steve Elstein. I would like to be able to call them up to help answer questions that you or other members may have after my remarks.

Senator CRAPO. Thank you.

Mr. GUERRERO. I am pleased to be here to discuss whether EPA and the States have the data they need to make critical water quality decisions required by the Clean Water Act. The Act, as you have heard this morning, has been credited with greatly improving

the condition of the Nation's waters. Much of this progress has come from addressing point sources of pollution.

The job that lies ahead will be much more difficult because it requires greater emphasis on controlling nonpoint sources.

Our ability to effectively deal with these problems depends heavily on the efforts of States to monitor their waters, to identify the most serious problems and to develop strategies to deal with those problems.

Comprehensive and reliable monitoring data have therefore become especially important. As you know, attention to our remaining water quality problems has been the subject of both lawsuits and EPA's proposed regulation.

The first step in this regard involves listing these waters as not meeting water quality standards under what is called section 303(d) of the Act. Once listed as impaired, States will then need to develop and implement Total Maximum Daily Loads or TMDLs which are intended to help restore water quality by reducing the amount of pollution these waters receive.

Last year the House Water Resources Subcommittee asked us to report on whether States have the data they need to carry out several key activities for managing water quality. In addition, that subcommittee asked us to determine if the information in EPA's national water quality inventory report is reliable and representative of water quality conditions nationwide.

My remarks today are based on this recently issued report and will focus on three issues. First the adequacy of data for identifying waters that do not meet standards even after the application of required pollution controls, in other words, impaired waters.

Second, the adequacy of data for developing TMDLs to restore those waters.

Third, the key factors that affect the States' ability to develop these TMDLs. We conducted a survey of 50 States including the District of Columbia. We conducted detailed interviews in four States and we also interviewed numerous EPA headquarters and field and regional office officials.

Regarding the first of these questions, Mr. Chairman, only six States responded that they have the majority of data needed to fully assess their waters.

We believe this raises serious questions as to whether the State 303(d) lists of impaired waters accurately reflects the extent of the pollution problems today.

While State officials we interviewed told us they felt confident that they had identified most of their serious water quality problems, some also acknowledged that they would find additional problems with more monitoring.

Moreover, studies that have involved more thorough monitoring have identified unforeseen problems. For example, in 1993 an EPA-funded study of toxins in lakes showed wide-spread levels of mercury in Maine's lakes, despite the belief of State officials that these waters were meeting standards.

As a result of these surprising findings, the State issued advisories against the consumption of fish for all of the State's lakes. While State officials acknowledged they might not have identified all waters that need TMDLs, they also told us that there

were some waters on their 303(d) lists that may in fact meet standards and not require a TMDL. The reasons for this varied widely.

For example, officials in one State said that they had mistakenly assessed some waters against higher standards than necessary. In another State officials told us that about half of the waters on the impaired list were placed there in the absence of current monitoring data and that subsequent monitoring data later showed that waters did indeed meet standards.

Regarding the second issue, the adequacy of data to develop TMDLs, States reported they had much more of the data they need to develop these TMDLs for point sources than for nonpoint sources.

States can easily identify and measure point sources of pollution because these sources generally discharge pollutants through pipes or other easily identified sources.

So it is not surprising that 40 States reported they have the majority of data they need to identify point sources causing pollution problems. Twenty-nine said they have the majority of data to develop TMDLs to address these problems.

On the other hand, nonpoint sources, by their very nature, are difficult to identify and measure. As a result, developing TMDLs for pollution problems caused by nonpoint sources often requires additional data collection and analysis.

For this reason, as the chart in front of you illustrates, few States have the majority of the data they need either to identify nonpoint sources of impairment or to develop TMDLs to address these problems.

The bars on the left of that chart there show the numbers of States that feel confident that they have more than the majority of the data to identify point sources and develop TMDLs for those point sources.

There are two bars on the right side which are noticeably lower and actually involve only three States in each category and they are the numbers of States that feel they can adequately right now deal with those nonpoint sources.

States also told us that their ability to develop TMDLs for nonpoint sources is limited by a number of factors. States overwhelmingly cited shortages in funding and staff as a major limitation.

In addition, they reported they needed analytical tools and technical assistance to use the complex models and methods that are frequently needed.

Several activities are currently underway at EPA, as discussed in my prepared statement and in our report, that could help States in some of these areas. Nevertheless, there are still critical areas in which States identified the need for additional tools or assistance. One is the need for expert advice in using watershed models and analytical methods.

Because many of the remaining pollution problems are caused by nonpoint sources or a combination of point and nonpoint sources, States are increasingly faced with complex analysis that require the use of those types of models.

In addition, EPA could help States to facilitate the development TMDLs by sharing lessons learned and by establishing a clearinghouse of information.

Perhaps most important, we believe EPA needs an overall strategy for identifying and addressing States needs for developing TMDLs.

That concludes my summary remarks, Mr. Chairman.

Senator CRAPO. Thank you very much, Mr. Guerrero. In your report you find that State officials feel pretty confident that they have identified the most seriously impaired waters, but that they would likely find more if they were to have the resources and the ability to do a more thorough and more effective evaluation.

You also State that officials report that some waters on their 303(d) lists don't need TMDLs. The question I have is, would it appear that the lack of and/or unreliability of the data could result in solving water problems that don't exist?

Mr. GUERRERO. It is clear that additional monitoring will be needed to implement this TMDL approach and that without it some States have listed waters on their impaired lists that will not require a TMDL.

Senator CRAPO. I note in reading your report, the full report, on page 9 there is a chart that shows the percentage of waters monitored, evaluated and not assessed broken down by oceans, rivers and streams, lakes and estuaries.

There are sort of four categories of how these waters have been evaluated and/or not evaluated. The first is waters assessed using monitoring data. I take it that is sort of like site-specific assessment. Is that correct?

Mr. GUERRERO. That is correct. That is actually taking samples, analyzing those samples for chemical or physical parameters.

Senator CRAPO. Then the next one is waters evaluated. I kind of understand that category to be sort of a professional judgment not based on data, sort of a "drive-by" is what I read that category to be. Is that correct?

Mr. GUERRERO. It can be based on monitoring data that is more than 5 years old and it can be based on professional judgment.

Senator CRAPO. But it is certainly not based on current data?

Mr. GUERRERO. That is correct. It is not based on current monitoring data.

Senator CRAPO. Then the next category is "waters assessed using unspecified means." Now what is that?

Mr. GUERRERO. Well, here I would like to call on Tricia for that answer.

Ms. MCCLURE. Good morning.

Senator CRAPO. Good morning.

Ms. MCCLURE. That is exactly what it is, the States didn't specify what means they used. In "unspecified means," the States did not indicate whether it was monitored or evaluated or what methods they used to determine those assessments.

Senator CRAPO. So we don't know how they got that information?

Ms. MCCLURE. Exactly.

Senator CRAPO. All right. Then the last is "waters non-assessed." I assume that means that nothing was admittedly done with regard to those waters.

Ms. MCCLURE. Yes.

Senator CRAPO. Now, as I look at this chart using those types of understandings, it appears that much more than half of all the assessment that has been done has not been done with site-specific information.

Mr. GUERRERO. That is correct, yes. For streams, I believe is the——

Ms. MCCLURE. On average, it is across all water bodies.

Senator CRAPO. Yes. As I say, it is about 50/50 on oceans and shorelines. It is maybe a little bit more on rivers and streams out of those that are assessed which is a very significant minority.

The vast majority of lakes and a little less than half of all the estuaries have been assessed with information that is not site-specific.

Mr. GUERRERO. Correct.

Ms. MCCLURE. Correct.

Senator CRAPO. To me that indicates a tremendous amount of room for error. I assume that that error could go either way, either we will be missing problems or finding problems that are not really there. Is that correct?

Mr. GUERRERO. That is correct. I think another way of saying that, too, is that it indicates how much more data are needed to approach this particular problem and to do it in the best way possible with the least cost.

Senator CRAPO. All right. Well, thank you very much. I have no further questions at this point.

Senator Wyden.

Senator WYDEN. Thank you, Mr. Chairman. I want to followup on exactly the same line of questions that the Chairman did and start by saying that I would like you all to give us a sense of how much it would cost the States to require the data needed under the EPA proposed rules.

Mr. GUERRERO. We were told that developing the data necessary to support a TMDL averaged about 40 percent of the cost of developing the total TMDL package. In other words, there are various activities associated with a TMDL. The data development costs with that could be up to 40 percent.

So it is a very substantial part of the price.

Senator WYDEN. Do the math for me, so that I don't have to go back to the office and take out an abacus.

Mr. GUERRERO. In terms of dollars?

Senator WYDEN. Yes. What is it going to cost the States? What you have here, folks, is you have five members of the U.S. Senate, and I suspect the Senator from Wyoming is in our camp as well, who don't agree with what the EPA is doing.

I have made it clear that while I do not agree with what the EPA is doing, I want to suggest a constructive alternative that builds on these State initiatives.

One of the key questions for us to look at, you know, a bipartisan alternative, is to get a sense in real dollars of what it is going to cost the States to acquire the data.

So, can you give us a ballpark of what it will cost them?

Mr. GUERRERO. Yes. You are asking exactly the right question. We have been asked that question as a followup to this work by

the House Water Resources subcommittee and we will be looking at that issue.

Senator WYDEN. Well, give us the minimum price tag this morning.

Mr. GUERRERO. We cannot without doing an analysis of that issue. We have not even started that analysis yet. We anticipate we will be starting it shortly. So, we just have not done any work there to give you any feel for that.

But as soon as possible we will report that information because I understand that it is really the crux of the issue here.

Senator WYDEN. When could we be given an analysis that would show exactly how much this would cost in our States?

Mr. GUERRERO. Without sitting down with my economists and my lawyers, because there are issues, as you have heard this morning, as to whether the Unfunded Mandates Act should apply or should not apply as EPA has maintained it does not.

It is hard for me to give you an estimate. As soon as we can I will do that.

Ms. MCCLURE. I think it is important to point out that EPA is conducting a study called the GAP analysis looking at the cost not only of TMDL implementation, but all aspects of water quality management programs. They are supposed to be finalizing a methodology for estimating costs this Spring and would presumably, after that, implement it across the States.

Senator WYDEN. What is really striking about this, Mr. Chairman, is that you are supposed to do those cost analyses before you go forward. Here we have a situation where in effect we have a rule out there, tremendous, you know, time crunch.

We have the GAO saying that they do not have the numbers in terms of what it is going to cost. They have talked to the agency and the agency is doing an analysis so that at some point some day down the road they are going to have an idea of what it is going to cost.

And yet we are going to stick it to small landowners at this point. I think that that sort of shows to me the fallacy in the way this process has evolved.

The only other questions I have involve some technical matters.

Do you see any evidence that EPA is at least sharing some of the data they are picking up with other agencies, like USGS and other agencies so that again we don't just go out and duplicate these exercises again and again?

Ms. MCCLURE. Can you clarify what type of data you are referring to?

Senator WYDEN. Well, the kind of data that is going to be collected under this proposed rule is going to be useful for other agencies like USGS and we have gotten kind of mixed reports about whether they are sharing the data. Are they?

Mr. GUERRERO. Yes. We did recommend that in terms of EPA's reporting of water quality that they need to do more of that. In response to our recommendation in that regard, EPA said they already do it.

We don't think that they do enough of that. We think there is a potential for more sharing of that type of information.

Senator WYDEN. My last question is about the technical assistance area. As far as I can tell you say they are coming up short as well. Is there any evidence that EPA is responding to this?

Ms. MCCLURE. They did initiate work on a strategy to try to identify State needs and what type of activities EPA needs to develop to support TMDL development. However, they put that effort on hold and have not started that effort again.

In our report we recommend that EPA needs to do that.

Senator WYDEN. Well, I think this sort of highlights it, Mr. Chairman. They are short in terms of technical assistance. They are short in terms of sharing data collection with other Federal agencies.

We are now going out and collecting the cost data that would be relevant to what States would need to know after there is a proposed rule. I think it just highlights the need for us to come up with an alternative, to come up with an alternative promptly.

It seems to me that is how you create the strategy that is in the public interest, that ensures water quality and minimizes legitimate and avoids unnecessary burdens to landowners.

I am going to have to depart as well, but I want to reiterate, as I have with you, Mr. Chairman, that I am very much looking forward to proceeding with an alternative out of this subcommittee quickly.

Senator CRAPO. Thank you very much, Senator.

Senator Thomas.

Senator THOMAS. Thank you, Mr. Chairman.

You have, I presume, dealt with the States and their agencies as you did this. I also assume that most people or most of us would like to do something with impaired streams and so on.

What sort of a reaction did you get? How did States and agencies on the State level believe they could best proceed?

Ms. MCCLURE. States definitely indicated they prefer to deal with these complex nonpoint source problems through the phased approach. Since nonpoint source problems are very difficult to understand and require a good bit of monitoring and analysis to be able to get to that point to develop a definitive TMDL, they would much prefer to take a phased approach, implement BMPs on likely sources that are serious contributors and then monitor to see how well these actions are working.

Senator THOMAS. Are they in a position to do that, most of them, do you think?

Ms. MCCLURE. Yes.

Senator THOMAS. So they could move forward in it. Is this a time imperative thing? Are they being pressed by these proposed rules in terms of time? Is that their feeling?

Ms. MCCLURE. They are pressed by the lawsuits being forced to develop TMDLs and in some States feeling the pressure of impending lawsuits so they feel the pressure to develop TMDLs in a certain way.

Senator THOMAS. Is there any inclination, do you think, or are they interested in making some changes in their own operations to move along in these directions?

Ms. MCCLURE. Well, I think in some States we talked about their being forced to shift resources from other areas to deal with

TMDLs and it may be sacrificing other areas of their program. So, States are certainly coming to attention in trying to develop TMDLs and deal with polluted waters.

Mr. GUERRERO. I would add, Senator, that the issue of resources comes up time and time again, the competition for scarce resources, the resources necessary to do the monitoring and to develop the data to implement this type of program and the data necessary to sustain it.

It is an iterative process, as Trish said, where once you put in place best management practices you do need to monitor and assess whether they are achieving their intended results and you need to make adjustments over time. That additional monitoring cost is a resource issue.

Senator THOMAS. The cost, is it a need to implement what they already know or is it a lack of scientific data, technical data, analysis?

Mr. GUERRERO. I think what we tried to convey in our statement was that there just is a need for more comprehensive monitoring of the Nation's waters to have some greater assurance that the right bodies of water have been identified to go through this very challenging process.

For those that there is confidence that the waters are impaired and there is a reasonably good understanding as to what those sources of impairment are, they can go down this route. But again, it needs to be an iterative type of process. It is a process where data will continue to be developed as practices are put in place over time and monitored for their effectiveness.

Senator THOMAS. So they generally feel as if they can do it given the resources and given the time if they are inclined. I guess I am also interested in how they see this is in terms of the division of responsibility of the States as opposed to EPA laying down the rules. How do they feel about that?

Mr. GUERRERO. Well, I think as you heard today from your colleagues here, there is a lot of concern out in the States that EPA's approach is too proscriptive and too top-down. EPA, of course, maintains otherwise, that they are trying to be flexible.

I think the key will be how EPA responds to the numerous comments it has received to date from both you and from the public in response to the rulemaking.

Senator THOMAS. Responses from up here have been rather specific, I would say. Wouldn't you? Thank you very much.

Thank you, Mr. Chairman.

Senator CRAPO. Thank you. I would like to followup with just a couple of questions, getting back to the line of questions that Senator Wyden began, namely the cost of compliance and the cost that we expect from the States.

I recognize your answer that you haven't done that analysis yet, but I want to push you a little further and see if I can get a little more information.

The EPA says they are going to do this on June 30th. Can you give us an answer by then?

Mr. GUERRERO. We will certainly aim to get you an answer by then if that is the Agency's date.

Senator CRAPO. I agree with Senator Wyden, and I'm sure Senator Thomas agrees. It's my understanding of the process that this analysis is supposed to have been done by the Agency on their part before they start so that they can determine whether the Unfunded Mandates Act applies as well as fulfill a lot of the other responsibilities for getting information.

It is remarkable to me that we are here now essentially 3 months from a deadline that is imposed on a fast track for this rule and we still don't know what the costs are.

In our last hearing, you may or may not be aware that we had some pretty dramatic information presented about what the costs are going to be. That leads to my next question. The Unfunded Mandates Act requires, if I remember, the level that if it is over $100 million impact that the act then applies. The EPA has said that the cost of this is only going to be $25 million. Do you have an opinion as to whether this is going to be more than $25 million?

Mr. GUERRERO. Well, that is exactly the questions we have been asked to answer. At this point we don't but hopefully we will in time.

Senator CRAPO. I can't even get you that far, right? Well, I do. I have an opinion on that. It seems to me that we are going to be looking at a figure that is a lot more than $100 million.

But the sooner we could get that information, the better. So I would encourage you to fast track your analysis so that we can keep up with this process.

Mr. GUERRERO. OK.

Senator CRAPO. Ms. McClure, you indicated in your answer that the EPA was doing something along this line of analyzing it cost-wise. Could you elaborate on that a little bit?

Ms. MCCLURE. I didn't mean to imply that they had not analyzed costs of the proposed rule, but, that they did in fact do an assessment of costs for the additional requirements over current requirements in the proposed rule.

The separate study that I mentioned called the GAP analysis is a study that I think they initiated because they knew that water quality programs have historically been under-funded and that TMDL emphasis has shifted some resources away from other programs in water quality management programs within the States.

So they wanted to get a complete understanding of the water quality management programs requirements for implementing the Clean Water Act.

Senator CRAPO. Is that information that they are working on in that study something that you are going to have to have for your evaluation of the costs?

Ms. MCCLURE. It is certainly something that we will look at as a source of information as we proceed.

Senator CRAPO. But you will not be relying on that? In other words, you are not going to wait to see what they do before you do your analysis?

Ms. MCCLURE. No.

Senator CRAPO. Can you finish your analysis without them finishing that study?

Ms. MCCLURE. I believe we can.

Senator CRAPO. We expect that a lot of people are going to be using the 305(b) report numbers in their testimony today. The questions is: Do you think that the EPA and others should be reaching conclusions based on this data and, in the EPA's case, producing a regulation based on this data?

Mr. GUERRERO. I think the data in the 305(b) report have to be very carefully qualified based on our work. The monitoring that is done is not comprehensive and the types of monitoring that are done differ from State to State.

So, the 305(b) report, as one of the few national reports of water quality, has to be very carefully caveated as to what its limitations are and reaching conclusions from it have to be cognizant of those limits.

Senator CRAPO. Well, what I am hearing you say is that essentially we are in a large sense flying blind here, both in terms of the cost numbers as well as the terms of the data on which we are trying to analyze this proposed rule.

Mr. GUERRERO. We have two problems. One is that we don't have as comprehensive data as we need. Then for specific waters we just don't know enough about the sources of problems and the nature of those problems to effectively deal with them.

Senator CRAPO. Thank you. Did you have anything further?

Ms. MCCLURE. The data issue goes beyond just whether or not we can implement this proposed rule or are we representing water quality problems nationwide.

I think there is wide agreement that we have a lot of water quality problems that we need to deal with. Now we are beginning to increase our investment in these areas. The need for good data and reliable information on the extent of the problem and whether we are addressing those issues effectively becomes that much more important.

Senator CRAPO. Thank you. I have no further questions.

Senator Thomas, do you?

Senator THOMAS. No, thank you.

Senator CRAPO. All right. We thank you very much for your testimony and wish you Godspeed in preparing the report.

Mr. GUERRERO. Thank you.

Senator CRAPO. We would like to now call up the third panel, Mr. Robert Wittman, the supervisor of Westmoreland County in Montross, VA; Mr. David Skolasinski, district manager of Environmental Affairs from the Cliffs Mining Services Company; Ms. Nina Bell, executive director of the Northwest Environmental Advocates, Mr. Jeff Pardue, director of Environmental Services at Florida Power Corporation; Mr. Norman E. LeBlanc, chief of Technical Services at Hampton Roads Sanitation Districts.

While the panel is taking their seats, let me check what the beeper is telling me.

OK, I have a couple of instructions. First of all, the beeper and the bell says that we just had a vote call. It is my understanding that there will be two votes stacked. So I can't just run over and vote and the other Senators who may be trying to get here can't just vote and come back.

But what I think that I will do is, we will go ahead for about 10 minutes so that I get quite a ways into this vote so I can run

over and vote and then hopefully the next vote will take place shortly thereafter and I can cast that vote and get back here and resume the hearing.

We may have to take a break until I can get over and get the vote finalized. So, to the witnesses and to those here for the hearing, I apologize. There will be a short recess and I will make it as short as possible so that we can then resume.

The other thing is, as you can see this is a large panel and we have another large panel following it. So I ask you to please watch the clock and if necessary, I may interrupt you and ask you to bring your testimony to a close after 5 minutes. The yellow light means there is 1 minute left. When the red light comes on, I would ask you to try to sum up to where you are as quickly as possible.

I will assure you that I have and the other Senators will review your testimony very carefully. It will be a part of the record. It is made available for the public. Our staff also will be reviewing it very carefully. So, if you don't get a chance to say everything, and you never do, please be assured that what you have to say will be very closely evaluated.

With that, why don't we start and try to get a couple of you before I have to run over for the vote. Let's start out in the order that we introduced you.

Mr. Wittman.

STATEMENT OF ROBERT J. WITTMAN, SUPERVISOR, WESTMORELAND COUNTY, MONTROSS, VA

Mr. WITTMAN. Thank you, Mr. Chairman. I am pleased to be here today to testify on behalf of local governments in the middle Atlantic region and on behalf of the Virginia-Rappahannock River Basin Commission concerning the Environmental Protection Agency's proposed changes to the national TMDL program.

Local governments in the mid-Atlantic region and the Virginia-Rappahannock River Basin Commission are major stakeholders in the Chesapeake Bay Program which stands as a highly successful alternative to the traditional Clean Water Act command and control approach.

It is based upon partnership and is successful because it depends principally on agreement rather than mandate to achieve its goals.

The Bay Program is very similar to the TMDL program. For example, each Bay's signatory jurisdiction is implementing a tributary strategy process geared toward identifying and achieving stakeholder-developed restoration goals. These tributary strategies account for all loading sources and are blueprints for achieving and maintaining desired pollutant load reductions from a wide array of point and nonpoint sources.

The Bay Program will achieve the same end points as would a properly implemented TMDL program. It will do so without resort to a Federal mandate. That means greater flexibility to develop and implement the most cost-effective controls at a much faster pace than would be possible under the TMDL program as we know it.

The Bay Program is a performance-based approach where innovation is stimulated and stakeholder initiated water quality solutions are accelerated. The advantages of these performance-based

programs are that they stimulate innovation in water quality improvements, they stimulate stakeholder initiated water quality solutions and they accelerate the protection and restoration of water quality nationwide.

We believe that TMDL rules must accept and encourage non-traditional stakeholder initiated efforts such as the Bay Program and the Rappahannock River Basin commission.

The proposed TMDL rule has several disadvantages. It eliminates the alternative pollution control programs. It does not recognize non-command and control approaches in water quality programs. The proposed TMDL rule should empower State and local governments as well as other stakeholders nationwide to engage in water quality restoration efforts.

My experience has been locally that community-based cooperative programs can be highly successful in achieving significant water quality improvements. The proposed TMDL rule must accommodate and encourage the development of non-traditional water quality initiatives and recognize the vital role that alternative programs like the Chesapeake Bay Program play today in water quality improvement efforts.

It also must promote an even greater role for existing and similar initiatives going forward and ensure that the States will have the flexibility to integrate effective non-traditional approaches.

The signatories to the Bay Agreement have agreed to embark on an unprecedented process of integrating the TMDL program into the Bay Program. They are committed to giving the opportunity to remove impairments before establishing one or more TMDLs for the bay.

Avoiding TMDL establishment is a powerful incentive for expeditious implementation of water quality controls under the Bay Program.

We ask the subcommittee and the full Environment and Public Works Committee to ensure the final TMDL rule allows the seamless integration of the Chesapeake Bay Program and stakeholder-based programs in your States with the TMDL program.

We believe that there are several obstacles, though, to this integration effort. EPA and States should not be required to use NPDES permits as the sole mechanism for implementing TMDLs for point sources.

There are a wide variety of mechanisms that have been successfully employed to achieve the Bay Program's nutrient reduction goals. Some are regulatory in nature. Some are not. But none are Federal mandates.

Virginia and Maryland have utilized grant agreements as mechanisms to implement biological nutrient reduction at publicly owned treatment works. They have signed many, many agreements. These grant agreements provide up to 50 percent grant funding and have total to date hundreds of millions of dollars of investment into biological nutrient reduction. Not one of these publicly owned treatment works has refused to execute a grant agreement when offered the opportunity.

The proposed TMDL program threatens to replace the cooperative grant agreement programs in Virginia and Maryland with NPDES permit limits.

EPA should give us the opportunity to remove impairments before TMDL is established. The Bay Program will have little meaning if one of its most accepted and successful implementation mechanisms is replaced by Federal mandate.

We ask that EPA improve on its draft proposal by restoring the Bay States' discretion to continue to utilize grant agreements as its primary mechanism for implementing point source nutrient controls.

We do not want States to be precluded from using nutrient limits, only that their discretion to use grant agreements and other mechanisms be preserved.

The second obstacle to the integration effort is EPA's offset requirement. We feel it is unnecessary under the Chesapeake Bay TMDL integration process. The bay agreement contains an interim cap strategy that has the same goal as the EPA's offset rule, that is, to avoid increased loadings of pollutants contributing to the bay's impairment until loading capacities for the bay and its tidal tributaries are identified and allocated.

The Bay Program loading cap will apply to far more sources than would be possible under the EPA's TMDL program. EPA's offset proposal threatens to bring to a halt continued voluntary point source nutrient reductions.

Publicly owned treatment works in the bay watershed have and continue to voluntarily install nutrient controls based upon Federal and State assurances that they will not be penalized for such efforts.

Their reliance on these assurances may have been misplaced. The publicly owned treatment works that voluntarily install nutrient controls may lose offsets from these upgrades that they will need for future growth.

This uncertainty is sure to slow if not halt commitments by point sources to voluntarily reduce their discharge of nutrients. The offset rule is also inconsistent with the promising concept of smart growth. With the reality that urban waters do not consistently and never will meet today's stringent water quality standards currently in place, the offset rule provides a strong disincentive or even prohibition on renewal projects. This pushes growth to undeveloped green field areas which promotes sprawl and the degradation of more healthy and productive watersheds.

Finally, I urge you and your colleagues to require the EPA to hold a second public comment period on the agency's proposed revisions to the TMDL rules. A second opportunity is warranted given the sheer number of comments the EPA received, as well as the number of open-ended questions on which EPA sought public comment.

This will hopefully provide an opportunity to comment on a more focused proposal from EPA and is a matter of fundamental fairness in this instance.

Thank you.

Senator CRAPO. Thank you very much, Mr. Wittman. I think that because of the time I am going to recess the hearing at this point and, as I said earlier, I will return as quickly as possible after the second vote that takes place.

Thank you very much. The hearing is in recess.

[Recess.]

Senator CRAPO [resuming the chair]. The hearing will come to order.

I thank everybody for your patience and as soon as the bells quit ringing here we will start right up again.

Mr. Skolasinski, would you like to begin?

STATEMENT OF DAVID SKOLASINSKI, DISTRICT MANAGER, ENVIRONMENTAL AFFAIRS, CLIFFS MINING SERVICES COMPANY, DULUTH, MN, ON BEHALF OF THE NATIONAL MINING ASSOCIATION AND THE IRON MINING ASSOCIATION OF MINNESOTA

Mr. SKOLASINSKI. Mr. Chairman and members of the subcommittee, my name is Dave Skolasinski. I am pleased to be here today to testify on behalf of the National Mining Association as the chairman of the Environmental Committee for the Iron Mining Association of Minnesota.

In my 26 years of environmental management experience with the mining industry, this TMDL proposed rule worries me and worries me for the future of my industry more than any other regulation I have dealt with in my career.

I want to focus my comments today on three particular aspects of the rule. These are historic legacy pollutants, mandatory offset provisions, and the alternative solutions that we would like to address.

The historic legacy issues are involved in impairment of water quality due to historic pollution problems, and these often manifest themselves in relation to contaminated sediments and many natural sources of materials, of pollutants. Some of these natural sources include forest fires, volcanic activity, and also naturally occurring metals in certain geologic locations. Often these naturally occurring metals manifest themselves in water quality and lead to the discovery of ore bodies for the mining industry.

In addition, there are certain industrial processes that have added to the legacy problems. In northeastern Minnesota the specific example of one of these issues, is contaminated sediments. With relation to mercury what we find is that 90 percent of the mercury that is currently in the State's waters is originating from outside of the State and moves into the State through air deposition.

The sources of this mercury are both from national and international sources. Under the TMDL rule, even if you brought all of the point source dischargers to zero with mercury you would not have any measurable effect on the mercury in the water or in the fish tissue that is there, again as a result of this 90 percent addition from the outside.

In addition there are other naturally occurring sources of other metals and in these situations again the TMDL-derived limits on point sources will never achieve water quality standards.

Under the mandatory offsets these are required for new and increased discharges of pollutants into listed waters.

Again, in my example of northeastern Minnesota, the entire region is listed, all waters in the region are listed as impaired for mercury. Under this situation there literally are no offsets avail-

able. Even if an offset became available in the future, it is unlikely that any entity who had that offset would ever sell it. They would hold it for their own reserve, for their own future expansion.

Now, unfortunately, in the mining industry we have to mine our ore bodies where they are found. We can't pick up and move as some other industries might to a different area. We have to be very cognizant of what the economic impacts of complying with these regulations would be because we have to compete on the international markets. We cannot pass on these costs to consumers.

Another example of this is that we have a municipal waste water consolidation project in progress in the region whereby a number of small communities that provide minimal treatment of their sewage effluents intend to consolidate and pipe their effluents down to a regional facility to provide better treatment.

However, this is going to result in an increase in the mercury discharge at the regional plant. Because there are no offsets available, this project may be prohibited from going forward. So the result is continued poor quality discharges going out from these small treatment plants.

As far as alternative solutions, one of the things we would like to promote is that the States be given the flexibility to develop local solutions to their specific problems. The watershed approach is certainly one of the things that we promote and especially through voluntary efforts.

In Minnesota right now we have a voluntary mercury reduction program where through this program based on 1990 inventory levels there has been a 50 percent reduction of mercury and we are hoping to meet a 70 percent reduction by 2005. This program is well underway and quite successful to date.

In addition, we are developing a TMDL program for our local river system and this is in its early stages. But we are fearful that the prescriptive nature of the TMDL program may bring this process to a premature close.

In conclusion I would like to urge you to request that EPA slow down and carefully address the comments that have been submitted to date and to focus on developing an approach that properly addresses the problems with the rule. Thank you very much.

Senator CRAPO. Thank you very much.

Mr. SKOLASINSKI. I would be happy to answer any questions that you may have.

Senator CRAPO. I appreciate that. I should tell you, my wife is from Minnesota so I have a special affinity for that place, too. It's just about as good as Idaho.

Ms. Bell.

STATEMENT OF NINA BELL, EXECUTIVE DIRECTOR, NORTHWEST ENVIRONMENTAL ADVOCATES, PORTLAND, OR

Ms. BELL. Thank you. Mr. Chairman and members of the committee, my name is Nina Bell. I am executive director of Northwestern Environmental Advocates. I work in Portland, OR on Oregon and Washington water quality issues.

I was also a member of the EPA's Federal Advisory Committee on this TMDL rule.

Today I would like to briefly explain what the law is regulating point sources through the NPDES permit program and place that in a practical context. Simply put, the Clean Water Act requires point sources to meet water quality standards or put it another way, not to cause or contribute to water quality standards violations. That is sections 301 and 302 of the Clean Water Act and EPA's implementing regulations.

In order to carry out those restrictions on point sources and to achieve an equitable result, equitable between point sources and between nonpoint and point sources in a water body or watershed we need two things. First we need TMDLs because TMDLs allow us to allocate responsibility for pollution reductions from all sources in evaluating their cumulative effects on a water body.

We cannot determine if point sources are causing or contributing to water quality standards violations in the absence of a TMDL.

Second, we need nonpoint source controls. Under both the existing act and EPA's proposed rules, nonpoint source controls are not federally regulated and, in fact, TMDLs themselves are not permits. They are, because of the uncertainty that we have already heard about today in terms of regulating nonpoint sources or even not regulating them but understanding what controls will result in reductions of pollution loads.

They are by nature subject to an interim process meaning that they need to be adjusted over time and have a review afterwards. That is a fact with EPA's proposed regulations on implementation plans, this idea of the iterative process.

Finally, the reason why the Federal Advisory Committee recommended implementation plans, because they understood the importance of that and included 4 pages of detailed content for this implementation plan.

Implementation plans will align the multiple different types of nonpoint source controls that are out there already and provide for seamless connections between the technical analysis of a TMDL and the actions that need to be taken.

This is necessary for point sources in order to meet legal requirements.

In summary, EPA's rule did not overstep statutory authority. The proposal is not perfect but it will lead to improved equity and environmental protection. It will maintain substantial State flexibility that already exists in water quality standards, nonpoint source programs and allocations made at the local level.

Last, the TMDL program remains necessary to protect the public health, for fish and for wildlife, the promise that the Clean Water Act made to the public in 1972.

Thank you.

Senator CRAPO. Thank you very much, Ms. Bell.

Mr. Pardue.

STATEMENT OF JEFF PARDUE, DIRECTOR, ENVIRONMENTAL SERVICES, FLORIDA POWER CORPORATION, ST. PETERSBURG, FL

Mr. PARDUE. Thank you, Mr. Chairman. I am Jeff Pardue, director of Environmental Services at Florida Power Corporation. I am

testifying for Florida Power Corporation, the Edison Electric Institute and the Clean Water Industry Coalition.

We are pleased to testify on EPA's proposed revisions to the TMDL program. I will summarize our concerns emphasizing how State initiatives to improve water quality will be undermined if the agency's proposals are finalized.

We are firmly committed to effective watershed management strategies as the best way to approach our remaining water quality problems. These problems are more challenging, complex and varied than those of the past.

Solving them requires better knowledge, objective water quality standards and more comprehensive, valid and accurate data. The effort also requires time, a commitment of resources and a flexible iterative approach to managing aquatic ecosystems and accommodating the tremendous variations that occur between water bodies.

TMDLs can be a useful tool to improve water quality. We don't believe, however, that Congress intended the TMDL provisions to be the central means for resolving all water quality problems.

We fear that EPA's proposals will impede further development of successful watershed management strategies. Such strategies have both regulatory and non-regulatory elements and allow States to make water quality progress in the face of uncertainty.

It makes a difference how these parts are combined. EPA's proposed rules, with its rigid requirements and Federal approvals are inflexible. Even if the agency grafts into this structure an accommodation for voluntary steps, the rules will still jeopardize the best features of successful watershed strategies.

Mr. Chairman, Florida Power Corporation is proud of our contribution to improving water quality. In 1999 we helped Florida develop a TMDL statute to meet the requirements of section 303(d). Stakeholders worked with legislators to craft a scientifically driven listing process that is followed by an equitable allocation among sources in a site-specific and cost-effective manner.

Florida proceeded with the understanding that its new TMDL law met Federal requirements. Our law and its success is now in jeopardy because in settling a lawsuit EPA has committed to a Federal takeover of Florida's activities if the State does not meet certain deadlines. But deadlines cannot be met under Florida's Administrative Procedures Act.

Mr. Chairman, I will outline some specific concerns we have with the proposed rules. EPA wants to finalize the proposed rules by June 30, 2000. We believe it is more important that the rule be done right rather than quickly. This is a discretionary, not a required rulemaking.

Dischargers face increased production costs, curtailed economic growth and the possibility of mandated operational modifications if they are located on or near a listed water.

The agency, therefore, should insist on the use of high quality, monitored data for listing and TMDL development. We think EPA's proposed listing criteria is too broad and defeats the purpose of identifying and prioritizing truly impaired waters. Listing waters that are threatened, impacted by pollution, air deposition or unknown causes should be approached through other Clean Water Act tools.

The TMDL program should encourage the most cost-effective pollutant reductions. This cannot be accomplished if the offset provisions and other enforceable regulatory restrictions are imposed prematurely on point sources.

We believe that States are in the best position to manage impaired waters. EPA should not write rules that pre-judge the outcome of a TMDL.

Mr. Chairman, we hope the subcommittee will consider whether EPA's proposal is good public policy and can work in practice. We also hope you will consider at least taking the following steps: Prevailing on EPA to take the time to get the rule right; providing more funding for monitoring and data collection by the States; assuring that the data used for listing and TMDL development is high-quality monitored data; and clarifying that States have the authority to evaluate and conclude that current watershed strategies, habitat conservation plans, and environmental decisions made under other environmental statutes are adequate to meet water quality standards and therefore do not have to be reopened under the TMDL program.

Finally, we encourage you to review the resource needs of State and local governments and the costs of the entire TMDL program. You will then be better able to evaluate the merits of the agency's proposed rules and appropriately address the substance and funding issues.

Thank you.

Senator CRAPO. Thank you very much, Mr. Pardue.

Mr. LeBlanc.

STATEMENT OF NORMAN E. LEBLANC, CHIEF OF TECHNICAL SERVICES, HAMPTON ROADS SANITATION DISTRICTS, VIRGINIA BEACH, VA

Mr. LEBLANC. Mr. Chairman and members of the subcommittee, my name is Norm LeBlanc. I am chairman of the Water Quality Committee of the Association of Metropolitan Sewerage Agencies or AMSA.

I have served on the front lines of the campaign to clean up the Nation's waters for nearly 30 years. The last 20 have been managing the Environmental Permitting and Compliance Programs for 13 of the Hampton Roads Sanitation Districts' treatment plants. That is in southeastern Virginia.

I greatly appreciate the opportunity to share with you the experiences of the waste water treatment community with regard to the Clean Water Act and more specifically TMDLs.

AMSA represents more than 240 municipal governments. Its members treat 18 billion gallons of waste water every day and provide service to the majority of the sewered population of the United States.

AMSA members hold NPDES permits and many such as myself have discharges that are located on 303(d) waters.

As veterans in the water pollution field, we are sympathetic to the gaps in our economic and scientific data, lack of funding and the absence of a consistent, comprehensive mechanism for monitoring and regulating nonpoint sources.

However, if States ultimately are not authorized to develop TMDLs that require load reductions from nonpoint sources, EPA and the States will be forced to rely exclusively upon point sources that secure the pollutant load reductions necessary to meet the water quality standards as required in the Clean Water Act.

AMSA supports the provisions in the proposed rule for equitable controls on both point and nonpoint sources, State-developed implementation plans and the requirements for States to develop sound methodologies for listing and priority rankings.

That last point I need to emphasize because we cannot afford any more "drive-by TMDLs" that are based on little or no data.

The recent draft TMDLs that are being produced, now that we have a chance to look at them, show a real lack of resources and a lack of understanding of holistic solutions to attain the requirements in the Clean Water Act, sometimes euphemistically called "nitwit science."

The proposed rule makes it clear that addressing nonpoint sources is critical to the TMDL program. In fact, the TMDL program cannot move forward unless nonpoint sources fully participate.

Specifically, we recommend proportionate responsibilities be adopted in allocation of pollutant loading reductions as well as parallel implementation of compliance schedules in blended waters where both point and nonpoint sources exist.

While supportive of some of the proposed changes, AMSA does have major concerns with the overly broad approach EPA has chosen for a listing criteria and expansion of the authority in the permitting issuing process.

EPA's proposal inappropriately expands its statutory authority to require a listing of waters under 303(d). Issues such as MCLS, threatened waters, fish advisories, antidegradation, and pollution should not be considered in the listing under 303(d).

Listing should be limited to impairments caused by pollutants from either point or nonpoint source water discharges that are controllable under the Clean Water Act. In other words, if the Clean Water Act cannot fix the problem, then it should not be listed under 303(d) of the Clean Water Act.

AMSA has major problems with the proposed changes to the NPDES permit and the antidegradation policy. Dischargers wishing to increase loadings to TMDL-listed water segments should not be bound by any kind of mandatory offset provision.

The regulations should recognize that increased loadings from point sources may be insignificant compared to the total loadings to the system. Therefore, any reasonable further progress provision must be extremely flexible and both pollutant as well as site-specific.

We believe that it is crucial that existing permit limits remain in place until the TMDL has been finished and approved. Right now POTWs are facing NPDES permit changes as soon as the water is listed, before the TMDL process even begins.

This is very problematic to municipal governments because we must have a defined long-range plan for improvements to the treatment process. Frequently changing permit conditions can cause a great deal of wasted resources because the processes that you in-

stall to meet an interim limit may be completely incompatible with the processes that you will ultimately need to meet your TMDL load allocation.

We are also concerned about the lack of flexibility in implementing control measures. EPA and the States are relying exclusively on permit limits, failing to recognize that there may be more effective and less costly alternatives for implementing TMDLs for both point and nonpoint sources.

We concur that EPA and the States need the authority to impose permit requirements on all sources that fail to cooperate in the TMDL process. However, they should be considered the least favored option and one of last resort.

HRSD is a main player in the Chesapeake Bay and I wholeheartedly support the statements by Mr. Wittman that EPA should include provisions in the TMDL rules that recognize alternative, non-traditional ways of dealing with water quality problems.

Finally, but of equal importance, is the very basis of the TMDLs themselves. The entire focus of the TMDL program is to achieve designated uses and supporting criteria. In fact, most uses were established 30 years ago without much scientific analysis, with little or no policy debate and certainly without the regulatory consequences that we have today.

They were in essence wish lists which have now become mandatory requirements. We are now finding out that in many cases those uses may not either make sense or may not be attainable.

Before we spend billions of dollars and millions of hours nationwide on a TMDL program we need to ensure that our water quality goals, that is the very foundation, the very basis of the TMDL program are both achievable and sensible from an economic and scientific point of view. That is why we strongly urge EPA to revisit the water quality standards rules before embarking, on a massive, nationwide TMDL effort.

We concur, Mr. Chairman, with the remarks that you made earlier today about the American public needing a full accounting of the TMDL program, what it costs in order to obtain the data in order to do the TMDLs, and to comply with the requirements of the TMDL itself.

On behalf of the municipal waste water colleagues, I thank you for the opportunity to present these comments to the subcommittee.

Senator CRAPO. Thank you very much, Mr. LeBlanc.

I would like to address a question and talk about an issue that each member of the panel has in one way or another address and just flush it out a little bit more.

The issue is there seems to be a tension between the concept of how we regulate point source versus nonpoint source water quality problems both in terms of whether there is jurisdiction under the act to do so and there is a disagreement among people about whether there is even jurisdiction to do so.

Second, in terms of how it is done and whether the way we approach it may end up pushing the burden more one way or the other way than is properly allocated.

Let me go with the first part of that, the jurisdictional question. Ms. Bell, you addressed that most directly in your testimony. It

seems to me that the position of those who say that the rule is not seeking to expand EPA jurisdiction over nonpoint source pollution beyond its current authority is based on the argument—and I want you to tell me if I am wrong in understanding this—is based on the argument that EPA is simply requiring the States to establish the TMDLs and come up with a plan and the plan that the States come up with is up to the States and therefore the EPA is not mandating that they do anything necessarily with regard to the nonpoint sources.

Am I correct so far?

Ms. BELL. Yes.

Senator CRAPO. To me there is a problem with that, though, because we have had other witnesses tell us and I have talked with people privately who indicate that as a pure technical matter that may be true but that the States have to then exert regulatory authority over the nonpoint sources in order to have their compliance plan work and if they don't and if the EPA is not satisfied with what the States do, the EPA can step in and take over and do it itself. Am I getting off course yet?

Ms. BELL. Now you are off course.

Senator CRAPO. OK. Would you clarify that to me?

Ms. BELL. Well, first of all, EPA has always taken the position, and I think still takes the position, that nonpoint sources can be regulated at the State level or can be subject to incentive programs, what I call pseudo-regulatory programs of which we have some in Oregon, and completely voluntary programs.

It is simply a matter of making sure that those are effective. I would hope that the TMDLs that get produced, individual TMDLs, have the effect of kind of shining a light on ineffective programs, thereby achieving both pollution reductions from nonpoint sources and equity between point and nonpoint sources.

On the second issue about if EPA, when it does its statutorily required approval or disapproval of the TMDL that has been submitted by a State, finds that the State's programs are not sufficient, that is where actually EPA is in a bind because it is required by law to promulgate a different TMDL.

But it cannot come in and substitute Federal programs for the lack of State programs because it doesn't have any statutory authority to do so. That, of course, is the underlying basis for the silvicultural rule which is an attempt to regulate point sources, not nonpoint sources.

But in any case, there is no other alternative for EPA because of the limitations of the statute.

Senator CRAPO. So then at the point where the EPA steps in and says, "you haven't done it right" to the State, your understanding is that the EPA has no authority to then go and do it right other than to create the correct—in their opinion—the correct TMDL.

Ms. BELL. Well, this is a problem that we talked about on the FACA quite a bit. I think part of the reason why point sources should be concerned is where you have waters with combined point and nonpoint sources affecting the water body, if EPA were to come in and say, "Well, you know we need to revise the numbers" or there could be all sorts of problems with the TMDL, but one of the areas might be that the allocations, the relative amount of reduc-

tion required by point sources and nonpoint sources might need to be adjusted.

There you have EPA needing to use its authority under the Clean Water Act to perhaps put more of the responsibility by allowing less pollution from point sources.

That is one way of cleaning up a water body in some instances. But as my written testimony says, lots of times that is not true. But I don't think that is equitable. I ultimately think that it also doesn't serve the economic interests of this country to create that kind of inequity.

Senator CRAPO. So EPA is left with then moving back to the point sources to find all of the correction that it sees necessary is what I heard you saying.

Ms. BELL. That and also using what other Federal tools are available. They may not be regulatory. The 319 grant programs, for example, could be focused.

Senator CRAPO. Sure. Incentives and so forth.

Ms. BELL. That is right.

Senator CRAPO. Would any other members of the panel like to comment on this issue?

Mr. LEBLANC. Well, I concur, and one of the things that we are concerned about is the point sources being held hostage because of the inability to get the water back into compliance with the water quality standards.

If the controls on the other sources cannot bring that back down, then when we come up for permit re-issuance every 5 years they look at that permit re-issuance and say, "We cannot renew it; you are going to have to reduce your loadings by this amount in order to meet water quality standards." The problem right now, in the Bay Program we get credits; not that the water is improving right now, it is going to take 10 or 15 years for the water to improve from nonpoint source issues because sometimes they are very slow in reacting.

But the implementation plan in the Bay Program says, "Well, they are going to do this, therefore we can allow you to do this." Even though in the short term you may have some noncompliance issues, we are doing our part and nonpoint sources are doing their part. That is where the implementation plans come in.

I am not a lawyer. I am a technical individual. Whether they need to be legal or not, I cannot comment on that part of it.

Senator CRAPO. Right. Are there any others?

Let me come back to you, Ms. Bell, with just one other question. In terms of understanding how we approach this, do you believe the EPA has authority under current law to come up with an implementation plan?

Ms. BELL. Yes, I do. Clearly it has it under section 303(e). I don't think there should be even any debate on that issue. But I also think EPA has the discretion to include in the definition of a TMDL that which it thinks will help make the TMDL program work.

Again, since the implementation plan is also not enforceable, it is not something that EPA is sort of creating out of whole cloth.

From a policy standpoint as well, it makes good sense because it does create, as Mr. LeBlanc said, perhaps different time lines for

attainment of allocations by different sources and it sets out the connection between all the money we are going to put into the scientific and technical analysis in the TMDL part and the control actions that people are either going to be required to or volunteer to take or be induced to take through incentive programs.

It puts those two things together so we are no longer sort of operating in the dark as much as we have been.

Senator CRAPO. Now on this implementation plan, many members of the panel talked about the need for flexibility to recognize other ways that the States are already traveling to try to address these issues.

This is a question to anybody on the panel who would like to jump in on it. Does the mandate that the State include an implementation plan as part of the TMDL become a part of the problem of rigidity that then forces the States away from some other solutions or is there some other problem in the rule that is causing the lack of flexibility on the part of those who believe there is that lag?

Mr. LEBLANC. One of the problems that we had, and we had quite a bit of internal debate with AMSA on the rule as to whether or not the implementation plan should be part of the approvable aspect of the TMDL.

It depends on whether one comes from a State that is effectively working with nonpoint sources or a State that is not effectively working with nonpoint sources as to whether you like the idea of Federal enforceability of an implementation plan or not.

Senator CRAPO. Do you agree that it is not enforceable? Ms. Bell believes that it is not enforceable.

Mr. LEBLANC. That is correct. I believe that the TMDL proposal is trying to make it an enforceable part, but that doesn't say it is. As I say, it is difficult, depending on which State you are, to say whether you like it or not on a Federal enforceable level.

Senator CRAPO. Do any others want to jump in on that?

Ms. BELL. Well, I would like to add something.

Senator CRAPO. Sure.

Ms. BELL. We did talk on the FACA about the idea of substitutes for TMDLs and after some debate I think, and I always hesitate to actually reflect what the committee came up with lest I be torpedoed by the people in the back there.

But I think that we agreed that if there were alternative programs that met the analysis and the intent of the TMDL that they could be submitted as a TMDL. Likewise, if they were three-quarters of the way down the TMDL they could be augmented and submitted to EPA as a TMDL.

I think that analysis pretty much carries over to the idea of the implementation plan as well. I would not expect any implementation plan to include all new programs.

What I would expect is sort of an alignment and coordination of all existing program with some focus on those areas where help was needed to improve nonpoint source programs and then all the other pieces of the implementation that have been proposed such as followup monitoring, timeframes to go back and incorporate the results of monitoring and those kinds of things.

Senator CRAPO. Mr. Wittman, I took from your testimony that you would probably conclude that the proposed rule would actually

impede the efforts that you are underway with in your area. Am I right in that and if so, why wouldn't there be flexibility in the system to just create an implementation plan that does what you are already doing?

Mr. WITTMAN. Well, again, I think an implementation plan, at least the way local governments look at that, look at it as a fairly rigid document. I can tell you in some of our experience in trying to address water quality issues locally, it takes some trial and error efforts in order to get to a point where you find things that actually do work.

When we begin to work with farmers and with silviculturists, we find that some of the best ideas come from them and we need to be able to be flexible to sort of change the plan as we go.

We have worked with trying to create community groups that actually have an interest in their smaller watersheds and they come up with development plans and action plans. Those things are far outside of the stock implementation plans that we have in mind that EPA is requiring under this rule.

Senator CRAPO. Thank you.

Mr. LeBlanc, you were about to say something; weren't you?

Mr. LEBLANC. Yes, Mr. Chairman. From the nonpoint source side of it, the implementation plan of the Chesapeake Bay Program, probably the TMDLs could make it more rigid on nonpoint source side than what it is right now.

But on the point source side, the Bay Program is not really considered a TMDL. EPA is now viewing it as a way to avoid the TMDL. If the program will work and get us off of listing by 2010, then the TMDL goes away. If not, in 2010 the TMDL gets implemented.

Now what that means is that those of us, particularly on the hardware side of things, the point source sides of things, who are embarking on agreements with the State to install biological nutrient removal processes using less traditional approaches that are essentially more cost effective. Essentially, they put in BNR at much less cost than the traditional point source, NPDES monthly/weekly average limits.

The problem we face right now as point sources, do we enter into this agreement with the State now, put this process in place, and if the Voluntary Chesapeake Program process doesn't work, then everything gets thrown out and we have to redo it all as a TMDL, rebuild the tanks, reput in our infrastructure, because all of a sudden the agreements that we had on how we operate our BNR facilities are no longer applicable under the TMDL.

So, it is kind of a line in the sand. It is not embracing the Bay Program and saying, "Yes, we would like to move this forward." It is a way of avoiding the TMDL hammer.

Senator CRAPO. Now you also said in your testimony that the fact that when a permit is changed upon the listing for the TMDL and that that causes a diversion of resources, if I understood you correctly; is that right.

Mr. LEBLANC. Yes. I mean that problem is that when the permit comes up for renewal and you are on a listed water that doesn't meet water quality standards, you get some very stringent permit limits that largely assume that the nonpoint source side is not

going to do a lot, or whatever the science says that they might be able to do, you can only get partial credit for it.

It is pretty much a point source issue. You have to comply with water quality standards. The TMDL, on the other hand, will work toward reducing nonpoint source loads in the other non-traditional ways and allow you to get more credit and not have as stringent limits.

That is where the problem comes in, what do we build for? Do we build now for the more stringent? Some of the TMDLs, the draft TMDLs that we have out there right now are saying that, "Well, we are going to put an end of pipe limit on these point sources now and if we come back later and we find out there is more allocation, you are not going to get any of it."

These are the issues that we have on this phasing of permanent limits. We believe there are ways of getting further progress from point sources to improve discharge situations in listed waters without having to modify the permit limits up front until the TMDL is done.

Senator CRAPO. All right.

Mr. Pardue, one of the four points you made at the conclusion of your testimony is that we need to be sure that the States have the authority to evaluate the efficacy of the activities they are taking. Could you expand a little bit on your concept there?

Mr. PARDUE. Well, as a practical matter, many of the remaining water quality programs that we have are very complicated and they are not easily addressable by pointing a finger at the point sources.

Most of us that have point source discharges have been regulated for many years. The remaining problems are also site specific and local in nature. The best way to address those is to bring all of the players to the table as we have done in the Tampa Bay area with the Tampa Bay Estuary Program.

Getting all the stakeholders together to come up with innovative ways to address remaining pollution problems has proven successful. The problem we have with EPA's oversight role in that is that EPA tends to take a very prescriptive view of anything that a State is doing and measure it against some standard.

We need to preserve the flexibility for local governments, local agencies and State agencies, to use their judgment in what works best in their waters.

Senator CRAPO. The concept that I kind of hear you talking about there is that perhaps we have a Federal standard for what the quality of the water should be but let the States figure out how to do it.

Mr. PARDUE. That is correct.

Senator CRAPO. Without having it be so prescriptive that there is only one narrow opportunity to do it.

Mr. PARDUE. That is correct.

Senator CRAPO. In that context, it seems to me that the more complicated or prescriptive the definition of the TMDL is or the requirements for the implementation are, then the less flexibility the States have as they seek to find solutions. Am I seeing it the way you are trying to explain it?

Mr. PARDUE. Yes, you are on track.

Senator CRAPO. Mr. Skolasinski, in your testimony a question came to me along the same lines with regard to what was happening with the State efforts in Minnesota and in your industry as a result of the application of the rule, if the rule were to become law.

The question is, in your opinion, do you feel that if the TMDL rule or program becomes law that that would impede the efforts to clean the waters in Minnesota?

Mr. SKOLASINSKI. At least from the perspective that we are looking at these alternative solutions, it would. One of the things that we are embarking on, again, is this voluntary mercury reduction effort.

In this program it is opened up to anything that any entity can do to reduce mercury discharges or to do research to further the information that would lead to discharges down the road.

In addition, in our local area we are currently attempting to develop the TMDL for the mercury situation that we have. However, as we envision it, we feel that we have several years of data collection before we can even get our arms around what it is we are dealing with.

After a number of years of collecting data, then we can come up with a proper implementation plan. This implementation plan is going to have to address the air deposition aspects. I don't know how much the States can do to address their deposition because the sources of many of these things are outside the boundaries of the State. So until there is a national and even an international program, there is not a great deal that we can do.

So as far as just the TMDL program in and of itself, no I think that will discourage a lot of us from trying to work together to come up with these solutions.

Senator CRAPO. I assume that everybody on the panel heard the testimony of the GAO in the previous panel about the lack of reliable data.

Does anybody on the panel disagree with the general thrust of the testimony that was given that we don't have sufficient data to be doing reliable TMDL analysis?

Mr. LEBLANC. I agree wholeheartedly that we are well short of that ability to first list the waters and then effectively come up with a TMDL program.

Senator CRAPO. Is everybody else in general agreement with that?

Mr. LEBLANC. If I am right, too, on the mercury issue, there are some interesting issues from the municipal standpoint that we are faced with and we are frankly having a hard time getting people to focus on, is that you know some of the larger sources of mercury within the municipal waste water system are foodstuffs, Kool-Aid.

FDA has an approved level of mercury in the coloring content of Kool-Aid of about, I think, five parts per million.

Mountain Dew has a tremendous amount of mercury in it, relatively speaking, not that it would kill you or anything. But certainly there is a lot of Mountain Dew going into the waste water treatment system.

Senator CRAPO. Now we are going to have to have them come and testify.

With regard to the question of the lack of reliable data, I am assuming that there is an awful lot more reliable data for point source pollution than for nonpoint sources of pollution. Am I correct there as well?

Mr. PARDUE. That is correct, yes.

Ms. BELL. But some of the data that we are talking about—we are talking about two different kinds of data. One is, what do we know is coming off or out of a source, and then the other is just what is in the water body. Those are related when you do a TMDL, hopefully, but they are a separate issue.

Senator CRAPO. But they are separate kinds of data. What I am getting at is that the real lack of data is in the area of the nonpoint source piece of it.

Mr. LEBLANC. And the receiving waters themselves, also.

Mr. PARDUE. I would say there is a lack of good quality data just in the ambient monitoring situation in most States. Most States don't have the funding available to them to collect the vast amounts of ambient monitoring data they would need in order to make these listing decisions.

As much as other people have testified to this already, it is an extremely important point that we cannot overlook. If you don't get the right data and if that data is not subject to the right protocols, QAQC, you are not going to get the right waters on the list. You are going to have State agencies running around with their limited resources not focused on truly impaired waters.

I can't imagine that EPA would look fondly on me submitting compliance data that was based on evaluated data as opposed to something that had gone through a rigid QAQC protocol.

We are asking that the same quality of data be collected in order to evaluate waters for listing.

Senator CRAPO. The point I am getting at here is that if we do have such a lack of data that we may end up putting streams of water bodies on the list, that we do not need the kind of attention that we will then pay to them and do not need the expenditure of resources that we will then expend on them, and we will end up, perhaps, not putting some on the list or not understanding how to deal with those that are on the list in a way that results in those that need the attention not getting the attention.

Senator CRAPO. Yes, go ahead.

Ms. BELL. Because of that concern, and again, Rob Olszewski in the back of the room will correct me if I am wrong. He is up on the next panel, I think.

But because of that concern I think all the interest groups except maybe the States, on the Federal Advisory Committee saw it as a benefit to maintain the current 2-year listing cycle because that allows point and nonpoint sources that are concerned about having their waters listed when they shouldn't have been to bring in data and information to demonstrate that the water should be delisted and that allows concerned citizens, other Federal and State agencies, and tribes, to bring in data that demonstrate listing should take place.

I think if you have EPA's colored map of listings you can see that there are huge disparities between States and I think that does not serve anybody well. So, in order to maintain the flexibility that

States want and to get to some consistency, that 2-year cycle makes a lot of sense, at least until States are able to get to some level that people are more or less comfortable with in terms of what those lists represent and then perhaps to go to a less frequent cycle.

Senator CRAPO. Go ahead, Mr. Skolasinski and then Mr. Pardue.

Mr. SKOLASINSKI. One of the other issues along with this is that currently there is not a standard protocol for determining if a water is impaired or not. The States do that independently and most of these protocols have never gone through peer review or formal rulemaking. That is one aspect that I think should go through in any revision of the TMDL regulations, is that this protocol should be standardized.

To respond to an earlier question of yours, in the situation we have in northeastern Minnesota where the State has designated virtually all of the waters as impaired for mercury, they are measuring that against the standard of 1.3 parts per trillion.

The methodology to measure to that degree was just approved by EPA this past year, yet almost all of the data they are relying on for these listings was generated several years ago.

How close they came to following the standard procedures for this methodology and the clean sampling techniques is of great concern to us.

What our laboratories are telling us is that at a level down around one part per trillion, if you have a mercury amalgam filling in one of your teeth and you breathe on the water sample, you could contaminate the water sample.

Yet, we have no assurances that the quality control ever went into the collection of these samples and the analysis of these samples. So there indeed could be many of these waters that may in fact not actually be impaired.

Senator CRAPO. Mr. Pardue.

Mr. PARDUE. Just two points, if I could. One followup to something Mr. Skolasinski just said, in Florida we have adopted a statute that requires a rule to be developed on the listing methodology. It is an open process that involves all the stakeholders who are participants.

Through that process you can hopefully come up with a robust methodology that will ensure that the right waters get listed.

Second, I am not sure I concur to want to stay on the 2-year listing cycle because I am not convinced that the States can meet that, given the gaps in the data, I would encourage us to continue to forge ahead and in particular look at being able to delist waters with an equal and equivalent amount of data that is collected.

As we meet standards in new water bodies, these water bodies should be able to be removed from the list just as easily as they are put on the list.

Mr. LEBLANC. Mr. Chairman, if I might, there is no requirement for minimum data sets at this point, nor is it being proposed. So one data point or in some cases no data points based strictly on observation or understanding is enough to list a body of water at this stage of the game.

The program works on extreme data points. The averages and the general trends of the data generally are not what drives the de-

cision to list or not list. It is the outlier; it is that one point that is way out here.

Without adequate data sets, you always get an outlier by statistics. So you need an adequate data set to make sure that that outlier point is valid and accurate.

Senator CRAPO. It seems to me that the information we are getting here at the hearing today tells us that with the unreliability of the data we have we are embarking on a very expensive course that we do know is going to apply our resources where they need to be applied and we have a lot of people telling us that they are going to be diverted from things they are doing right now.

I believe that is one of the big concerns that we share.

I see you want to respond to this, Ms. Bell.

Ms. BELL. I do.

Senator CRAPO. Go ahead. You can have the last word and then we will go to the next panel.

Ms. BELL. Well, I guess I wanted to say that there is an impetus for people to collect data because of this listing process and they in fact are doing it and waters are getting delisted. There is no doubt about it.

The second thing is that when TMDLs are done it behooves everybody involved and that often does include Federal agencies and other State agencies as well as regulated and nonregulated interests to go out and collect data and to help work with the State to collect the data or what have you, or to get the data that they already have, and there is plenty of it out there that is not being used, and bring it to the table.

In that process, if it is determined that a TMDL is no longer NPDES needed, then one doesn't need to pursue data collection. But if it is, then data are usually collected in order to support the TMDL effort. Because it is not to anybody's advantage and particularly not to point source's advantage to prepare a TMDL without sufficient data.

Senator CRAPO. I agree. Thank you all very much. We could go on with this for a long time, and we probably will in one way or another. I appreciate your attention to the issues at hand and the testimony. This panel will be excused.

We will now call up our fourth panel. Ms. Joan Cloonan, vice president, Environment and Regulatory Affairs at J.R. Simplot Company Food Group. Hi, Joan. Joan is from my home State and we have worked together on a lot of issues.

Mr. Thomas N. Thomson of the Thomson Family Tree Farm of Orford, NH; Ms. Sharon Buccino, senior attorney at the Natural Resources Defense Council; Mr. Robert J. Olszewski, director of Environmental Affairs at The Timber Company; and Ms. Dina Moore of the National Cattlemen's Beef Association.

While this panel is taking its seat, we have been joined by the chairman of the full committee, Senator Smith. I would be glad to offer you the time now to make a statement or take whatever time you would like, Mr. Chairman.

OPENING STATEMENT OF HON. BOB SMITH,
U.S. SENATOR FROM THE STATE OF NEW HAMPSHIRE

Senator SMITH of New Hampshire. Thank you very much, Mr. Chairman and thank you for having this hearing and thank you for your leadership on the issue of TMDLs.

I would say to the panel, welcome to the city of acronyms, TMDLs, you name it, we have it here in Washington.

As you know, Mr. Chairman, we are looking at at least one subcommittee hearing. We have talked about another one out your way and we are planning to have one in New Hampshire on the 6th of May on this issue. So we look forward to that.

I want to say, it is a pleasure to have so many knowledgeable people here this morning. I am sorry I missed the earlier panels, and I do have to leave in a moment and I apologize to the witnesses for that.

The congressional hearings, as well as conversations that I have had with other Senators on this issue have caused me to have great concern about the impacts and legal ramifications of this proposed rulemaking.

As a matter of fact, Carol Browner, the EPA Administrator was here a week or two ago, a little longer than that, I guess, for an oversight hearing. We discussed this issue and I asked her a question about it.

She said as far as she was concerned the States would make these decisions. They were not trying to secure more permitting or anything of the kind.

But then when we talked with the local farmers and foresters in various States we hear otherwise. I think you may hear some of that this morning, Mr. Chairman, or you probably already have.

But the proposed rule is being criticized by State governments, Federal agencies, industry, agriculture, silviculture, not to mention the grassroots contribution to the 30,000 on EPA.

So I would say, I have heard from landowners and business men and women in New Hampshire and all over the country since I have been the chairman of the committee about this rule. If they have to get new permits for their farms or logging operations, many will have to sell their land to developers. For the life of me, I cannot understand how that could be in the best interest of our environment.

I also want to say, Mr. Chairman, and I want to introduce Mr. Thomson in just a second, but Tom Thomson who is here today, a tree farmer from New Hampshire, has a very interesting point, I am going to ask unanimous consent that this be made a part of the record.

Senator CRAPO. Without objection.

Senator SMITH of New Hampshire. This is a memorandum to Mr. Thomson, the National Tree Farm Operating Committee, from Eric Kingsley, the executive director. There was a meeting with EPA on TMDLs that took place just a day or two ago. At this meeting, according to this memo, Mr. Manfredonia, who was the EPA Region I Associate Director for Surface Water Program, and in that meeting, I want to quote what Mr. Manfredonia indicated.

He said that silviculture and forestry operations are not, to the best of his knowledge and data, an issue for water quality in EPA Region I.

He indicated that waste water treatment facilities combine sewerage overflow and urban storm water runoff were the areas where there was significant opportunities for improvement in water quality, but not this.

The conclusion of the meeting with EPA and the State agencies was that there is no reason why the EPA should step in and regulate forestry in this region as the States and private sector are doing an excellent job of making certain that forestry operations do not harm water quality.

Why are we looking at a proposed rule change? I think hopefully we will get to the bottom of this with this hearing, which I commend you for, and perhaps a couple of other hearings out in the field.

Let me just introduce, in deference to the other witnesses, but Mr. Thomson here from New Hampshire, the Thomson family have been long-time friends of mine. Tom's father was a former Governor of New Hampshire. I have known the Thomson family since 1970, so we go back a long, long way.

I am pleased to welcome you here today, Tom. You are a very well respected forester in New Hampshire and I think what we find with people like Tom Thomson, I would encourage those who have doubts about the stewardship of private owners to go out and take a look at Tom Thomson's farm and see how he manages his land.

In fact, there was a quote by a district conservationist in a tribute story about Tom by the Appalachian Mountain Club and I can't say it any better than that. It is a quote: "If everyone had Tom's stewardship ethic, there would be no environmental problems." So, I understand when you are not working, it is probably costing you money to be here, but thank you for coming and thanks to all the witnesses for being here this morning.

Thank you, Mr. Chairman.

[The referenced documents follows:]

NEW HAMPSHIRE TIMBERLAND OWNERS ASSOCIATION,
March 20, 2000.

The Honorable ROBERT SMITH, *Chairman,*
Environment and Public Works Committee,
U.S. Senate,
Washington, DC 20510.

DEAR CHAIRMAN SMITH AND MEMBERS OF THE COMMITTEE: The New Hampshire Timberland Owners Association (NHTOA) represents over 1,500 landowners, loggers, foresters and wood-using industries in the State of New Hampshire. Our members own and responsibly manage over one million acres of productive forestland statewide. I am writing to convey NHTOA's strong objections to the Environmental Protection Agency's proposed rules regarding Total Maximum Daily Loads (TMDL) from forestry operations.

New Hampshire is the second most forested State in the nation, with over 83 percent of the State forested. The vast majority of this land is in private hands, contributing to the economic and environmental quality of the State. The EPA's proposed TMDL rules threaten private landowner's ability to manage their forestland in a reasonable manner—the very action that makes land ownership economically possible.

The proposed regulations would eliminate the designation of forestry activities as a "nonpoint source," reversing a 27-year determination under the Clean Water Act. The new rules change the definition of forest management, opening the door to

NPDES permit requirements for private landowners. If harvesting, site preparation, and other forest management activities take place near certain waterways, then landowners could be required to obtain a Federal clean water permit.

New Hampshire's forest landowners and forest industry have proactively addresses this issue, and there is no need for Federal intervention. Landowners closely follow State "Best Management Practices" (BMPs) when harvesting timber, building forest roads and conducting other forest management activities. Over 1,000 New Hampshire loggers have voluntarily participated in the acclaimed New Hampshire Professional Loggers Program, which focuses attention to the careful design and implementation of timber harvesting operations in order to protect water quality.

In addition to the lengthy and costly delays and permitting requirements that these rules would subject landowners to, they would also open up landowners to citizen suits under the Clean Water Act. If sued, landowners would be required to defend themselves at great personal expense. This is simply unreasonable.

These rules threaten the ability of landowners to responsibly manage their land for forestry. Forestry in New Hampshire is a business with very small profit margins, and these rules threaten to add cost and time delays to forestry activities. In the absence of the ability to profitably manage forestland, many landowners may choose to sell their land to developers. The permanent loss of this forestland poses a far greater—and more pressing—environmental threat to New Hampshire than any forestry activity ever could.

Forest landowners need the ability to manage their lands without unnecessary government intervention, and have done so admirably. We urge the Senate Environment and Public Works Committee to require the Environmental Protection Agency to halt this ill conceived, and possibly damaging, rule.

Sincerely,

ERIC KINGSLEY, *Executive Director.*

U.S. SENATE,
Office of Hon. Judd Gregg, January 18, 2000.

The Honorable CAROL M. BROWNER, *Administrator,*
Environmental Protection Agency,
Washington, DC 20460.

DEAR ADMINISTRATOR BROWNER: I am writing to convey my strong objections to the Environmental Protection Agency's (EPA) proposed rules regarding Total Maximum Daily Loads (TMDL) from forestry operations that were published in the Federal Register on August 23, 1999. The proposed rules could have a significant negative impact on New Hampshire forest landowners and the businesses that rely upon them.

New Hampshire is the second most forested State in the nation, with over 4.8 million acres of forestland. Eighty percent of this land is owned and managed by over 84,000 private landowners. Their ability to own and responsibly manage forestland is critical to the environmental and economic health of New Hampshire. Your agency's TMDL rules threaten a private landowner's ability to efficiently manage their forestland and, thus, threaten the forest resource that New Hampshire relies upon.

The proposed regulations would eliminate the designation of forestry activities as a "non-point source, reversing a 27-year determination under the Clean Water Act. The new rules change the definition of forest management activities so that regulation of these operations shift from State-level to Federal supervision, opening the door to EPA permit requirements for private landowners. If harvesting, site preparation, and other forest management activities take place near certain waterways, then landowners could be required to obtain a Federal clean water permit for each and every such project.

New Hampshire landowners closely follow State "Best Management Practices" (BMPs) when harvesting timber and conducting other forest management activities. Over 1,000 New Hampshire loggers have participated in the voluntary New Hampshire Professional Loggers Program. which emphasizes, among other things, designing and conducting harvesting operations to protect water quality. Licensed New Hampshire foresters follow these BMPs as well. To require that landowners operating in certain watersheds go through the delay and expense of receiving a Federal discharge permit, given the effective State-based programs already in place, is unacceptable.

The above-mentioned permit requirements for forest management activities could open up private landowners to more red tape and to citizen lawsuits under the Clean Water Act, as well aS other Federal laws. In fact, forest landowners could

be subject to Endangered Species Act consultation and significant administrative delays before conducting practically all silivicultural activities.

These rules threaten the ability of landowners to responsibly manage their land for forestry. Forestry in New Hampshire is a business with very small profit margins, and these rules threaten to add cost and time delays to forestry activities. In the absence of the ability to profitably manage forestland, many landowners may choose to sell their land to developers. The permanent loss of this forestland poses a far greater environmental threat to New Hampshire than any forestry activity ever could.

I urge you to cease your efforts to redefine forestry, a traditional non-point source activity, as point source pollution. Forest landowners need the flexibility to manage their lands without undue government intervention and have done so admirably. Your proposal on TMDLs threaten the continued viability of forestry in New Hampshire.

Thank you for considering these comments. Please keep me informed as you deal with this important issue.

Sincerely,

JUDD GREGG, *U.S. Senator.*

U.S. CONGRESS,
Office of Hon. Charles Bass, January 20, 2000.

Ms. CAROL M. BROWNER, *Administrator,*
Environmental Protection Agency,
Washington, DC 20460.

DEAR MS. BROWNER: I would like to express my sincere concern about the Environmental Protection Agency's proposal to include silviculture as a point source under the Clean water Act (CWA). I believe that these proposed regulations run contrary to the initial legislative intent of the original CWA.

I am extremely concerned about the EPA's proposal to regulate all silviculture activities as point sources of pollution under the National Pollutant Discharge Elimination System. Specifically, this regulation would include previously exempt categories, such as nursery operations runoff, site preparation, reforestation activities, thinning, prescribed burruna' pest and fire control, harvesting operations, surface drainage. and road building and maintenance.

I am concerned that removing the exemption on these activities may unnecessarily impose heavy-handed Federal regulation on forestry activities. The silviculture industry has long history of seeking conmon-sense solutions to achieve effective, sustainable land management. In 1996 EPA report to Congress, forestry activities were identified as the smallest source of nonpoint source pollutions contributing approximately 3 percent to 9 percent of nonpoint source pollution to our nation's waters. Due to the relatively small impact of this industry, I believe that landowners should be encouraged to work directly with States and local governments to find answers to pollution problems.

Furthermore in the original rulemaking process following enactment of the CWA, the EPA recognized that the Congress's original intent was to designate forestry activities as a nonpoint source of pollution. Therefore, this proposed rule would represent a departure from 30 years of regulatory practice. Although we share the common goals of categorically improving the quality of our nation's streams and rivers, we must not impose an excessive Federal regulatory burden which could cripple the silviculture industry. I urge you to reconsider this proposed rule.

For your reference, I have enclosed several letters that I have received from my constituents' including Ivfr. Ray Burton, a member of New Hampshire's Executive Council. As you can see, they share my concerns about the effects of this proposed rule.

Again, thank you for your consideration of my views. I look forward to hearing from you soon about this important issue.

Sincerely,

CHARLES F. BASS, *Member of Congress.*

STATE OF NEW HAMPSHIRE DEPARTMENT OF RESOURCES AND ECONOMIC DEVELOPMENT,
Division of Forests and Lands, January 20, 2000.

Comment Clerk for the TMDL Rule,
Water Docket (W–99–04),
Environmental Protection Agency,
Washington, DC 20460.

DEAR SIR OR MADAM: I am writing to request a retraction of the proposed Revisions to the National Pollution Discharge Elimination System Program and Federal Antidegradation Policy in Support of Proposed Revisions to the Water Quality Planning and Management Regulation (NPDES rule).

My agency, the Division of Forests and Lands, is the governmental unit in the State of New Hampshire responsible for the enforcement of forestry laws, including those laws protecting water quality. The law enforcement staff inspects logging operations in the State to ensure compliance with these laws.

In addition, these forest rangers work through educational programs, such as those provided through certified logger programs, to ensure protection of water quality. We believe in voluntary and incentive based programs to protect the environment first.

In discussing the proposed rules with law enforcement staff, we concluded that the proposed rule will do little, if anything, to improve water quality in the State of New Hampshire. It is a poor allocation of collective public and private resources to protect the environment. Those few individuals who have little regard for the law will continue to ignore any new permitting process. For the rest, a permitting process will divert resources away from where it does the most good, implementing our State'e Best Management Practices on the ground. We have adequate laws on the books now and do not see any benefit in the proposed rule.

The proposed rule is misguided. It creates an ominous and uncertain Federal regulation over silviculture and forest management. It opens the door for abuse by those who do not support active management and stewardship of our natural resources. These activities, in the larger scale of water quality issues, have a limited negative, if not a positive, overall impact on the environment. The non point source designation for silvicultural practices should remain. The regulation of these activities on private lands belongs with the States, not the Federal Government.

Our collective efforts on behalf of the public should focus not on additional permitting and a shift to Federal control, but on monitoring, education and when necessary, enforcement of existing laws.

Thank you for the opportunity to comment.

Sincerely,

PHILIP BRYCE, *Director.*

STATE OF NEW HAMPSHIRE,
Department of Environmental Services, January 20, 2000.

Comment Clerk for the TMDL Program Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington, DC 20460.

DEAR COMMENT CLERK: The New Hampshire Departmenet of Environmental Services (NHDES) submits the following comments concerning Environmental Protection Agency's (EPA's) proposed revisions to the agency's water quality regulations, 40 CFR parts 122, 123, 124, 130, and 131, published in the Federal Register on August 23, 1999. Thank you for the opportunity to comment on this proposal.

As a preface, NHDES appreciates the outstanding partnership and working relationship that we have had over the years with EPA staff, both in the EPA New England offices in Boston and Headquarters in Washington. This partnership, which encompasses all the water, waste and air programs, has truly resulted in significant measurable improvements in New Hampshire's environment and public health protection. These joint efforts go way beyond the funding to support State program implementation provided by EPA, which is critical, to include activities that range from joint field sampling programs to national policy development. For example, we have just initiated a joint EPA/NHDES effort to develop a TMDL for New Harnpshire's Sugar River. We took forward to continuing this valued partnership into the future.

The systematic listing of impaired waters and the development of TMDLs, followed by water quality restoration, are important activities to ensure continuous

progress toward the long-term objectives of the Clean Water Act, including the attainment of water quality standards for all of our nation's waters. NDES fully appreciates that the proposed rules are a significant effort by EPA to make national improvements toward this goal. We strongly support your efforts to improve water quality across the country. However, we are also concerned that these proposed rules may have unintended consequences for States like New Hampshire that have continuously moved forward to develop high quality TMDLs and to address our highest priority water quality concerns NHDES worked closely with the other member States of the New England Interstate Water Pollution Control Commission (NEIWPCC) in the development of the comments submitted by letters dated December 9, 1999 and December 13, 1999 on the proposed rules. We also have participated in the development of the joint comments of the Association of State and Interstate Water Pollution Control Administrators (ASWIPCA), the Environmental Council of States (ECOS) and the Coastal States Organization (CSO) dated January 20, 1999. We generally concur with the comments provided by NEIWPCC and jointly by ASWIPCA, ECOS and CSO. The comments below are provided to highlight issues of specific concern to New Hampshire.

1. The proposed regulations seek to authorize EPA to designate certain additional silviculture activities as subject to NPDES point source permits; specifically. activities like nursery operations, site preparation, harvesting operations, surface drainage, and road construction and maintenance. New Hampshire forestry operations are regulated by a partnership of NHDES and the State forestry agency, the Division of Forests and Lands, Department of Resources and Economic Development. Enforceable State water quality standards exist and are applied to forestry operations. In practice, our experience had been that water quality violations caused by forestry operations are virtually always short-term problems that clearly do not merit NPDES permitting. In New Hampshire, additional Federal regulation of these activities would only add an unnecessary regulatory burden to the forestry industry without any clear environmental benefit.

2. The proposed rules contain expansive listing requirements that are likely to lead to more studies performed as an exercise to address a regulatory requirements caused by listing rather than to improve water quality. We strongly support the listing format proposed by NEIWPCC as a means to provide greater flexibility to the States while fully meeting the intent of the Clean Water Act.

3. Based on our experience with the development of TMDLs, the costs to prepare TMDLs under the proposed regulations will substantially exceed EPA projections. Significant funding increases for the States will be necessary to support the expanded TMDL program, if these rules are promulgated.

Thank you for the opportunity to comment on these regulations. If you have any questions please contact me at 603–771–3308.

Sincerely,

HARRY T. STEWART, P.E., *Director,*
Water Division.

THOMAS D. LAPOINTE,
51 SHERWOOD DRIVE,
Hooksett, NH 03106, January 17, 2000.

Comment Clerk for the TMDL Program Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington, DC 20460.

Re: The EPA's proposed revisions to the TMDL and the NPDES permit programs.

I am currently involved in managing family owned land in northern New Hampshire, I have my Bachelor Degree in Forestry (BSF), and am an active member in the Forest Industry. I have recently been informed of the EPA's proposed rules that will change the designation of forest operations from "non-point" to "point" source pollution. I strongly oppose that these proposed revisions be accepted.

Through my education and experience I have learned that conservation through forestry is necessary in the effort to supply the world's demand for wood products, benefit wildlife, promote healthy forests, provide recreational opportunities, provide clean air and water, and continue to maintain a well-balanced ecosystem. By changing the status of forestry activities to a point source pollutant more pressures through permit fees, operational delays, and (undoubtedly) uninformed citizen lawsuits All be placed on landowners, foresters, and loggers. It is these unnecessary

pressures that will limit their ability to perform environmentally beneficial silvicultural forest operations.

I strongly disagree with EPA's push for regulation through Federal Government. Most of New Hampshire is owned by private landowners and the introduction of more laws and regulations w ill dissuade them from engaging their properties in proper stewardship programs. This is sending a negative message to landowners. This proposed revision would increase landowner costs and allow developers a competitive advantage in land acquisition. New Hampshire is already seeing a steady increase in the amount of productive timberland turned non-productive through developments.

Foresters and loggers are well aware of the potential impact on the environment through harvesting operations. And extensive measures are already employed to minimize and eliminate any and all potentially hazardous situations. New Haunpshire already has stringent regulatory agencies heavily involved in monitoring the impact of forest operation on our environment.

I urge you to vote against this proposed revision, for you, for me, and for generations to come.

Sincerely,

THOMAS LAPOINTE.

JOHN O'NEIL,
129 GROVELAND AVENUE,
Manchester, NH 03104, January 17, 2000.

Comment Clerk for the TMDL Program Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington, DC 20460.

IN RESPONSE TO PROPOSED REVISIONS TO THE TMDL: I am a landowner and licensed forester in the State of New Hampshire. I would request that forestry activities remain a "non-point source" classification for regulatory purposes. Listing forestry activities as a point source pollutant would increase costs of owning forestland dramatically. Landowners would be forced to sell their timberland for short term goals and abandon the philosophy of land stewardship for the next generation. Managing forestland for timber, water resources, recreation, and wildlife has been the goal of many New Hampshire landowners for generations. This type of management has not been the most profitable but quite marginal at times. Please do not force landowners to stray from these ideals.

Sincerely,

JOHN O'NEIL.

NICHOLAS C. BRUNET,
8 MATTHEW DRIVE,
Auburn, NH 03032, January 17, 2000.

Comment Clerk for TMDL Program Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington, DC 20460.

Re: New Hampshire Forestry Rules.

I am a non-industrial timberland owner in the States of New Hampshire, Maine and Connecticut (461 acres in total). My reasons for owning and managing the properties are not strictly financial. I am motivated more by a respect and love of the land than the monetary rewards. In fact, I can show that my land investments have not been competitive with standard financial instruments. Despite this I remain committed to good management of my property and, with luck, passing the lands down to my children.

I doubt that I can express the full extent of my objection to the new water quality rules proposed by the EPA. This proposal exposes the true liberal arrogance of our Federal bureaucracy. The suggestion that a centralized agency will use my tax dollars to monitor and judge my land management practices is unbelievable.

Our forests in New England are in the healthiest condition than at any time in the last 100 years. The reason for this is the predominance of private land ownership along with minimal government interference. I honestly do not see the problem that these rules are expected to correct, and I am out in the forest every week.

Changing forestry operations to a "point source" designation will add unnecessary delays and financial burdens on an already marginal financial activity. It is more than financial, however. Adding Federal oversight will have an overwhelming psychological effect. It will be both insulting and discouraging for anybody that has put their heart and soul into their property. I am certain that a significant percentage of landowners will choose to sell rather than put up with the expense and red tape. I, for one, will not likely purchase any more land and will probably sell the small piece I own in Connecticut.

The proposed EPA changes will result in unintended negative consequences. Government should encourage forest stewardship rather than add unnecessary costs to it I strenuously object to the proposed changes.

Sincerely,

NICHOLAS C. BRUNET.

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58 BRANCH TNPK, UNIT 52,
Concord NH 03301, January 17, 2000.

Comment Clerk for the TMDL Program Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington DC 20460.

TO WHOM IT MAY CONCERN: I am writing to comment on Proposed EPA rules to designate forestry as a point source for pollution. I am opposed to the EPA or any other Federal agency regulating private landowner rights to log build roads, or perform sound forestry practices on their land. Requiring private landowners to acquire Federal permits as well as the permits required by the States creates a burden that is not only costly but also totally unnecessary. I ask that forestry activities remain a "non-point source" for regulatory purposes.

This ruling would impact me as a private landowner by restricting activities on MY PROPERTY. The permit system would impede my ability to sell logs into the best market by reducing my ability to schedule when to harvest my timber.

The Impact of the EPA's purposed New Water Regulations on the timber industry would be equal to or greater than the impact the Federal Endangered Species Act had on the Pacific Northwest. These regulations will eliminate jobs, shut down manufacturing facilities, economically cripple small towns in the Northeast as well as keeping me from practicing sound forestry on my land.

Respectfully,

JAMES M. BEX.

MICHAEL D. SULAS,
P.O. BOX 293,
Andover, NH 03216, January 17, 2000.

Comment Clerk for the TMDL Program Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington, DC 20460.

DEAR SIR OR MADAM: I am writing in regard to pending EPA rules concerning the designation of forestry activities as a "point source pollutant" under the Clean Water Act (CWA). As a land acquisitions forester in the northeast for a "'timberland company", I feel that such a designation would have a devastating effect on the industry and our nations land base.

Since the CWA's inception, forest activities have been considered a "non-point source" of pollution, meaning that such activity contributed only a small part to the nation's overall water quality problems. By labeling forestry as a "point source" polluter, the EPA is in effect grouping forestry with polluters like sewage plants and factories, and their associated discharges. Such a change would have horrifying effects on the forest products industry and the forest land base.

Under this proposed ruling landowners, both industrial and private, would be forced to obtain Federal permits from the EPA before any road building or timber harvesting could take place. Permits could take a year to be approved or denied. They could be subject to fines and suites, and could be required to stop activity and study its impact on endangered species. These permits, in addition to those already necessary to conduct forestry activities, will greatly increase the cost of conducting harvests and building roads; severely impacting the financial feasibility (often negligible in comparison with other land uses) of purchasing and maintaining forest

land. Would be long-term forest land owners will be scared off, and current owners will likely consider less environmentally friendly alternative uses such as development.

Current forest practices already take great measure to protect water quality: like the "Best Management Practices" (BMP's) set forth from the 1972 Federal Water Pollution Control Act and it's subsequent amendments. Also, most States have sufficient water quality laws, regulations and permits already in existence. Further regulation from a Federal level would prove burdensome, costly and a gross misallocation of taxpayer money. In the few years I have been in the industry, great strides in the practices we use in the field have been made. I believe the industry is truly conscious of its environmental impact: more so than any other industry. The effect of being further regulated may prove to be the breaking point for our industry.

The benefits of forested land have always been clean air and water, diverse wildlife habitat, countless forest products, and immeasurable recreation opportunities. [developed land offers none of these benefits. Forestry activities are responsible for only a fraction of our nation's pollution. To designate them as a "point source" polluter would have more negative effects on the environment than positive. Therefore, I strongly suggest that forest activities maintain their "non-point source" status.

Sincerely,

MICHAEL D. SULAS.

RODMAN R. BLACK,
134 HURD ROAD,
Newport NH 03773.

Comment Clerk for the TMDL Program Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington, DC 20460.

SIR: For many years my wife and I have been certified Tree Farmers and as such have done our best to practice responsible forestry practices on our forest acreage.

We understand the EPA is currently endeavoring to gain Federal regulation of forestry activities by changing the present "non-point source" status, under the Clean Water Act, to "point source" which would designate forestry operations to the same status as a factory or sewage treatment facility.

Like other Tree Farmers we are proud of our stewardship of our forest land. There appears to be no significant pollution of rivers and streams as a result of forestry activities. So why should the EPA expand its jurisdiction and impose a myriad of red tape rules on us tax payers. Where is the supporting evidence?

Who knows what the EPA will define as forest land having potential impact on water quality standards. Such Federal regulations would probably put an end to the Tree Farm system and what kind of organization would Cone forward to fill the void. Certainly the EPA would not fill the bill.

Most Tree Farmers, like us, are "Mom and Pop" operations. We don't hire workers to help us perform TSI (Timber Stand Improvement) we could not afford the expense so we do the work. Federal regs would prohibit us, as a practical matter, from fulfilling our Tree Farm tasks. And the question of our actions being monitored for their impact on endangered species is beyond understanding.

Because there is no reasonable evidence to support the "point source" change we strongly oppose the proposed rule as being counterproductive.

Sincerely,

RODMAN R. BLACK.
NANCY H. BLACK.

HUNTERS HILL TRUST,
99 STATE STREET,
Saratoga Springs, NY 12866, January 14, 2000.

Comment Clerk for the TMDL Program Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington, DC 20460.

TO WHOM IT MAY CONCERN: I write as Trustee of Hunters Hill Trust, owner of 120 acres in Elkins, New Hampshire. The trust's property has been operated by us as a tree farm and seasonal residence for more than 40 years. We are a Certified Tree Farm and member of the New Hampshire Timberland Owners Association.

Over the years, we have periodically harvested a variety of trees, including white pine, hemlock, spruce, birch and others. Our management of the renewable timber resources has provided us with very modest cash-flow about every 10 or 15 years, about enough to pay a year or two of property taxes. In addition, our harvesting has enhanced wildlife habitat significantly, which has contributed to our enjoyment of the property, and to the health of the local ecosystem.

Our concern with the proposed rule is that it would materially harm both the economic basis of our property, and unnecessarily and detrimentally alter the health and viability of wildlife habitat. It seems incongruous that EPA would consider a rule that would be so damaging to a viable economic activity that enhances the environment.

The proposed rule requires landowners engaged in forest management activity to obtain a Federal permit, and subjects them to citizen suits for permitted activities, possible fines and other penalties. If this rule is adopted, we will no longer engage in forest management on our property, because the cost of obtaining a permit will be more than the profits from future harvesting, and the potential of lawsuits would be an unacceptable risk to the trust. Although a cessation of tree farming would be deeply disappointing to us, as we have enjoyed it for years, the costs and risks of doing so under the proposed rule are simply too great to bear.

We know what happens when tree harvesting (even once every decade) is curtailed for extended periods of time. When we first acquired the property in the mid 1950's, it had never been harvested, and there was a period of more than 15 years between two subsequent harvests. At the end of those periods, the forest canopy was high, and very little vegetation grew below because of the lack of sunlight penetration. Wildlife, including game birds, deer and others, was deprived of cover and was not in evidence.

After our periodic harvests open up small cleared areas for natural regeneration, evidence is abundant of all kinds of wildlife, including moose (*Alces aloes*), deer, black bear, fishers (*Martes pennanti*), many birds, including turkey (*Meleagris gallopavo*), hawk, vulture, wild cat and others too numerous to mention, all of which have been personally observed by members of my family, and documented in our Forest Management Plan which was professionally prepared and is on file with the Town of New London.

The proposed rule would cause the habitat of these species to be eliminated from our property, which is located near other managed woodlands in a significant watershed at the headwaters of the Blackwater River.

Although the economic benefits of woodland management are relatively modest far the trust, if they were eliminated altogether (which would be the result if the proposed rule is adopted), the trust would be forced to consider other uses for the land. New London is under tremendous pressure for development, and it is likely that the only alternative use for the property, once tree farming is eliminated, would be to sell to a developer. There are a number of potential home sites on the property, which has a commanding view of Pleasant Lake.

As active Tree Farmers, we can say that a significant amount of time and money is put at risk when a harvest is undertaken, with no certainty of the return. Requiring a Federal permit for such environmentally benign activity is onerous and will cause us to stop harvesting. The potential of "citizen suits" exposes the trust to legal action from parties other than those who may be directly affected by our actions. Such a risk is completely unacceptable. In addition, by curtailing tree farming because of the EPA rule, our tree farm certification would be put at risk, which could cause our local property taxes to rise, as we presently enjoy a low assessment due to certification.

Forestry activities should remain a non-point source under the agency's rules. None of the activities we engage in impact any waterway or watershed, other than beneficially by increasing forest cover and reducing erosion.

Please acknowledge receipt of these comments.

Respectfully submitted,

GORDON M. BOYD, *Trustee.*

CHARLES W. THOMPSON,
233 BRICKETT HILL ROAD,
Pembroke, NH 03275, January 28, 2000.

Comment Clerk for the TMDL Program Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington, DC 20460.

TO WHOM IT MAY CONCERN: I am writing in response to a recent notice which I received regarding a proposal by the Environmental Protection Agency (EPA) whereby forestry operations would be designated as a point source for pollution. As a tree farmer under the American Tree Farm system I was quite surprised that forestry management activities would be considered as a point source for pollution similar to that which might be experienced from a chemical plant, sewerage treatment plant, factory, or the like.

As background, I currently manage a 200-acre tree farm which has been in our family since 1800. Over the years my ancestors, and now I, have managed this 200-acre tree farm as a working forest much the same as a person would manage a home vegetable garden. There is a time for seeding, a time for management, a time for harvesting, and a time to prepare for succeeding generations. In actuality the impact upon the land through normal tree farm management activities is less significant than those activities undertaken in managing a vegetable garden.

As a working forest, there are activities which are continually being undertaken. First, selective harvests are planned and carried out every 8 years to 12 years. This time period is expressed in a range since I try to plan these harvesting operations in conjunction with a white pine seed year. The normal disturbance of the soil prepares an excellent seed bed in which the white pine seeds can germinate. There are times when it is unknown precisely when the best seed year will occur and oftentimes these selective harvests are planned with little long range planning.

A second activity which occurs is the periodic salvaging of timber which has been lost due to winter blow downs, insect damage, or other natural occurrences such as the ice storm which had a devastating effect on a portion of our tree farm 2 years ago. These harvesting operations also occur without a great opportunity for long range planning.

Ongoing maintenance to include erosion control, narrowing of logging and access road, drainage control, preparation and management of wildlife feeding areas, etc. are ongoing activities. Again, this entire process is not unlike the management of an agricultural crop.

As a tree farmer, like most tree farmers, I am constantly concerned with the health of my forest. I would be greatly disturbed if any pollution of any of any sort occurred on our land or polluted any of the waters on our land. I am very diligent in monitoring all activity that is carried out on our tree farm to insure that no contamination of any type occurs. I can speak with confidence that all of the tree farmers whom I know feel the same way.

In summary, the proposal to designate foresty operations as a point source for pollution would if an excessive burden on the ability to manage these tree farms as we have in the past. The prospect of having to go through a permitting process, hearings, potential appeals, etc. prior to conducting any of the stewardship activities outlined above, would significantly diminish the effectiveness and efficiency of these ongoing activities and in many cases would discourage a tree farmer from performing these stewardship activities and thereby diminishing the productivity of these lands. Further, tree farmers might consider posting land making it off limits to the general public for fear of adverse consequences which might result from public use of these tree farms. Accordingly, please consider tree farms as positive influences upon the environment rather than point sources for pollution.

Very truly yours,

CHARLES W. THOMPSON.

HOAG ISLAND TRUST,
98 HIGH ROCK LANE,
Westwood MA 02090, January 20, 2000.

Comment Clerk for the TMDL Program Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington DC 20460.

DEAR SIR OR MADAM: I appreciate the opportunity to comment on the new rules prepared by EPA. As I understand it these proposals would designate forestry operations as a "point source" for pollution, require a Federal permitting process, and remove the responsibility for monitoring from State and local to Federal agencies.

While I would welcome the Federal Government setting high standards for environmental protection under the CWA, I believe first, that it should target the large commercial logging operations on publicly owned lands, and second, that forestry practices by private landowners should be exempted from the "point source" designation provided they qualify under a Tree Farm or similar program, and that they should continue to be monitored by State and local authorities.

Federal Agencies have for centuries allowed the timber industry to get away with murder on our National Parks and other public lands. To subject private owners to any further regulation before that issue is faced and resolved would be a monstrous miscarriage of justice!

The Trust that I represent is located in New Hampshire and is a family owned affair. It's limited forestry operations have been carried out in accord with a long term management plan carefully worked out 50 years ago by professional foresters, (New England Forestry Foundation). It has qualified for Tree Farm status for over 20 years. Permitting and monitoring by local and State authorities has been protective of erosion, water quality and other environmental concerns as they should have been. Because of our property's location we are particularly sensitive to any regulation that would prolong or delay our operations or would add to the already high costs associated with difficult access. I find it hard to believe that adding Federal supervision would result in increased protection of the environment and it would surely add to delays and higher costs.

My impression is that forestry operations on private property is a negligible contributor to pollution of our watersheds and that the situation has been improving in recent years. I am told that EPA's studies substantiate this.

I strongly believe that the proposed regulations will be counter productive in that they will add to the burdens of private ownership of forest lands forcing more owners to sell out to developers which is not in the best interests of NH, or the country as a hole. I hope you committee will carefully consider the suggestions I have outlined.

Sincerely,

HAMILTON COOLIDGE, *Trustee.*

SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS,
Concord, NH, January 19, 2000.

Comment Clerk,
Water Docket (W–99–04),
Environmental Protection Agency,
Washington, DC 20460.

Re: Comments from the Society for the Protection of New Hampshire Forests on the EPA's Total Maximum Daily Load Program Proposed Rule.

DEAR COMMENT CLERK: Since its founding in 1901, the Society for the Protection of New Hampshire Forests has advocated for good forestry practices and the protection of water resources, including the reduction of non-point source pollution. However, the Society is opposed to the TMDL rule changes as proposed by the Environmental Protection Agency.

Specifically, the Society opposes the reclassification of forestry operations under the Clean Water Act from the non-point source category to the point source category. The legislative history of the Clean Water Act makes clear Congress's intent that forest management practices were to be regulated under the non-point source program. We believe that forestry contributes a negligible fraction of pollution to streams and rivers and that forestry operations are, in fact, a non-point source of pollution, as negligible as they are. Reclassification as a point source is unwarranted.

Further, best management practices have been developed in most States to control these non-point sources. New Hampshire woodlot owners and foresters have a heritage of responsible stewardship and commitment to following best forestry practices. The Society believes that continued education about and monitoring of these practices is the best way to control and reduce non-point source pollution resulting from forest management operations. The proposed TMDL rule changes would undermine the continuing efforts made in this area.

The Society also believes that the proposed rules, which will move the responsibility for monitoring TMDLs from the States to the Federal Government, will impact forestry operations in a way that is exactly opposite of the intended effect of the proposed rules. A Federal permitting process for forestry operations would impose a heavy burden on New Hampshire landowners in increased cost and bureaucratic delay. We believe that the proposed rule changes are onerous in scope and could force land out of productive forestry and into development. Forcing landowners to choose between healthy forests and selling for development is not good for New Hampshire's environment, or for the nation's.

We believe that the removal of the point source exemption for forestry operations fails to recognize the beneficial contributions to water quality provided by the presence of forestlands and their appropriate management. Healthy streams, lakes and watersheds are clearly linked to the presence of forests. Forests provide other public benefits as well, such as clean air, good wildlife habitat and public recreation. The best way to continue these benefits is to provide incentives to landowners to maintain healthy forests. The Society believes that these proposed rule changes will remove current incentives by increasing regulatory and financial burdens on landowners. For these reasons, the Society opposes the proposed rule changes.

Sincerely,

SUSAN SLACK, POLICY SPECIALIST,
Society for the Protection of New Hampshire Forests.

From: Paul A. Doscher.
To: ow-docket@epa.gov <ow-docket@epa.gov>
Cc: Carl DeLoi <deloi.carl@epamail.epa.gov>
Date: Thursday, January 20, 2000 4:47 PM.
Subject: Comments on Water Docket (w–98–31)
To: Comment Clerk USEPA 401 M. Street, SW Washington, DC 20460
Re: TMDL Program Rule, Water Docket (W–98–31)

As a forest land owner, environmental scientist, former professor of environmental science and professional in the land conservation field, I am writing to object to the potential designation of forestry as a ''point source'' of pollution for regulatory purposes.

I have been involved in environmental protection in New Hampshire for more than 25 years, own a small Tree Farm and have supervised forest management on many thousands of acres. I have high standards for forestry on my land, and can state with absolute certainty that no forestry practiced on my land has ever produced any water quality problems on my land or in the stream which dissects it. In fact, if New Hampshire forest and wetland laws in place today are enforced correctly, this should be the case for any forest operation in the State.

Further, in this era when the employment of Best Management Practices (to control soil erosion) and Recommended Voluntary Forest Management Practices are becoming common practice, water pollution due to forestry activities has declined dramatically in New Hampshire. Placing a new layer of Federal regulation on forestry, with seemingly negligible actual environmental benefit would be a serious error.

Why?

Because this new requirement will increase the cost of forestry to many landowners for whom good forestry is already a marginally economic activity.

Because it will cause significant delays in harvesting and may prevent operation on dry and frozen ground conditions unless landowners anticipate permit delays well in advance.

Because it will create a significant ''backlash'' by conservation minded landowners against environmental regulation they perceive to be of inconsequential benefit to water quality.

Because there are many more important water quality problems to deal with in our State and region and injecting Federal regulation into forestry activities cannot help but dilute the Federal resources available to address more important problems.

Forestry should remain a ''non-point'' source for regulatory purposes. EPA should instead continue to support the promotion of education on Recommended Voluntary

Forest Management Practices, and training of land managers, owners and loggers on BMPs. These have proven successful, and EPA funding has helped them to succeed. Please do not undermine the good work that has been achieved through past EPA collaboration with the forestry community.

Sincerely,

PAUL A. DOSCHER.
274 Poor Farm Road Weare, NH 03281

PINE KNOB FARM,
RR 1, BOX 614,
Whitefield, New Hampshire 03598, January 17, 2000.

Comment Clerk for the TMDL Program Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington, DC 20460.

TO WHOM IT MAY CONCERN: Do not designate forestry operations as a point source for pollution. As Tree Farmers and as stewards of the land we have tried our best to maintain or improve water quality, wildlife and plant habitats as well as the quality of timber for eventual harvest by our grandchildren.

Most of our more than 800 acres of forest grows on hydric soils. We have limited timber harvests to frozen ground, but on occasion there is a thaw during the operation which may cause some temporary run off. Seldom has this affected any area beyond the immediate operation. Most people would never see a problem, but we have shut down logging operations until freezing temperatures return. We take other measures as well to protect water quality during and after logging operations. Most landowners and loggers, whether or not they are Tree Farmers, follow the same procedures. As landowners we must live with the results of what we do. We do not need more permits, analysis, fees or "outside experts" telling us how to manage our land.

We have, for many years, encouraged school groups, various organizations and individuals to visit our Tree Farm to see the way we manage the land, to hunt, to hike or to cross country ski. We have invited people to see logging operations in progress. No one has ever questioned our care of the land, but two hikers did question the cutting of "all those beautiful trees".

Regrettably we have a few people in our town and surrounding communities who do not believe a tree should ever be cut whether in our nearby White Mountain National Forest or on private land. These individuals will welcome your proposed rules, especially the opportunity to bring legal action against landowners for perceived violations. It would only take a couple of well publicized cases not only to curtail logging on private lands, but also to end good and active stewardship on such lands. More private land now open to the public will likely be posted against trespassing.

Encourage and assist private landowners to be good stewards of the land. Do not promulgate new regulations which will in the long term defeat what we all want to achieve—retention of open space, clean water, clean air, a habitat that will sustain diverse wildlife and plants alike and a place for people to enjoy. We are enclosing a copy of the information sheet we give visitors to our Tree Farm. We would welcome the opportunity to have one or more EPA folks visit and see for themselves some of what we have done.

Sincerely,

DAVID W. TELLMAN, *New Hampshire Tree Farm No. 2112.*
TANYA S. TELLMAN.

JUDITH E. FRY,
RFD NO. 1 BOX,
73 Alton, NH 03809, January 17, 2000.

Comment Clerk for the TMDL Program Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington, DC 20460.

ATTENTION COMMENT CLERK: It was recently brought to my attention that the EPA is proposing new Clean Water Act regulations that will seriously impact Tree Farm owners. I understand the proposed EPA regulations would designate forestry oper-

ations as a "point source" for pollution-the same status given to a factory or sewage treatment plant.

Secondly, I understand that these new regulations being proposed will remove a State's authority to monitor TMDL'S, total maximum daily load, and place this responsibility in the hands of the Federal Government.

I do not believe that Tree Farmers should be considered in the same category as a factory or sewage treatment plant. Also, I do not believe that Tree Farmers should be considered mayor water polluters of our rivers and streams. Even your agency's studies indicate forestry practices contribute only a very small percentage of pollution to our rivers and streams.

Currently I am the caretaker/owner of a small Tree Farm, 300 acres, in the Lakes Region of NH. There are a series of steps required of an owner who is planning a logging program or other practices that require permits,etc. Here in our town, the Town Forester oversees each forest cutting, there are numerous town and State permits required and regulations in place to be followed before a logging Job may begin.

Ultimately the responsibility for careful responsible and informed forestry practices lies with the landowners), guided by the expertise of a town, county or professional forester and responsible logger. Who better to oversee Tree Farm operations, when needed, than our own New Hampshire State Agency, Environmental Services Dept. and not a Federal agency.

idur proposed rule will mean more red tape, more delays, more permits, more analyzing, not to mention more expense to a Tree Farmer like myself. I do not support the EPA'S proposed changes.

Respectfully,

JUDITH E. FRY.

BROOKDALE FRUIT FARM, INC.,
38 BROAD ST. P.O. BOX 389,
Hollis, New Hampshire, January 17, 2000.

Comment Clerk for the TMDL Program Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington, DC 20460.

COMMENT CLERK—EPA: We are small tree farmers in New Hampshire, and part of our property borders a major river.

The proposed national rules under the Clean Water Act will replace State control of TMDL. With Federal monitoring and responsibility, it will also replace the "non-source" point designation with "point source" for pollution regulation. This classification is totally wrong—another example of the government acquiring property rights through agency regulation.

Tree farmers are good citizens and help provide the public with clean air, water, habitat for wildlife, recreation, and healthy forests for the future. Please don't make us land developers.

Sincerely,

FRANK WHITTEMORE, *Treasurer,*
Brookdale Fruit Farm, Inc.

FREDERICK AND VIRGINIA HATCH,
27 PEASE ROAD,
Meredith NH 03253, January 18, 2000.

Re: EPA TMDL Program Rule Comments.

We are Tree Farmers (Nos. 1641 in Meredith NH and 2464 in Sandwich NH) whose management of our woodlands will be adversely affected by the proposed rules for transferring control and permitting to a Federal agency. Our 72 acres in Meredith has recently been placed under a perpetual conservation easement with the New England Forestry Foundation (NEFF) to include tree farming, wildlife habitat enhancement, and public recreation. Both tree farms have management plans created and implemented by NEFF licensed foresters. There are already many regulations and "best management practices" concerning timber management operations, which are adhered to by our forester and the selected loggers. Most of these concern protection of water quality. Note also that in this part of New England most harvests are carried out in venter on frozen ground and water.

The Meredith tree farm contains one small permanent and several seasonal streams. The drainage passes through a prime wetland, a larger brook and river, and several intervening lakes before ultimately becoming part of the Merrimack River. The 34 acre Sandwich tree farm contains no significant watercourses and little or no drainage ever leaves the property. An exception is frontage on a beaver pond at the rear which has a major brook outlet. However, because of the scenic and wilderness value of the pond, any timber operation will leave a large uninvolved buffer around the pond.

Major management operations are carried out on these tree farms only every 10–15 years. Given the descriptions above, it is inconceivable that these activities could contribute more than a de minimis point source of pollution. Adding a layer of Federal control on top of established and proven local regulations and professional practices would create a great inconvenience for our care of this property. Our NEFF foresters are already so busy that gaining their services requires lengthy advance planning. Adding another layer of bureaucracy to this process violates all common sense for operations of our magnitude. We will admit that operations on tracts ten or 20 times our size, or closer to major water bodies of concern may justify more stringent control. An important negative consequence of applying the proposed program to small tracts is that landowners who do or might practice good forestry will reject the regulation overlay and its costs and sell their land for development, with far greater degradation of the New Hampshire environment than will occur with the present level of stewardship of our natural resources.

Thank you for your consideration of these comments.

Sincerely yours,

New Hampshire Timberland Owners Association.
Society for Protection of New Hampshire Forests.

BRUCE M. SCHWAEGLER,
P.O. BOX A, INDIAN POND ROAD,
Orford, NH 03777, March 20, 2000.

THOMAS THOMSON,
Bridge Street,
Orford, NH 03777.

DEAR TOM: It is my understanding that you will be testifying soon regarding the TMDL Program Rule. I believe strongly that forestry activities should remain a "non-point source" for regulatory purposes and that monitoring of TMDLs should remain with State agencies.

Attached is a copy of the letter that I provided to the Comment Clerk for the TMDL Program Rule during January, 2000. I hope you will represent my point of view during your testimony.

Best regards.

Sincerely,

BRUCE.

SCHWAEGLER FAMILY TREE FARM,
January 17, 2000.

Comment Clerk for the TMDL Program Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington, DC 20460.

DEAR ENVIRONMENTAL PROTECTION AGENCY: I am asking that forestry activities remain a "non-point source" for regulatory purposes. Furthermore, I am asking that monitoring of TMDLs remain with State agencies rather than moving that responsibility to the Federal Government.

My certified Tree Farm is in the Connecticut River valley. Its 2800 acres includes 95 percent of the watershed of a 150-acre lake and its major outflow wetlands. I am proud that my stewardship ethic is that of taking great care of this natural resource. I invest extra financially to assure that my standards are high. I go out of my way to encourage other non-industrial forestland owners to adopt a similar high-level stewardship ethic.

I am very concerned that the proposed rule may have severe negative implications. To the extent that the additional regulatory review results in additional costs—for instance time delays and professional fees—my finite resources will be si-

phoned into those activities and away from my ability to meet my own high standards on a voluntary basis. I am also concerned that the proposed rule may open me to legal challenges even though I am practicing sound, sustainable forestry.

From a public policy point of view, I feel that any additional Federal resources should go toward the ongoing job of educating non-industrial private forestland owners about proper standards of forest management. This group, who collectively own nearly 59 percent of our nation's 490 million acres of timberland, are well intended and share the goal of high water quality standards. Many are new to forest management and, therefore, education is important.

Sincerely,

BRUCE SCHWAEGLER.

W.M. DANNEHY,
6 MAPLE STREET,
Woodsville, NH 03785, March 10, 2000.

THOMAS THOMSON,
RR1, Box 9,
Orford, NH 03777.

Thanks for requesting the use of my letter of 1/18/2000 to the Environmental Protection Agency regarding the proposed rule changes for W–98–31.

You are more than welcome to utilize this letter at the upcoming Senate hearing. Specifically, your local knowledge and testimony will give the beltway people a true picture of field and forest conditions.

Best of luck with your efforts.

W.M. DANNEHY,
6 MAPLE STREET,
Woodsville, NH 03785, January 18, 2000.

Comment Clerk for the TMDL Program Rule
Water Docket W–98–31
Environmental Protection Agency,
Washington DC. 20460

:Proposed revisions to the Water Quality Planning & Management Regulation W–98–31.

For the past 35 years I have been involved with nonpoint agricultural and silvicultural water quality efforts as both a professional Federal soil conservationist (30 years) and for the past 5 years as a consultant. I have also been a timberland owner and tree farmer for over 30 years. My activities have generally been focused in northern NH, VT, NY and ME.

Over the past 35 years, I have witnessed and been involved with various efforts on the local and State which have made tremendous progress in developing and implementing aggressive and effective non-point programs. This has been a cooperative effort utilizing State agencies, University systems, local professionals and a variety of Conservation organizations. Despite the success of the local and State effort, we now are told that EPA is proposing a Federal regulatory program aimed at non-point sources of pollution.

Admittedly, there are demonstrated non-point problem areas which may not be successfully addressed on a voluntary basis. I would suggest that everyone would be better served if State and local organizations be funded with Federal dollars and utilize Federal technical guidelines to address problems rather than tarring the matter over to another Federal agency.

As proposed, I feel these rules changes will destroy the sense of trust, stewardship and partnership which many people have worked for many years to establish between landowners and State and local technical agencies. By bringing in an outside Federal enforcement agency/local attitudes and feelings will revert back to what they were over 30 years ago.

HIGH RIDGE TREE FARM,
1999 NEW HAMPSHIRE OUTSTANDING TREE FARMERS.

Comment Clerk for the TMDL Program Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington, DC 20460.

DEAR EPA: My wife, Ginny, and I are tree farmers in New Hampshire and have recently become aware that your agency is proposing new Clean Water Act rules for forestry that could adversely affect our tree farming activities on our property in NH.

As I understand the proposal, your agency feels that Forestry needs more Federal control over our tree farming activities in NH. I would disagree with this assessment for several reasons:

1. Forestry results in the lowest source of sediment of all land uses. The cropping factor used in the universal soil loss equation is the lowest for forestry. Regular farming activities have much higher soil loss than forest activities primarily because the rotation for forest activities is so long compared to other land uses.

2. Forest landowners are the best protection for water quality in the nation. If we are forced to undergo additional and unnecessary Federal regulation in the name of water quality, the result could very well be counter productive because of the forced sale of forest land to other land uses which are not as beneficial to water quality.

3. Forest activities are currently regulated by the State of New Hampshire by the required implementation of BEST MANAGEMENT PRACTICES on harvest operations. These rules as I understand them have been reviewed by your agency and have been affectively implemented for many years with the result that forestry has the least impact to water quality of all land uses in NH. If it ain't broke don't fix it. If a forest activity is in violation of the law regarding water quality, than current law should be enforced on the violator instead of putting an additional burden on forest landowners who are currently protecting water quality better than any other land use category.

4. I have not seen any specific information or data to support EPA's proposal that additional regulation is required in New Hampshire to regulate forest landowners through a Federal permitting process. Lacking this information there is no logical reason to put this costly regulatory burden on landowners.

Please consider our concerns and seriously consider the withdrawal of your proposal because it is not needed for forestry in NH. Because your proposal has such a large potential financial impact on forest land owners in New Hampshire I would request that you hold public hearings in New Hampshire before taking any final action on this proposal so that all points of view can accurately be expressed in public and the merits of the proposal can be closely examined by the public in a public forum.

Please forward to us specific material that you have to Justify your proposal that would affect forest landowners in NH. Also notify us of any hearings or other notices on this matter that your agency may undertake.

Thank you for year consideration.

THOMAS G. CHRISENTON.
VIRGINAL L. CHRISENTON.

SCHWAEGLER FAMILY TREE FARM,
P.O. BOX A, INDIAN POND ROAD,
Orford, NH 03777, January 17, 2000.

Comment Clerk for the TMDL Program Rule Water,
Docket (W–98–31),
Environmental Protection Agency,
Washington, DC 20460.

DEAR ENVIRONMENTAL PROTECTION AGENCY: I am asking that forestry activities remain a "non-point source" for regulatory purposes. Furthermore, I am asking that monitoring of TMDLs remain with State agencies rather than moving that responsibility to the Federal Government.

My certified Tree Farm is in the Connecticut River valley. Its 2,800 acres includes 95 percent of the watershed of a 150-acre lake and its major outflow wetlands. I am proud that my stewardship ethic is that of taking great care of this natural resource. I invest extra financially to assure that my standards are high. I go out of

my way to encourage other non-industrial forestland owners to adopt a similar high-level stewardship ethic.

I am very concerned that the proposed rule may have severe negative implications. To the extent that the additional regulatory review results in additional costs—for instance time delays and professional fees—my finite resources will be siphoned into those activities and away from my ability to meet my own high standards on a voluntary basis. I am also concerned that the proposed rule may open me to legal challenges even though I am practicing sound, sustainable forestry.

From a public policy point of view, I feel that any additional Federal resources should go toward the ongoing job of educating non-industrial private forestland owners about proper standards of forest management. This group, who collectively own nearly 59 percent of our nation's 490 million acres of timberland, are well intended and share the goal of high water quality standards. Many are new to forest management and, therefore, education is important.

Sincerely,

BRUCE SCHWAEGLER.

PHILLIPS EXETER ACADEMY,
20 MAIN STREET,
Exeter, NH 03833, January 14, 2000,

TMDL Program Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington, DC 20460.

DEAR CLERK: The Phillips Exeter Academy owns approximately 700 acres and is a registered tree farm.

In the past, we have been involved in various forestry practices including timber harvest, pruning, fire access road construction. In recent years we have become committed to increased forest management, wildlife habitat improvement, grassland management, recreation trail construction and maintenance, and land protection. We enlist the knowledge and experience of the county the extension service, USDA Natural Resources Conservation Service, private consulting foresters, and professional contractors. Fortunately we have not been unduly delayed by lengthy process and restrictions. Increased regulation, inspection, permits, etc. will only serve to retard our good progress.

The Academy puts a high priority on the management and protection of its land and we consider ourselves responsible stewards. We would ask that forestry activities remain a "non-point source" for regulatory purposes. Thank you for the opportunity to express our opinion.

Sincerely,

DENNIS HUBER, *Supervisor of Grounds,*
Phillips Exeter Academy.

TOMAPO FARM,
BRUCE C. TOWNSEND,
11110 STORRS HILL ROAD,
Lebanon, NH 03766–2312, January 15, 2000.

Comment Clerk for the TMDL Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington, DC 20460.

I would like to respond to the proposal to include forestry operations as a "point source" classification.

I live on and operate a family farm which was settled by my four greats grandfather in 1769. I am the seventh generation to live here. The farm consists of 400 acres of which 60 acres are tillage and the remainder is forest of mixed hardwoods with a fair amount of Eastern White Pine and a lesser amount of Eastern Hemlock. Probably seventy-five percent hardwood. We also have a 1500 tap maple sugar operation and are members of the American Tree Farm System.

For two hundred plus years we have practiced good forest stewardship, and at no time have had a problem with "point source" or "non-point source" pollution. We have always practiced good soil conservation on our land as well.

As a small business (under $100,000 per year) the additional regulations and red tape they create would only add to our costs and make it that much more difficult to stay here. In fact I think it highly likely that if I found myself facing the additional red tape, citizen suit liability, and even the possibility of having my business "held up" while someone checked to be sure there are no endangered species here, I'd call it quits.

I feel like the only endangered species here are the landowners, farmers and foresters. Does anyone care about this human race?

Please, don't put Forestry Operations in the "point source" classification. I believe it will have a very negative effect on small landowners and Tree Farms.

Finally, It seems to me that the State of New Hampshire has been doing a very good job of handling water pollution control.

Sincerely,

BRUCE C. TOWNSEND.

MR. & MRS. LESLIE C. BRIGGS,
157 SOUTH ROAD,
Kensington NH 03833–5807, January 10, 2000.

Comment Clerk for the TMDL Program Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington, DC 20460.

DEAR SIR OR MADAM: This is being written in response to your proposal for new Nationwide rules and regulations that will impact our ability to practice responsible forestry. No new rules regarding how we manage our woodlands are necessary since we have been exhibiting responsible stewardship over a good many years.

My wife and myself are the proud owners of a 177 acre Tree Farm known as the Pine Tree Trust which has been in my wife's family for six generations. We have been the custodians of this property since 1978 when my wife inherited the property from her father.

Since acquiring ownership, forest related work has been in continuous practices A 25 year Forest Management Plan was prepared by a certified consulting forester, Charles Moreno and silverculture practices have been carried out ever since.

Mr Moreno incidently is also a Tree Farm Inspector. He has been selected as the New Hampshire Tree Farm Inspector of the Year six times—and the Northeast Region winner twice. Last November he was named the 1999 Westley R. Meier Outstanding Inspector of the Year by the American Tree Farm System. He has served as a Tree Farm Inspector for 18 years and has-earned the American Tree Farm System's Gold Hard Hat award for certifying more than 100 Tree Farms in his career.

Our property which spans two Towns here in the Southern most part of Rockingham County which happens to be the fastest growing part of the State and New Hampshire also happens to be the fastest growing part of New England.

My wife and myself have been working for almost a year to obtain a Conservation Easement on this woodland. The easement has been drawn up and with a little fine tuning will be in place later this month.

Tree Farmers as well as other Woodland Owners in this State have been responsible stewards of their woodland property and any additional Government rules and regulations are not needed.

We do not want more red tape, more expenses and more administrative delays. Back off and let us continue to handle our woodlands in a responsible manner.

Sincerely yours,

LESLIE C. BRIGGS.

BILL & NANCY YATES,
RR2 392A1 CHESTNUT HILL ROAD,
Farmington, NH 03835, January 11, 2000.

Comment Clerk for the TMDL Program Rule,
Water Docket (W–9–31),
Environmental Protection Agency,
Washington, DC 20460.

DEAR SIR OR MADAM: I would like to make a comment about being a tree farmer. I have 150 Acres of land under the stewardship program. I would request that forestry activity remain a "non-point-source" for regulatory purposes. I have been able

to be a tree farmer and follow all good conservation practices because of the financial assistance I have received, as well as the help in obtaining permits.

We do not need more regulatory action that could seriously damage the heritage of responsible stewardship that New Hampshire tree farmers have built up over the last 50 years.

I would appreciate my comments be considered before any regulatory action is taken.

Thank you,

WILLIAM A. YATES.

KATHRYN DONOVAN KACHAVOS,
New Boston, NH 03070.

Comment Clerk for the TMDL Program Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington, DC 20460.

DEAR SIR: I am writing to you regarding the proposed rules because of my concern that the implementation of such regulation may have a serious adverse effect on the stewardship of New Hampshire forest lands. The land that I own is an undivided parcel of 50 acres that has been cared for by only four families since it was settled in the 1760's. Most of the acreage is second growth forest, primarily white pine. Forest management began in the 1960's under the previous owner to maximize sustainable yields.

The land has been a certified Tree Farm since 1986. A stewardship plan was developed in 1996 to guide continuing management. Besides the forest, the land has water courses and two ponds which are in the watershed of the Piscataquog River. The forest supports a rich and varied wildlife, including deer, black bear, coyote, fox, weasel, snowshoe hare, mink, fisher cat, porcupine and raccoon. Herons and hawks nest as well as numerous smaller birds. Moles, mice and voles are well-represented. Because of forest diversity, ample resources are available to the entire food chain.

This result has been achieved through the guidance and support of several groups and individuals. However, it would not have been possible to accomplish this without these resources being accessible and easily utilized by the small landowner. Most of the timber in New Hampshire is owned and managed by small landowners like myself. Current programs have made it convenient for us to develop sound forestry practices and management skills.

While I appreciate the goal of clean water and protecting the watershed, I would note that sound forestry practices already add a great deal to any watershed, by acting as active filters and drawing pollutants out of the air and soil. Increasing regulation is likely to drive the small landowner out of sound management because of the burden of forms and bureaucracy. I would also note that the time consumed by regulatory procedures may prevent the owner from selling at prime market price. As small landowners, most of us harvest only sporadically, and missing the market may cause real hardship.

Finally, I would observe that Tree Farmers are already interested in, and active in protecting watershed quality. The conservation easement on my land is held, not by the Forest Society but by the local watershed association (Piscataqoug Watershed Association). I currently allow access to my land for hiking, fishing and hunting, but I am concerned that under the proposed regulations, liability issues would force me to reconsider the question of access.

In conclusion, let me share with you what I consider a far more serious threat to watersheds than forestry activities. As a very young child, I listened to my grandfather berate the paving of a road near his truck farm. "In a hundred years, you will not be able to grow corn on this black top," he said. But then he turned to me and explained that the real damage was that the paving prevented the rain from soaking into the ground and replenishing the springs and wells and that most of it would end up wasted, returning to the ocean unused. The amount of land sacrificed to road paving within watersheds constitutes much more of a problem for water quality than forestry activities.

Please let forestry activities remain a "non-point source" for regulatory purposes.

Sincerely,

KATHRYN DONOVAN KACHAVOS.

PETER C. RHOADES,
NEW HAMPSHIRE LICENSED FORESTER NO. 69,
South Acworth, NH 037607–7703, January 11, 2000.

Comment Clerk for the TMDL Program Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington, DC 20460.

This letter is a comment on the proposed new rules to designate forestry operations as a "point source" for pollution. I consider myself a dedicated conservationist and in general support most efforts to improve the quality of our nation's air and water. However, I am strongly opposed to the proposal to designate forestry operations as point source for pollution, for the following reasons. My knowledge is limited primarily to New Hampshire(NH) and surrounding New England States, and my comments are most specific to this region. However, as I feel that these proposed rules are counterproductive to good forest management and environmental quality in general for this region, I feel that a different approach is needed to address this problem if indeed it exists in other regions of the country.

1) This designation is not needed. Forestry operations contribute a tiny portion of the pollution to New Hampshire waters. Existing regulations under the jurisdiction of the New Hampshire Dept. of Environmental Services are quite inclusive and provide a framework within which forestry operations can be monitored and controlled. Other agencies such as the New Hampshire Division of Forests and Lands, Cooperative Extension, NRCS, Regional Planning Agencies, Local Conservation Commissions, etc., are available to provide technical assistance, education, and monitoring to help continue to improve the quality of logging operations and the quality of our waters. The New Hampshire logger certification program is one example of the efforts to continually improve the quality of logging.

2) Because forest management activities are such a negligible source of pollution, forest landowners can have virtually no impact on upgrading the quality of an impaired watershed. If other sources of pollution, such as mentioned below, and such sources of silt as natural landslides along waterways, which are a major source of silt in this area, are not dealt with, the forest landowners will be burdened with these onerous rules indefinitely.

3) The EPA is not the right agency to be involved with the regulation of logging operations on private lands. It is impossible to believe that the EPA has the resources or the knowledge of local conditions to be able to administer these rules in an efficient manner, without causing undue burden on landowners.

4) The rules could be counterproductive to the goal of improving the quality of our environment. Tree Farming is a marginal occupation financially. While many forest landowners own and manage forest land primarily for the pleasure it brings them, most need to be able to generate enough income from the forest to be able to continue cover the costs of ownership. As I understand the proposed rules, the added costs and delays in conducting forest management activities, and the subjection of landowners to citizen suits for permitted activities, will almost certainly cause some if not many landowners to sell their woodlands for house lots, industrial sites, or other development purposes. These developed uses will contribute much, much more pollution and environmental degradation than the forest management activities which they replace. For example, the largely unregulated use of fertilizers, pesticides, and herbicides used by homeowners and on commercial grounds Is a major potential source of water pollution. In addition, for every acre of forest land that is lost to productive use in New England, where soils are resilient and forests easily regenerate, a comparable amount of fragile rain forest may harvested, or marginal land be put into monoculture plantations, to replace the volume of wood that could have been produced in NE. I consider the impact that this shift in wood production has on the loss of species, global warming, and environmental degradation in other areas of the globe to be much more serious than the negligible pollution caused by logging in NE.

I believe that the EPA can use its resources much more effectively than to adopt and try to administer these proposed rules. I also believe that the adoption of such intrusive and unwarranted rules such as those proposed will have the effect of fuming many supporters of sound environmental legislation, which I believe most New Hampshire landowners are, toward an anti-regulatory attitude, and have a negative long-term impact.

The background from which I form the above opinions includes 25 years experience as a consulting forester, managing many thousand acres of forest land; owning and managing 215 acres of my own woodland, part of which has been in the family for 100 years; working as a Town Forester for 5 New Hampshire towns, and observ-

ing many of the timber harvest operations that take place in those towns; serving as Chairman of a local planning board for many years, during which time a Water Resource Protection Plan was developed and adopted; and serving as the elected representative from this area on the Farm Service Agency County Committee, working with programs to direct Federal money under programs such as EQUIP toward funding voluntary landowner projects to improve water quality. Thank you for your attention to these concerns.

Respectfully,

PETER C. RHOADES.

JACKSON, JACKSON & WAGNER,
January 10, 2000.

I strongly protest, Mr. Comment Clerk. . . . the proposal under Water Docket (W–98–31) that Forestry should become a point source for pollution and therefore be included in TMDL of impaired water.

I am a small landowner and tree owner in Rockingham County, New Hampshire. This is one of the fastest growing counties in the northeast and any landowner is under continuous lucrative enticement to sell land for development.

As a certified Tree Farmer with a stewardship program based on SFI, my long-range plan is based on soil conservation, quality timber for selective harvesting recreation, wild life conservation (the land is not posted) and preservation of clean water resources. Because of the terrain of the land, my best hope is that well managed forestry will provide break-even financial returns for the investment required for roads, culverts, updated management plans and harvesting with minimum impact.

My opposition to the proposed TMDL rule is based on three concerns:

1. I am past president of Rockingham County Woodland Owners and the New Hampshire Timberland owners. In my experience the State of New Hampshire has a good record in both passing forestry legislation that protects the environment and in enforcing water quality regulations in forestry operations.

Recommendation: If the EPA has money in its budget for this proposed rule, use these funds constructively. On a grant basis make them available to States and non-profit organizations such as the NHTOA to provide expanded water quality education to landowners and industrial forestry.

Remember the Yankee saying "If it ain't broke don't fix it".

2. For small landowners like myself the reality of dealing with the uncertainty and intricacy of TOOL regulations would add so much to the time and expense of managing my land that the rule will be counterintuitive. The regulations will encourage me to let my forestland become once again unproductive.

A conservation organization such as the SPNHF designed to promote good forestry would have little interest in accepting an easement on land that is potentially subject to the expensive capriciousness of Federal permitting. On my death the acreage would go on the market for development.

Recommendation: Since forestry contributes so little to water pollution, EPA spends our tax money on dealing with major sources including acid rain. More generous grants to small communities would help clear up sewage pollution; greater cooperation between the EPA and the Department of Agriculture would help deal with the TMDL caused by soil erosion, fertilizers and pesticides.

3. The Declaration of Independence specifically condemns harassing lawsuits. This rule gives those groups committed to the wilderness philosophy an open door to halt by threat of an injunction, fines and interminable appeals any forestry project that does not fit with their views This truly is outdoor relief for environmental lawyers and their supporting organizations.

Recommendation: The EPA accepts training from the leaders of New Hampshire conservation organizations who have the experience to set up productive partnerships—not litigation—between private and industrial landowners, conservation organizations and State agencies to improve water quality.

Most vigorously,

ISOBEL PARKE, *APR, Fellow PRSA, Senior Counsel.*

MILTON L. PAGE,
P.O. BOX 171,
Melvin Village NH 03850, January 12, 2000.

Comment Clerk for the TMDL Program Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington, DC 20460.

DEAR COMMENT CLERK: This letter refers to TOOL Water Docket (W–98–31). The director of the New Hampshire Timber Owners Association, Eric Kingsley, and the President-Forester, Jane Difly of the Society for the Protection of New Hampshire Forests requested my comment.

As the outstanding Tree Farmer of Carroll County for 1983, I personally know that the landowner usually does not operate the logging on his land. Therefore, I think permits should be required of the person doing the work.

Decentralized control at the local level and permits issued to forest operators, not landowners, I feel is the way to go. The Clean Water Act took the landowner's rights away in 1964 anyway.

Sincerely,

MILTON L. PAGE.

GREENLEAF PRODUCTS INC.
POST OFFICE BOX 228
West Ossipee, NH 03890, January 10, 2000.

Comment Clerk for the TMDL Program Rule,
Water Docket (W–98–31)
Environmental Protection Agency,
Washington, DC 20460.

DEAR SIRS: This letter is in reference to the proposed changes of the Clean Water Act.

As a landowner and forester I am requesting that forestry activities remain a non-point source for regulatory purposes.

Ownership of forest land is at best a marginal enterprise. One more layer of regulation will only hasten the liquidation of these assets into the hands of intense commercialization. There are already enough regulations in place to maintain the environmental quality if enforced.

At the present we make every effort to achieve sustained yields {or our own lands and the lands we manage.

Timing is very important when managing natural resources, harvesting of trees must be coordinated with seed sources, wildlife populations and seasonal vanations only to mention the most obvious. Any more tinkering with already effective regulations will only create more obstacles and delays at the source of production.

In addition any more obstacles wit} ultimately affect our toad and fiber supply for our urban population at the end of the supply chain.

Your consideration of these comments will be appreciated.

Sincerely,

HAROLD COOK, *Forester*.

To: Comment Clerk for the TMDL Program Rule,
From: George W. Chase (497 Putney Hill Road, Hopkinton, NH 03229)

I wish to comment on the proposed new nationwide rules of the Environmental Protection Agency.

While I am normally in favor of any strengthening of EPA standards and even more supportive of efforts made by EPA to actually pursue and prosecute those found to be violating EPA guidelines already in place, I am not convinced that the redesignation of forestry operations as "point source" operations is in the best interests of the country. Furthermore, I have greater doubt that the Federal oversight of forestry is likely to be more effective than local and State oversight. This is especially true when the Tree Farm Program is involved.

I am a Tree Farmer and have been for 20 years. I am on the boards of conservation organizations, and I am a State representative. I have witnessed both good and bad forestry operations. One of the poor ones took place on land abutting mine and caused unnecessary erosion. Such things do indeed happen but as a group forest land owners are probably about as fine a group when it comes to conservation as

you will find. I cannot say the same for the transportation industry, the construction industry, many corporations, and even some in the agricultural sector who have not made every effort to minimize the amount of fertilizer and pesticides used by employing environmentally friendly alternative methods (albeit initially more expensive but in the long run less expensive). To impose regulations on a group that already is well aware of long-range planning and is willing to wait for 5, 10, 15 or more years between cuttings may well drive some of the group into the hands of developers. EPA will then be faced with the unenviable job of taking on business and industry whereas EPA is now considered to be an ally of most forest owners.

Working cooperatively and supportively with New Hampshire Tree Farmers will, I firmly beileve, prove to be a better course of action than to aggravate an important group of landowners who have proven that they wish to be responsible stewards of a large amount of acreage. In fact they are quite willing to encourage millions of others to enjoy those acres in a variety of recreational pursuits.

Thank you for considering this response to your plans.

GEORGE W. CHASE.

ROGER S. LEIGHTON, SR.,
Stratford, NH 03884, January 10, 2000.

Comment Clerk, TMDL Program Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington, DC 20460.

Reference: Clean Water Act (CWA) "Forestry and the Non-Point Source of Pollution"

DEAR EPA PERSONNEL: I am the owner of the 500-acre Leighton Tree Farm in the towns of Barrington, NH and Strafford, NH.

It has been brought to my attention that the EPA, under the CWA, is planning to reclassify forestry operations as a point source for pollution, rather than a nonpoint source of pollution, and a Tree Farmer, such as myself, would have to obtain Federal permits when carrying out forestay operations that might have the potential for causing point pollution. These permits would be in addition to the present permits required by the N.H. Dept. of Environmental Services.

It would appear to me that Federal permits would be a duplication of the present permits, infield supervision, and enforcement now in place in the State of New Hampshire Tree Farmers, Loggers, and Foresters have over the years adapted their field operations to include the New Hampshire permit system. Through our continuing education programs for licensed foresters and loggers we are kept up-to-date on correct field operations to stop possible erosion from forestry operations. The Tree Farmer, or, his consulting forester supervise all forestry operations on his tree farm. Most, if not all, Tree Farmers require the services of a licensed (certified) logger.

I should like to go on record as opposing the changing of the category of forest operation as a "non-point source of pollution" under the CWA to a point source of pollution, and the requiring of Federal permits for forestry operations.

Sincerely,

ROGER S. LEIGHTON, SR., *Forester.*
New Hampshire Lic. No. HC–74.

DAVID D SKIDMORE,
EMERY HOLT ROAD,
P.O. BOX 127,
Lyndeborough, NH 03082, January 9, 2000.

Comment Clerk for the TMDL Program Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington, DC 20460.

DEAR SIR: I was recently advised that the Environmental Protection Agency (EPA) is proposing new nationwide rules related to forestry, and that these rules would affect private lands. As a New Hampshire Tree Farmer, I wish to express my concern for the proposed rules, as I understand there, as they will adversely affect my ability to manage my land and tree farm.

New Hampshire is one of, if not the most progressive State with respect to protecting its forests and wild life habitat environments. I have an eighty-acre tree farm with a wide variety of hard and soft wood trees, and wildlife. My management

plan provides for continual improvement of that forest and its products, as well as caring for and ensuring a sound habitat for the wildlife that reside and pass through the area on natural game trails. In addition, we provide controlled recreational access to hikers, wildlife enthusiasts, cross country skiers and snow mobile's on designated trails, while restricting access to certain wildlife habitats.

It is responsible forest management by responsible landowners working in conjunction with the New Hampshire Timberland Owners Associations and Society for the Protection of New Hampshire Forests that protect our forest environments and wildlife habitats. It is not big government, Federal Agencies that have little or no local knowledge or understanding of the region. I believe forestry activities should remain a "non-point source" for regulatory purposes. While your agency does a wonderful job on the whole, X does not need be over zealous and get involved in New Hampshire's forest activities pre-empting the State's Department of Environmental Services. I do not need an absentee agency to impede my efforts and add a cost burden to meet my responsibilities as a tree farmer.

"If it ain't broke, don't fix it."

Sincerely,

DAVID D. SKIDMORE.

JOHN C. CALHOUN, JR.,
Gilsum, NH 03448–0008, January 8, 2000.

Comment Clerk for the TMDL Program Rule,
Water Docket (W–98–31),

Envtronmental Protection Agency,
Washington DC 20460.

DEAR RULE MAKERS: I write to you as a landowner, a tree farmer, a former chairman and honorary director of the Connecticut River Watershed Council, and a founding member of the Board of the Ashuelot River Manaagement Protection Program. I am a believer in clean water.

But I write to you also as a career forest manager who provided management guidance and services to the private land owners in the New England area and beyond for the past 46 years.

It is agreed that forests are the single most effective protection for watersheds and for the rivers that drain them. Only 25 percent of the forests in the Northeast are owned by the public as national and State forests. The rest are all private forests, owned mostly in relatively small—under 200 acres—by the few remaining farmers, their successors, the weekenders and some retirees, and a representative cross-section of citizens, some wealthy, but many of average means.

A significant, but decreasing number of large acreage holding are owned by the forest products industry.

The forest industry in the New England States has been alert to the problems of water quality, and already have in place very tough laws with respect to maintaining water quality on stream crossings and erosion during the process of logging.

These are already in place and have proved to be effective in curbing the few offenders that failed to follow those rather simple and sensible rules that are in place in Vermont, New Hampshire, Massachusetts, and Maine, with which I am familiar.

The ethic for protection of the soil and the quality of water in our streams is at ready in place, in my opinion. The means of dealing with the few who through ignorance or indifference ignore the rules, are also in place and are proven to be effective.

The imposition of a new, Federal permit layer will be completely redundant for the New England area! In addition it will add a layer of complexity and delay and vulnerablity to the forest management process that will greatly add to the disincentives for owning and managing woodland for the long range. There are already a number of permits and hurdles to secure and clear prior to a harvest of timber. There are also a number of taxes on the owning and harvesting of forest products. As these pile up every owner will be asking how much more can they try to control and regulate what i do to make money on the renewable products that I grow on my land?

And there is the larger question to be asked: Compared to all the other forces at work to impair the surface and subsurface water of this country how much actual damage is being caused by logging and other activities on my property, to the waters draining that property? Or is the result of my maintaining a valuable and perpetual forest/tree farm is there a very positive benefit to all the New England water ways?

In a time of surpluses and plenty we dismiss the importance for the region or the country of one dairy or crop farm and one tree farm. But that is how they are lost—one ownership at a time. Over 20,000 acres a year are gone in New Hampshire, to be succeeded by development, pavement, drains roads, run-off, sewerage, you know the rest.

The concern of the EPA and all the branches of government including the Congress, should be: How can we encourage and sustain the productive farm and forest land of this country to bolster the life-support system of our mostly urban and totally dependent citizens, who presently care little as to where their food, shelter, paper products, fuel, chemicals come from. But God help us when the time of shortage comes, as it did during the oil embargo, and fuel is scarce, or when due to drought or crop disease, food is scarce and has to be rationed!

The forest industry has over the years demonstrated a responsibility and a stewardship of its forest lands. It has an ethic that has been aided by a resilient forest environment, that has demonstrated that resilience from past overcutting of the past, and from wildfires. We know what we have to do and we are doing it. But the process is fragile and threatened. Please EPA, do not add to the problems!

This EPA proposal, which I judge you feel is a major step to save the rivers and waters, will not be aided in any way by including forestry activities as a point source of pollution. Nor will it result in any cleaner water from our presently forested hillsides.

Most sincerely,

JOHN C. CALHOUN, JR.

THOMSON FAMILY TREE FARM,
Orford, NH 03777 January 12, 2000.

Ms. CAROL BROWNER,
Comment Clerk for the TMDL Program Rule,
Water Docket (W–98–31),
Environmental Protection Agency,
Washington, DC 20460.

DEAR MS. BROWNER: I am wearing two hats as I write this letter in opposition to EPA's rule change (TMDL) in regard to changing forestry from non-point source to a point source.

First I represent myself as a private non-industrial woodland owner and certified tree farmer and second as the Vice Chair of the National Tree Farm Operating Committee representing nearly 70,000 members across the United States who are managing 85 million acres in a sustainable manner.

We are opposed to this rule change and strongly urge you to leave forestry as is: a non-point source. Enclosed is a recent article that outlines our concerns.

This rule change will only encourage and in some cases force landowners to sell and convert their woodlands to development. I ask you, which is more environmentally beneficial to society, the forest as we know it today or housing developments, shopping malls and pavement? I think we would both agree on the forest. Please use common sense on this important issue and leave forestry as a non-point source.

I would invite you to tour a healthy forest (tree farm) and see for yourself the many benefits we provide to society which include timber for our nation, enhance wildlife habitat, create recreational opportunities and provide clean air and clean water.

Sincerely yours,
Thomas N. Thomson, Tree Farmer.

STATEMENT OF THOMAS THOMSON NEW HAMPSHIRE TREE FARMER AND CHAIR OF THE POLICY COMMITTEE FOR THE NATIONAL TREE FARM SYSTEM

Mr. Chairman and members of the committee: Thank you for allowing me the opportunity to discuss the concerns that non-industrial landowners from across the country have about the Environmental Protection Agency's (EPA) proposed water quality protection rule change that will impact forestry.

First, I represent the Thomson Family Tree Farm as a private non-industrial woodland owner from New Hampshire. This Tree Farm is owned and managed by my family, including my wife Sheila, and our 22 year old son Stacey. We manage 2,600 acres as a working, sustainable forest.

Second, I represent the National Tree Farm System as Chairman of the Policy Committee. The National Tree Farm System is made up of certified Tree Farmers from across this great country numbering 66,000 members who are responsibly managing nearly 25 million acres of forest. This organization began in 1941 in the State of Washington and today has certified tree farms in nearly every State.

To be a Tree Farmer one must actively manage their woodland and must meet the high standards set out by our national office. There are four basic elements to a certified tree farm; Wood, Wildlife, Recreation and Water. We plant, weed and thin our forest to grow quality timber for our nation while at the same time we enhance the wildlife habitat, create recreational opportunities for our neighbors and protect water quality.

In the United States there are 9.9 million private non-industrial landowners that own over 60 per cent of this nations forest and produce over 65 per cent of the raw materials for the U.S. Forest Industry. Our forest is this nations most valuable, renewable, natural resource that we have.

Opposed to EPA rule change

We are opposed to EPA's rule change that would change forestry from a non-point source (reversing a 27 year determination under the Clean Water Act) to a point source.

EPA is proposing private landowners would need to secure a Federal permit before a timber harvest, site preparation, planting, control burns and other forest management practice in areas where water ways are classified as having impaired water quality. A Federal permit would take over a year to obtain and any citizen could challenge such a permit. Permitting may require landowners to consult with the U.S. Fish and Wildlife Service concerning Endangered Species, and under the proposed regulations a landowner found in violation could be subjected to fines of up to $27,500 per day. I believe in the old adage that "if it ain't broke, don't fix it".

For many years tree farmers have been working with our individual States in a voluntary effort practicing State approved Best Management Practices (BMP). Some examples would be pole crossings, water bars, stream culverts and final stabilization, which adds to the overall expense to protect water quality, but we believe it's the right thing to do. A total of 47 States have adopted BMP's for forest practices and on average individual compliance is nearly 90 percent. Even EPA recognizes the good job we are doing; so we believe it is important to continue to maintain control with our States where they know and work best with their people.

You may recall 2 years ago on January 8th, the devastating Ice Storm which struck four northeast States and caused hundreds of millions of dollars worth of damage to our forest. Two months before the storm hit, our 1,060 acre tree farm was recognized as the Northeast Outstanding Tree Farm. In less than 3 days 900 acres was devastated. This was to be our legacy to our son, Stacey. Today, we are working tirelessly to restore and regenerate this forest which will take another generation before it is productive. The point I want to make is many tree farmers across this nation face similar challenges with their forest such as fire, drought and disease, but we are willing to make the best of it and go forward.

However, I am convinced that under EPA's proposed rule change this could be the straw that breaks the camels back. Many will throw up their hands and give in to the constant calls from land developers.

I ask you which is more environmentally damaging to our society, our tree farm that is managed as a working sustainable forest, protecting water quality, or this forest replaced by housing developments, shopping malls and asphalt pavement which we know today as urban sprawl. I don't believe anyone can disagree with me that the forest is by far safer and healthier to our society.

As our nation's tree farmers prepare for their 60th Anniversary and reflect on the accomplishments we have provided to this nation that includes clean water we would hope that EPA will join us to celebrate, not regulate.

This concludes my remarks Mr. Chairman and I will do my best to answer any questions you have. Thank you.

Mr. Luther M. Preston
517 Post Rd.
Greenland, NH 03840-2320

14 Jan. 2000

Comment Clerk for the TMDL
Program Rule
Water Docket (W-98-31
Environmental Protection Agency
401 M Street SW
Washington DC 20460

Dear Sir:

I am opposed to some new nationwide rules of the Environmental Protection Agency (EPA) has proposed.

I have a certified Tree Farm of 50 acres in Auburn, N.H.. It is important that my Tree Farm is there to filter run off from development is that area from the roads and changes taking place.

I feel the State of New Hampshire the N.H. Timberland owners Association and the Society for the Protection of N.H. Forests are doing an excellent job of Protecting our Clean water in New Hampshire in relation to certified Tree Farmers.

All the water from my Tree Farm goes into Massabesic Lake

I want to Protect the water run off and I feel I am doing the best that can be done from our selective timber and Products from a Tree Farm.

Sincerely

Luther M. Preston
517 Post Road Greenland N.H. 03840-2320

2 Fox Field Ln
Hanover, NH,
03755

Comment Clerk for TMDL Program Rule
Water Docket (W-98-31)
Environmental Protection Agency
401 M Street SW
Washington, DC 20460

We have timberland in our family which we have had for generations. There is no industry, no development. It is for wild animal habitat, clean air + recreation. There are no water sheds. It is rough territory + requires selective cutting to keep good trees by weeding out small growth that undermines.

Forestry activities should definitely remain a non-point source for regulatory purposes. The idea of the Federal gov't

assuming the responsibility is ridiculous. More tax $$ being used by Fed Gov't that can be kept at home. Keep control for N. H. Tree Farmers at home.

Thank-you.

Constance Klefos
2 Fox Field Dr
Hanover, N.H.
03755

1-17-00
3 Cheney Road
North Hampton, N.H.
03862-2110

Comment Clerk, TMDL Program Rule
Water Docket (W-98-31)
EPA 401 M Street, SW
Washington, DC 20460

Ladies & Gentlemen

As a New Hampshire Tree Farmer, Certified Professional Forester, and member of the Committee that pioneered the Best Management Practices for Erosion Control on Harvesting Operations in New Hampshire, I stand absolutely opposed to designating forestry operations as a "point source" for water pollution. We in New Hampshire have utilized an educational approach to reducing water pollution in logging operations with great success.

The New Hampshire Department of Environmental Services in cooperation with UNH Cooperative Extension, State Division of Forests & Lands, Society for the Protection of N.H. Forests and many other public

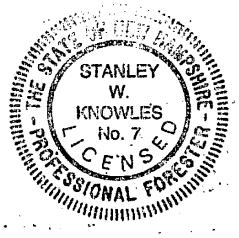
and private agencies and organizations, published a Field Pocket Guide for Foresters, landowners, and loggers, that clearly explains practical erosion control measures that can be applied when crossing streams and wetlands during logging operations. These organizations than sponsored meetings and field demonstrations for this audience to attend and learn the practical approaches to erosion control.

As an active consulting forester with 40 years of practical woods experience, I carry this pocket guide on every job, to help landowners understand this process.

No we do not need federal intervention in this process of compliance. We have written the book on successful compliance. The EPA does some things very well. However, this is not an area that requires their expertise. Thank you anyway.

Respectfully,

Stanley W. Knowles



Copy of letter sent to:

George M. Demmons
RFD1 Covill Rd
Pittsburg NH. 03592
603 538-7730

Environmental Protection
Agency
Washington DC.

14 JAN 2000

To Whom it may Concern;

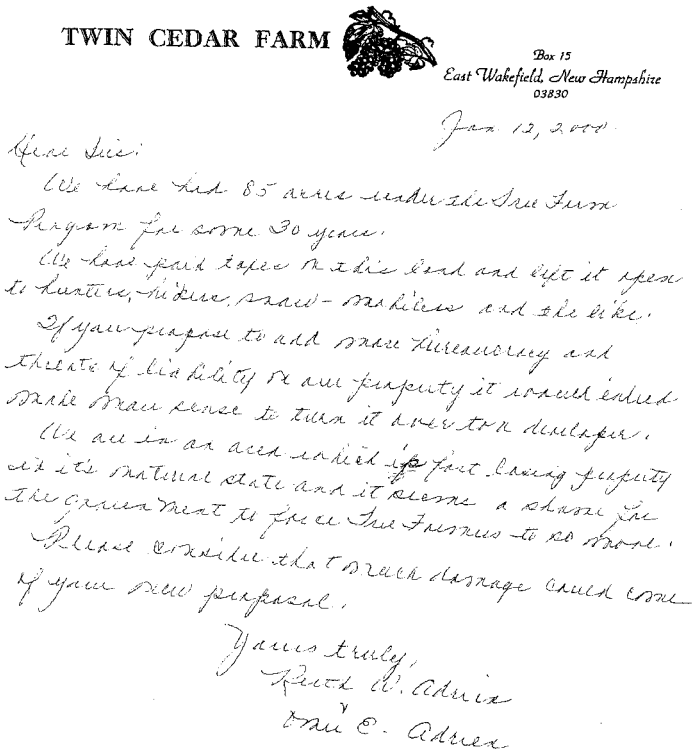
I am writing to ask that you do not regulate my land management any further. I own 100 acres in Northern NH. This land is in the N.H. TREE FARMERS Program and "Current use Program". I also am a Cooperator with the Coos County Soil Conservation District and USDA Soil Conservation Service and use my land as a good steward with the help of these Agencies. The County Forester of the NH Coop. Extention Service also gives me guidance. I need to build some roads in order to work my woods using good forestry practices. I have no wet land's in my property or streams.

Please LEAVE forestly activities as a "Non-Point source" for regulatory purposes. Your proposed Rules could cost me considerable money, time and put us small Tree farmers in potential devastating legal challenges. I am retired aged 62 and enjoy working in the forest using good stewardship practices with the help of the aforement. Agencies. I do not want to sell my land for development purposes but if I am regulated out of this retirement hobby (forestry) I may be forced to sell. Please consider this request seriously.

Sincerely yours

George M. Demmons

George Demmons
Covill Rd.
Pittsburg, NH 03592



TWIN CEDAR FARM

Box 15
East Wakefield, New Hampshire
03830

Jan 12, 2000

Dear Sirs:

We have had 85 acres under the Tree Farm Program for some 30 years.

We have paid taxes on this land and left it open to hunting, fishing, snowmobiling and the like.

If you propose to add more bureaucracy and threats of liability to our property it would indeed make more sense to turn it over to developers.

We are in an area called "Lake Country" at its natural state and it seems a shame the government must force the farmers to do more.

Please consider that more damage could come of your new proposal.

Yours truly,
Ruth R. Adrian
Dan C. Adrian

Senator CRAPO. Thank you very much, Senator Smith.

Senator SMITH of New Hampshire. I do apologize for leaving. I have another commitment.

Senator CRAPO. We appreciate your attendance and we will proceed to try to find solutions to this problem.

I first want to say to this panel that I want to thank you for your patience in waiting so long to get up here, but as is true with all the other witnesses, your testimony is going to be very thoroughly reviewed and we appreciate the time and attention that you bring to this issue.

I also remind you to try to watch those lights. Let's start out in the order that we announced. First, Joan Cloonan from Idaho. That is my home State. I have known you, Joan, for a long time and I have worked with you on many issues and I am glad to see you here.

STATEMENT OF JOAN CLOONAN, VICE PRESIDENT, ENVIRONMENT AND REGULATORY AFFAIRS, J.R. SIMPLOT COMPANY FOOD GROUP, BOISE, ID

Ms. CLOONAN. Thank you, Mr. Chairman, I am glad to be here. First, I will mention that the J.R. Simplot Company is a privately held agribusiness corporation based in Boise, ID, but I am speaking today on behalf of the Northwest Food Processors Association as well, a regional trade association representing the fruit, vegetable, and specialty processing food industry in Idaho, Washington, and Oregon.

I submitted with my testimony copies of the comments on the TMDL rule submitted by Northwest Food Processors as well as those submitted by the food industry and environmental council.

They address some of the details of EPA's proposal and I would like to be a little more general here with some of my comments.

The food processors fully support the goals of the Clean Water Act to restore and maintain the quality of the quality of the Nation's waters. We are supportive of the general concepts that we believe motivated the proposed regulation, a consistent national approach is desirable and there does exist a water quality problem that in some areas cannot be solved by solely controlling point sources.

It appears, however, that EPA has taken a straight-forward program originally directed at point sources and broadened it to a wide-ranging plan encompassing point and nonpoint sources and they are very different regulatory and technical issues.

In the Pacific Northwest States have assumed a strong leadership role in establishing and funding programs to meet Clean Water Act requirements, including preparation and implementation of TMDL programs. All three States are committed to preparing TMDLs for all State water bodies listed as water quality impaired within timeframes dictated by litigated agreement.

It is important to recognize, however, that although some Federal funding has been provided to the States for these programs, the current programs are primarily funded by State moneys. In the State of Idaho, the stakeholder groups work with out Division of Environmental Quality to help them develop TMDLs.

The stakeholder group is charged with the development of the implementation plan within 18 months of EPA approval of the TMDL. The implementation plan is not now subject to EPA approval.

In Idaho it also involves a number of different State agencies, not solely our DEQ. The proposed system would include the implementation plan as part of the TMDL and add significantly to time for development with an unclear effect on the court-ordered schedules for further development.

I think we had something like 900 segments listed, a more than 8-year schedule. There was a lot of uncertainty there.

In addition, EPA can refuse to approve an implementation plan until it is satisfied that the State is a sufficiently strong authority to achieve water quality standards.

Under this proposal, EPA expands its authorized authority over nonpoint sources by its ability to withhold TMDL approval, holding

the State and point sources hostage to the process and threatening with the issuance of nonpoint source NPDES permits.

Under the proposed offset provision, listed water bodies cannot accept new or significantly increased discharges of the water quality limited constituent unless mandatory effluent trading of offsets occur.

Mandatory effluent trading may place potentially a disproportionate burden on point sources inconsistent with the equity considerations of this process.

We believe voluntary effluent trading is far more effective than a cleanup program and mandates or coerces private parties into effluent trading.

The State of Idaho is in the forefront working with EPA on the development of a voluntary effluent trading program. The process has proved to be complicated but this voluntary program could provide a model for the rest of the country. The first model trades will involve a point source and a nonpoint source with key concepts being local control, market-based pricing and appropriate ratios.

This process will encourage and finance nonpoint source projects such as constructed wetlands which otherwise might never happen. Trading ratios are not arbitrarily set by regulations. Quantification can be broad based on the type of project with a conservative reduction credit or monitored with liberal reduction credit.

The trade ratios will be dependent upon the relative location of the trading partners. We believe this will provide a flexible and economic mechanism to meet environmental responsibilities without the need for additional regulation.

We urge that EPA reconsider its attempt to expand its authority into traditional State regulatory areas. It is important to look at the entire Clean Water Act with its balance of State and Federal authorities for achieving clean water goals rather than to force the TMDL program to achieve all of these goals on its own in a complex and prescriptive program.

Thank you, Mr. Chairman.

Senator CRAPO. Thank you very much, Ms. Cloonan.

Mr. Thomson.

STATEMENT OF THOMAS N. THOMSON, THOMSON FAMILY TREE FARM, ORFORD, NH

Mr. THOMSON. Thank you, Mr. Chairman.

First I would like to say a special thank you to my Senator, Senator Smith, for that introduction.

I would also like to introduce some tree farmers who have joined me today that also have the same concern as I. Anitra Webster from Virginia, Bill Lawhon from Ohio, Wilson Rivers of Florida, and Greg Daley of New Jersey, along with George Ice, a forest hydrologist for the Society of American Foresters.

The following is a summary of my testimony. First, I represent the Thomson Family Tree Farm as a private, non-industrial woodland owner from New Hampshire. This tree farm is owned and managed by my family, including my wife, Sheila, and our 22-year old son, Stacey. We manage 2,600 acres as a working, sustainable forest.

Second, I represent the National Tree Farm System as Chairman of the Policy Committee. The National Tree Farm System is made up of certified tree farmers from across this great country, numbering 66,000 members who are responsibly managing nearly 25 million acres of forests.

This organization began in 1941 in the State of Washington and today has certified tree farms in nearly every State. To be a tree farmer, one must actively manage their woodland and must meet the high standards set out by our national office.

There are four basic elements to a certified tree farm—wood, wildlife, recreation and water. We plant, weed, and thin our forests to grow quality timber for our Nation, while at the same time enhance the wildlife habitat, create recreational opportunities for our neighbors and protect water quality.

In the United States there are 9.9 million private non-industrial landowners that own over 60 percent of this Nation's forests and produce over 65 percent of the raw materials for the U.S. forest industry. Our forest is this Nation's most valuable, renewable natural resource that we have. We are opposed to the EPA's rule change that would change forestry from a nonpoint source reversing a 27-year determination under the Clean Water Act to a point source.

EPA is proposing private landowners would need to secure a Federal permit before a timber harvest, site preparation, planting, control burns and other forest management practices in areas where waterways are classified as having impaired water quality.

A Federal permit would take over a year to obtain. Any citizen could challenge such a permit. Permitting may require landowners to consult with the Fish and Wildlife Service concerning endangered species and under this proposed regulation a landowner found in violation could be subjected to fines of up to $27,500 per day. I believe in the old adage that "if it ain't broke, don't fix it." For many years tree farmers have been working with our individual States in a voluntary effort practicing State-approved Best Management Practices—(BMPs). Some examples would be pole crossings, water bars, stream culverts and final stabilization which adds to the overall expense of protecting water quality, but we believe it is the right thing to do.

A total of 47 States have adopted BMPs for forest practices and on average individual compliance is nearly 90 percent. Even EPA recognizes the good job that we are doing. So we believe that it is important to continue to maintain control with our States where they know and work best with their people.

You may recall 2 years ago on January 8, the devastating ice storm which struck four northeast States and caused hundreds of millions of dollars worth of damage to our forests.

Two months before this storm hit, our 1,060 acre tree farm was recognized as the Northeast's Outstanding Tree Farm. In less than 3 days, 900 acres was devastated. This was to be our legacy to our son, Stacey.

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The point I want to make is that many tree farmers across this Nation face similar challenges in their forests such as fire, drought

and disease; but we are willing to make the best of it and go forward.

However, I am convinced that under EPA's proposed rule change this could be the straw that breaks the camel's back. Many will throw up their hands and give in to the constant calls from land developers.

Mr. Chairman, I ask you which is more environmentally damaging to our society, our tree farm that is managed as a working, sustainable forest protecting water quality, or the forest replaced by housing developments, shopping malls, and asphalt pavement which we know today as urban sprawl.

I don't believe anyone can disagree with me that the forest is by far safer and healthier to our society. As our Nation's tree farmers prepare for their 60th anniversary and reflect on the accomplishments that we have provided to this Nation that includes clean water, we would hope that EPA would join us to celebrate, not regulate.

This concludes my remarks, Mr. Chairman.

Senator CRAPO. Thank you very much, Mr. Thomson.

Ms. Buccino.

STATEMENT OF SHARON BUCCINO, SENIOR ATTORNEY, NATURAL RESOURCES DEFENSE COUNCIL, WASHINGTON, DC

Ms. BUCCINO. Thank you for the opportunity to talk with you today about critical steps needed to address the more than 20,000 water bodies across the country that still do not meet water quality standards.

My name is Sharon Buccino. I am a senior attorney in the Public Lands Program of the Natural Resources Defense Council. NRDC is a nonprofit organization with over 400,000 members across the country. NRDC's members depend on clean water to enhance their quality of life and protect their health.

NRDC supports EPA's efforts to revive the Clean Water Act's TMDL Program. We also support EPA's proposal to eliminate the current regulatory exemption for silviculture point sources from NPDES permit requirement.

I will focus on three points in my oral testimony. First, I want to clarify the extremely limited scope of EPA's silviculture proposal.

Second, I will provide some examples demonstrating the need for EPA's new regulations where silviculture point sources are causing significant water pollution and therefore an NPDES permit is appropriate.

Finally, I will explain why nonpoint sources should be included in the TMDL process. NRDC has urged EPA to move forward expeditiously with new regulations that will make the TMDL program more efficient and effective. We hope Congress will not interfere with this progress.

In particular, we urge Congress not to adopt the legislation proposed by Senators Lincoln and Hutchinson. I have with me today a letter signed by over 250 organizations of citizens across the country opposing this legislation's exemptions for timber companies from clean water requirements.

I ask that the letter be entered into the record.

Senator CRAPO. Without objection.

Ms. BUCCINO. Let me briefly focus on a piece of EPA's proposal that addresses silviculture. There is significant misunderstanding about the proposal's scope. EPA's proposal does nothing to require permits from nonpoint silvicultural activities.

The proposal simply eliminates the blanket exemption from the definition of point source that most silvicultural activities have enjoyed pursuant to regulation.

To be affected by EPA's silviculture proposal an activity must fall within the statutory definition of point source which requires a discernible combined industry conveyance.

EPA's silviculture proposal does not even appear to cover all point sources. After having identified the set of activities that would be considered point sources under the Clean Water Act, EPA only proposes to consider requiring a NPDES permit where, No. 1, the activity affects an impaired water body; No. 2, that activity is a significant source of the impairment; and No. 3, EPA has written a TMDL.

Where such conditions exist, it is entirely logical and appropriate to use the NPDES system as a mechanism to ensure that appropriate pollution controls are adopted by the sources.

EPA's proposal will not affect those silviculture activities that are taking appropriate steps to prevent water pollution. If a timber company is following all the best management practices adopted by its State and those BMPs are effective in preventing water pollution, EPA's proposal will not apply.

Unfortunately, there are many places where silviculture operators are not taking the steps necessary to prevent water pollution. It is these operations that are the subject of EPA's proposal.

Let me give you just one example. This photo, the one on the left there is of a skid trail at a timber harvest near I–40 in Humphries County, TN. The second photo is the stream at the bottom of the skid trail.

It is this kind of activity and damage that made EPA's silviculture proposal necessary. I think few would disagree that the skid trail pictures here is a discernible, confined industry conveyance from which pollutants are discharged into a stream.

Since the skid trail falls within the Clean Water Act definition of point source, the Act requires the timber operator to obtain an NPDES permit before discharging any sediment or debris into the stream below.

Numerous States have identified silviculture activities as sources contributing to the impairment of water bodies listed under section 303(d) of the Clean Water Act.

I have brought a map of Idaho to illustrate the problem in that State. The lines marked on that map show Idaho waters that do not meet clean water goals. The ones in blue, it is probably hard to see the map, but you can see on the bar chart on the left there, it is well over half that are impaired as a result of sediment and much of the sediment does come from silvicultural practices.

Then finally, I would just like to respond to the data issues raised by GAO. Of course better data and more funding is needed, but this need should not be used as an excuse to delay improvements to the TMDL program. Implementation of the TMDL pro-

gram is already almost 30 years overdue. Data is sufficient to know we have a problem and to identify initial steps to address it.

It is certainly better to start now. The problems will only get worse and cost more to fix later.

In conclusion, the silviculture piece of EPA's proposal does not apply to nonpoint sources. While the requirement for an NPDES permit is limited to point sources, the TMDL process should address nonpoint sources and I didn't get a chance to explain that but I would be happy to do so in questions.

Basically, the failure to address nonpoint sources simply ignores 90 percent of the problem. I hope that Congress will recognize the need for EPA's proposal and support the agency's efforts to ensure clean water for all Americans. Thank you.

Senator CRAPO. Thank you very much, Ms. Buccino.

Mr. Olszewski.

STATEMENT OF ROBERT J. OLSZEWSKI, DIRECTOR OF ENVIRONMENTAL AFFAIRS, THE TIMBER COMPANY, ATLANTA, GA

Mr. OLSZEWSKI. Thank you, Mr. Chairman and members of the committee. My name is Ronald Olszewski. I am director of Environmental Affairs for the Timber Company which represents the timberland assets, about 5 million acres of Georgia-Pacific Corporation. I appreciate the opportunity to present my testimony today on behalf of AF&PA.

I come with a unique background. I am a technician, a hydrologist by nature. I have worked for State government in implementation programs for BMPs down in Florida before I worked for the private sector.

So, I would like to talk to you about that a little bit today and how that, I believe, effectively works.

I was also a member of the FACA that Ms. Bell was on. I have to tell you that the proposal related to silviculture in terms of the point source designation was never raised as an issue at all during that process and came somewhat as a surprise here last August. I will address that to some extent today.

We also represent the country's manufacturers in the paper business and while most of my remarks will be confined to the forestry components of the rule, I would like to highlight some issues of concern to the manufacturing segment of our industry also. One of these issues that has come up in the GAO testimony this morning is the data concern issues. I would like to also put my 2 cents in on that one, if I could.

An interesting point was raised by our folks from GAO, the fact that six States have the data needed to list. I chair the industry's committee that is working on this subject.

We had a field trip in northeastern Florida last week where we looked at a watershed called Plummer Creek which turns out was listed with the use of three grass samples from a construction site where it crossed I–95, a definite misrepresentation of water quality conditions in that basin.

It resulted in that water body being on the impaired list. When we met with the folks who owned land, timberland, in that 4,000-acre watershed, they have been involved with various agencies trying to unwind that process. They said they had collected data that

they estimated to be somewhere in the cost for them of $100,000 to $120,000, just to get that watershed delisted. It is a fairly complex watershed, but think about that, a 4,000-acre watershed and they spent $100,000 minimum to delist. That is $250 an acre.

It is a major, complex issue we are dealing with in many instances and I think that is a key point.

I would like to go on and talk, however, about the point source designation issues for forestry in particular. I want everyone to understand that forestry is not trying to escape their responsibility in this process. We want to be a participant in the TMDL process.

Ms. Bell heard me say that many times in the FACA, but I think it is the rules, it is the authority that we play by in the TMDL process. We are not comfortable with some of what has happened. For us, we are a large land use all over the country, one of the largest. I think everyone would recognize we are one of the lowest intensity land uses around the country.

I can't tell you we are perfect. You know, if you have a regulatory program for someone you could come up with a photo like you did today. We certainly don't condone that. We don't support it. We think we are dealing with those things aggressively and I will tell you some ways we are doing that.

But let me get into the issues of the point source designation here for just a minute. I think that today I would like to talk about that to some extent. I would like to first explain the background of dealing with regulation affecting forestry in the past.

In the original Clean Water Act regulations, EPA chose to exclude certain activities, including all silvicultural activities, from the NPDES program without regard to whether they were point sources.

When some environmental groups challenged this in the 1970's, the Federal courts ruled against EPA and ordered the agency to identify those specific activities that are point sources.

EPA responded with rules back in 1976 that identified four specific, discrete conveyances, point sources associated with forestry operations. They concluded at that point that everything else associated with forestry was a nonpoint source.

EPA stated in their proposed rulemaking at that time that the Clean Water Act and its legislative history, and I am quoting, "made clear that it was the intent of Congress that most water pollution from silvicultural activities be considered nonpoint in nature."

Yet, EPA has proposed to eliminate the following activities from categorization as nonpoint source: nursery operations, site preparation, reforestation, cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, road construction and maintenance.

Instead the EPA proposes to redefine these as point sources under some circumstances.

Now I am somewhat frustrated by this process at this point in time. Indeed, first of all, tree planting, planting of trees, could be designated as a point source with a discrete conveyance. That doesn't make a lot of logical sense to me as a citizen.

Further, I have testified before a number of committees on this subject, but Secretary Browner has been making the rounds stating

that the TMDL program is not designed to regulate nonpoint sources.

I guess that is true, but from our perspective what she has done with silviculture and the agency has proposed with silviculture is basically to potentially redefine everything we do as a point source. So it is kind of a backward way to address the same issue which is somewhat frustrating.

Further, this kind of frames the NPDES program almost to use it as a punitive action. I don't think that is what the Senate had in mind when this program was developed years ago.

For forestry this exposes us to a number of scary legal paths when you open this door, citizen suits, Federal endangered species consultation around forest reactivity and EPA has stated, and others, that this will have limited impact.

I have to tell you today, Senator, we don't have a lot of comfort in that right now when we look at places like the Garcia River in Northern California where EPA has stepped in to do a TMDL on behalf of the State and has clearly indicated that in a State with what is widely regarded to have the most rigorous forest practice act regulation in the country, they are not satisfied with that.

They want further measures in dealing with the silvicultural nonpoint sources at this point in time but potentially point sources if this moves forward.

So we are greatly concerned about this issue.

The good story for us is a lot of good things are happening in terms of dealing with nonpoint source issues around the country. States do have significant oversight.

I am not familiar with the laws in Tennessee, but most States have some ways they can reach "bad actors," if you will, erosion sediment control laws that State water quality agencies implement and States have taken the option to regulate forestry through forest practice acts in some instances.

In other instances they have dealt with non-regulatory programs like Georgia. I have brought a revised Georgia BMP program here that was just developed last year. It was excellent work, a mixed team of the environmental community, the forestry community, agencies of government that have worked on this program. I am going to leave it and submit it for the record, if I could.

Senator CRAPO. Thank you, Mr. Olszewski.

Ms. Moore.

STATEMENT OF DINA J. MOORE, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, KNEELAND, CA

Ms. MOORE. Thank you, Mr. Chairman and members of the subcommittee. I am Dina Moore and I am honored to be here today to address this subcommittee on behalf of the National Cattlemen's Beef Association, representing America's one million cattle farmers and ranchers.

While my full-time job is as a partner with my husband and family on our 8,000-acre commercial cattle and timber ranch in northern California, I am proud to actively participate in our local watershed efforts.

I have done extensive work with EPA on TMDLs conducting historical narrative interviews. I have a completed copy of our watershed narrative that I would like to submit for the record.

Ms. MOORE. Assisting in public outreach and education and working collaboratively with EPA in building a consensus on the development of TMDLs in the Van Duzen River watershed.

I also founded and am current president of our local watershed working group, the Yager/Van Duzen Environmental Stewards, or YES. The mission statement of YES most clearly states one of my own personal goals, to ensure the environmental integrity of our watershed while maintaining our heritage and the economic sustainability of our endeavors.

I am here today to tell you about what I have learned from my experience. One of the things I have learned is that there must be better collaboration between the Federal and State agencies. The resource, government and landowner would best be served if government could address resource issues in a clear and consistent manner with a single unified voice.

The Federal Government should use its powers to encourage States to implement a one-stop shop where land owners can deal with all agencies at one time and place. The 319 program could be the mechanism for integrated State and Federal efforts.

Delisting and listing of watersheds needs to be clarified. While the EPA's proposal does help ensure that listing methodologies are more specific, it doesn't provide guidance for delisting.

Again, I refer to our watershed and my own experience. None of the landowners knew that it had been listed as impaired. When EPA did the TMDL, it broke the watershed into three distinct areas: the lower basin, middle basin, and upper basin.

Those areas were characterized by different geologic types, distribution of anadromous fish, and land management ownership patterns. EPA's own sediment source assessment found that natural erosion accounted for 84 percent of the erosion in the middle part of the basin. This portion of the watershed is comprised of ranches like my own.

Concurrently, on our ranch, we participated in an ongoing study by the University of California Cooperative Extension on the effects of cattle grazing in a riparian area. After an on-ground assessment using three different Federal field assessment tools, EPA's, NRCS's, and BLM's, our streams with the EPA assessment rated 18.4 out of 20; 20 being the highest mark.

NRCS rated 9.4 out of 10; 10 again being the highest mark.

BLM's were rated properly functioning. Given all of the above information, I question whether our portion of the watershed should have been listed as impaired.

Pacific Lumber Company is a neighboring landowner in the lower part of the basin. The concern has been expressed that this is more a political process than a scientific process driven by litigation.

The private sector will clearly incur costs from more stringent regulations. As more regulations are being mandated from multiple national and State agencies the cost will trickle down to the landowner. His only way of covering that cost is with heavy extraction from the land-based resource that he manages.

There is no compensation, reimbursement, or incentive to the landowner for the time and knowledge that it takes to comply with regulation. There is no direct clarity for landowners faced with weaving their way through meeting all the regulatory requirements.

My fear is eventually we will have to hire a professional consultant and out-of-pocket expense that can be staggering.

The monetary return that comes from a cattle ranching enterprise alone. The cattle and the range that they live on provide enough of an economic return to pay for their direct costs, overhead costs as well as provide families like mine with a below-poverty level, even when the cattle market is in an upswing. This enterprise alone cannot cover the previously mentioned hidden costs. Other resources will need to be developed and extracted.

As managers of a working landscape, we know that we cannot mine the resource without long-term negative effects. We have been given the resource to hold in trust for future generations.

Oftentimes we feel that we are meeting the needs of government to the detriment of the environment we are managing. My counterparts in the mainstream environmental community recognize the cost to the environment of greater regulation as we do, and share our beliefs that government should provide greater incentives that encourage stewardship.

Let us hold out a carrot rather than wield a stick. Other options that become a reality when we are no longer economically sustainable are selling to larger industrial landowners or breaking large landscapes into subdivisions and ranchettes which clearly cause a degradation to the environment.

I recognize the important role and need that regulation has served in protecting the environment, nevertheless, I firmly believe that further regulation will swing the pendulum in a direction that will not serve in the best interest of the resource, government or non-industrial landowner.

Thank you for the opportunity to participate in this important decision. I look forward to a day when we are all working collaboratively on resolving the issues of managing a natural, working landscape.

Thank you.

Senator CRAPO. Thank you very much, Ms. Moore.

Let me go first to you, Joan. The question I have is sort of back to this point source versus nonpoint source conflict that seems to be facing us here.

I know that you are familiar with food processing issues and facilities and I am assuming that they are significantly point source entities. Is that right?

Ms. CLOONAN. That is right. The food processing is mostly point source. Our suppliers are all nonpoint source.

Senator CRAPO. So you've got an interesting little tug of war going on there in your particular part of the world or the industries that are dealing with this.

Ms. CLOONAN. Right.

Senator CRAPO. Can you just describe to me how the EPA's proposed rule would either benefit or negatively affect the food processing industry?

Ms. CLOONAN. I think it will make it much more difficult for us. Our suppliers, that is probably 90 percent of the cost of our operation, the raw material, potatoes for French fries.

I think that their costs, if they are being requiring to do some things under regulatory pressures, I am going to back off and say that I am optimistic and I think voluntary programs where we work with the Department of Agriculture, the Department of Lands, the Soil Conservation Services and all and Development of BMPs and the working out of BMPs is going to be the best way to do this.

To have the demands put upon the State, it is going to cost the State more money, which costs us more money. It is going to cost the farmers more money to try to comply in a top-down type approach.

I think the approach that Idaho is proposing to use, things like tradeoffs, effluent trading where farmers actually get a benefit through their irrigation districts or whatever, of putting in BMPs, putting in wetlands.

We have already put in wetlands in one of the areas, Twin Falls Canal Company has a wetlands program which is done in the context of a TMDL and done in the context of a voluntary group, the stakeholder group getting together.

This was not an effluent trading. Once you have effluent trading the point sources whom they need to reduce can go to the nonpoint sources and put in a wetland which is going to benefit both of them.

I think it is very complicated. I don't know if I can pinpoint one particular.

Senator CRAPO. But the voluntary aspect is something that you think can work?

Ms. CLOONAN. I do.

Senator CRAPO. When you talked about the costs, I am assuming and I would just like to ask you this, that you are also of the opinion that the same degree if not better degree of environmental protection can be achieved without the costs that would be imposed.

Ms. CLOONAN. Absolutely. I think that by using the free market methods that the costs are reduced.

Senator CRAPO. Do you feel that application of this rule, if it occurs, will impede efforts in Idaho that are already underway?

Ms. CLOONAN. I am concerned that it would. One area would be in the implementation, for example. The pilot program that is underway for effluent trading, I don't think we could include implementation in a TMDL and get the TMDL done in time and still include something innovative like that.

We are still working on the details. It turns out that it is not simple knowing where to trade, you know, an upstream reduction for a downstream nonreduction or whatever.

I think that the implementation part is probably one of the big areas where it would be a detriment to us.

Senator CRAPO. Thank you.

Ms. BUCCINO. Senator, I would like to address the issue of costs, if I could real quickly.

Senator CRAPO. Sure.

Ms. BUCCINO. I just wanted to add two points to what had already been said. I think there has been a lot of focus on the low number that EPA came up with.

I think it is important to remember that this regulation, the proposed regulation, is about relatively minor changes to TMDL program regulations that are already on the books.

The cost figure is the incremental costs of the additional requirements.

The second point that I would like to make about costs is that it is important to remember the costs of inaction in the calculation.

Senator CRAPO. Well, those points are well taken. With regard to that, let's clarify that issue of the data as well. You were here for the testimony of the GAO?

Ms. BUCCINO. Yes.

Senator CRAPO. It seemed to me as they talked about the very low level of data that we had in the various types of water bodies and I don't if you could see the chart. Well, actually, they didn't put it up. The chart that I refer to was on Page 9 of their report that they did not put up.

It was a chart that showed that really the vast majority of the analysis was either not done at all or was done in what has been described as "drive-by" or very low levels of data.

Given that, wouldn't the costs of achieving that type of analysis be properly considered here as new costs that this rule is requiring or are you saying that those costs that we were talking about in their testimony would not necessarily be attributable to this rule?

Ms. BUCCINO. I think that is correct. In the cost analysis that EPA did I think they focused on the costs of implementing the new requirements. I don't disagree that better data and more funding to help address particularly nonpoint source issues is appropriate.

Senator CRAPO. Let me continue. Since we are talking about this. In today's hearing and even more particularly in the previous hearing that we held, we have had a lot of testimony that the proposed rule is going to actually interfere with other types of water improvement efforts that are underway and that things are moving in the right direction.

I get the feeling from that testimony that things are moving in the right direction, that we have a lot of good things happening at the State level that this rule could interfere with.

In the pictures that you put up, if those pictures are typical then that would be contrary to that other evidence.

I guess I had a question about those pictures. Would you consider those pictures to be typical of the kind of activities that we have in, say, silviculture in the country or not?

Ms. BUCCINO. I think there are plenty of places, and the gentlemen from New Hampshire is probably a very good example of where practices are in place that are working to address potential water pollution problems.

Unfortunately, there are many places where they are not. That is why you end up with so many water bodies listed by States as impaired, in part due to silviculture activities.

I think the number that EPA has given is around 350, but that is just from the 32 States that actually report source information,

because they are not required to. In fact, Idaho has not reported source information.

Washington and Oregon have not either. So there is significant States where logging is occurring that are not included in the 350 number.

Again, EPA's proposal only addresses those situations where the job is not getting done. It will not affect places where BMPs are implemented and are effective.

Senator CRAPO. Do you know whether the site that you had a picture of there was managed under BMPs? Was it in compliance with BMPs?

Ms. BUCCINO. No. The site there was not in compliance with BMPs, but the State had difficulty actually addressing it. Those are relatively recent photos and they are still in the process of actually pursuing an enforcement action to address the situation there.

But one of the obstacles for the State addressing the situation is the current regulatory exemption from the requirement for an NPDES permit.

Senator CRAPO. Was that just a timber harvest or was that land use for some other purpose?

Ms. BUCCINO. No. It was a timber harvest.

Senator CRAPO. Let me ask you, and I do want others to have an opportunity to get in on this question. Back to the original question I was getting at, and that is, there has been a lot of testimony about how the proposed rule is going to interfere with things that are already underway at the State level.

I am sure you come from the perspective that things are not happening well enough at the State level or that we need to do more and that this rule will help that happen.

There seems to be a very significant conflict on that.

Could you address that?

Ms. BUCCINO. Well, my perspective is from the point of view that the TMDL program was put in place by Congress in 1972, almost 30 years ago. There has been significant delay in achieving the Clean Water Act's goal of restoring water quality.

Senator CRAPO. Would any others like to comment on this?

Mr. Thomson.

Mr. THOMSON. Thank you, Mr. Chairman. I take exception to the photos that were shown. Those clearly are not what tree farmers do or for the most part those individuals that are out practicing good stewardship on the land.

Carol Browner and others, in these hearings, have referred to those as "bad actors." In any industry there are a few bad actors. But the fact of the matter is there are State laws and Federal laws on the books today to take care of those bad actors. And I think they should be taken care of.

The Federal Government does not need to burden us with another layer of bureaucracy. That is what would happen.

The fact of the matter is, on water quality in 1996 EPA dropped silviculture from its list of seven leading sources in river and steam impairment. The same year silviculture contributed only 7 percent of the total stream impairment.

So, what this industry and non-industrial landowners have been doing is great. What it comes from is the voluntary practice of best

management practice. This is the publication that New Hampshire works by.

Senator CRAPO. Do all 50 States have this?

Mr. THOMSON. Forty-seven States are practicing voluntary best management practices. This is the avenue which I would encourage you and the others to hopefully encourage EPA to follow, voluntary, not regulatory. Thank you.

Senator CRAPO. Mr. Olszewski.

Mr. OLSZEWSKI. Yes, I have got to followup. I guess I am somewhat frustrated by the EPA proposal with regard to the point source designation because I think it ignores the fact that the States do have a fair amount of State-specific oversight authority.

Ms. Buccino talked about the fact that the State is trying to deal with this. I would be interested in knowing what happened because we have many examples around the country of the States dealing with someone who truly is a "bad actor." The opportunities are there in most States and most instances and the cases are around.

As I said earlier, you know, showing one slide, I mean I could show a slide of something that clearly is a point source discharge that is violating the law right now.

I think the point that Mr. Thomson made is the relatively low impact of us, forestry, as a nonpoint source relative to pollution inputs around the country bring me back to the concern that we are trying to attack a flea with a sledge hammer here.

We ought to let these State programs try to work things out, I think. In the TMDL program we want to be a player. We want to be a participant. Really, implementation on the TMDLs is a new ballgame for people.

I think it is only fair to give the forestry community a chance to work through things like the BMPs that Mr. Thomson has shown, these that I have shown in Georgia.

One other quick point, a lot of consensus building is going on in the States to build documents like this. As I said earlier, we have participation from a lot of folks in the environmental community to develop these BMPs in Georgia as an example.

I think there is some potential damage to be done by some Federal oversight in some instances of what is going on with good stories that are making excellent progress in States like Georgia around the country.

Senator CRAPO. Ms. Moore.

Ms. MOORE. Yes, and I guess I would say that obviously my perspective comes from my experience in the State of California. Currently, right now, the State Water Resources Control Board, which is our governing body for dealing with TMDL is in a holding pattern. They are waiting to see what happens. Is this going to pass in June.

At the same time, I, as a private landowner from the grass roots level up have dealt with EPA in developing our TMDL allocations. We would like to move forward now and be able to work with our regional water quality control board and put in place our implementation plan.

Everyone is holding. Again I would go back to the fact that from my perspective, what I would really like to see is a coordinated effort all the way around. I think that right now there are programs

in place that allow the Federal Government to let the State governments work toward working with local government at the local level to address these issues.

I don't know that it can come from the Federal Government down; it needs to come from the grass roots up.

Senator CRAPO. Did you want to jump back in and defend yourself there, Ms. Buccino?

Ms. BUCCINO. Well, I could address the point of California, specifically, because as you may be aware, in fact, today the Federal courts are hearing a case that addresses the issue of whether it is appropriate to include nonpoint sources in the TMDL process.

The State of California has actually filed a brief in that case in support of EPA and urging the court to recognize both the need and the legal authority for including nonpoint sources, because the State recognizes the need to address those sources of pollution to deliver clean water.

Senator CRAPO. Mr. Thomson.

Mr. THOMSON. Mr. Chairman, I would like to make a point. I don't know that it has been made today. It may have been in some of the other hearings.

But when we are talking about forestry, spruce and fir silviculture, and tree farming, we are talking about rotations that have a minimum of 60 to 70 years in New England, and hardwood species, which have 100- to 120-year rotation.

We are not cutting annual crops like tobacco, corn, or wheat. What I am doing on my property today, I will never see the end result of that. Unfortunately, with the ice damage, it will be my grandchildren that will actually see that.

As I indicated, we are prepared to roll up our sleeves and continue to go forward. But if the Federal Government lays out some amount of additional regulations on us and it is not economical for us to continue and the developer has been calling us, we will sell to the developer and that clearly is not what is in the best interests of society.

Going back to the best management practices, because I think this is really the key issue here in this whole argument, that 47 States are practicing this today. I am afraid that if we continue down this road that all of the good will that has been built up between the landowners, industry and the government, both State and Federal, will be lost overnight.

I would suggest that this committee encourage EPA to leave forestry as a nonpoint source and to increase the funding through section 313 and increase the education on BMPs and let's work together on a voluntary basis.

Ms. BUCCINO. I just have to come back to the point that these regulations do not affect and do not add any new requirements to situations where the BMPs are working and where they are being followed.

Unfortunately, there are places, as we see from the list of impaired water bodies, where they are not working. That is the focus of EPA's——

Senator CRAPO. The question that that raises to me is sort of a jurisdictional question. If they are not working, does that then make them a point source and therefore justify EPA regulating

them or should they still be considered nonpoint sources and dealt with in terms of trying to improve the BMP process?

In other words, I don't see how the fact that they don't work justifies EPA stepping in and treating them as point sources.

Ms. BUCCINO. But all EPA is doing is eliminating the blanket exemption, the categorical exemption that these kinds of activities have enjoyed in the past. There is nothing in the regulation that actually designates them as point sources.

The activity would still have to fall within the statutory definition of point source, a discrete, discernible conveyance.

I brought the picture to show that there are some kinds of practices that would fall within that definition and to date they have been excused from the permit requirement. EPA has the legal authority to decide that changing that exemption is appropriate at this point.

Senator CRAPO. Mr. Olszewski.

Mr. OLSZEWSKI. I guess we don't want to go down the legal debate route, but that is not a position that we would predictably be in agreement with.

Senator CRAPO. I am not surprised to hear that.

Mr. OLSZEWSKI. We don't believe this 27 years of the Clean Water Act history, and as my testimony outlined and I outlined briefly, we think there was a decision that was made back in the 70's to designate those four sources as point sources in terms of silviculture.

Now, this proposal is far-reaching. We have talked about everything. As I said in my example, even tree planting, they have listed that specifically, reforestation. How do you get a discrete conveyance, something that connotes what we all think of as point sources out of things like that?

I could go on. I mean basically it is included, their real proposal has included everything we do silviculturally, everything.

Senator CRAPO. Ms. Moore.

Ms. MOORE. Senator, you mentioned something that really, I think, raised a thought or concern of mine. You said there is a jurisdictional question. I think that that is, at least from my perspective, one of the most challenging issues that we are dealing with.

When EPA states, "Well, we just want to, you know, ensure or we just want to cover it a little more," well, right before I came to Washington I attended a public hearing for NMFs, National Marine Fisheries. They were threatening listing steelhead as threatened in my watershed because there was no longer habitat for them.

Now, our watershed was listed as impaired because the sedimentation did not provide habitat for the anadromous fish.

So in essence, what I am seeing from my perspective is that I am dealing with two different governmental agencies, Federal agencies over the same issue and the same watershed with the same landowners. Yet we are having to deal with both of them in different playing fields. They have different agendas and different time lines.

I think that we need to get back to how are we really going to deal with the resource in the best sense and I don't think that by continuing to enlarge these programs is really helping us.

I think that what we need to do, if we really want to look at taking care of that resource, is be able to have a coordinated plan where all of the government agencies are working together in coordination and then we can effectively deal with them as resource managers and protect the research.

Senator CRAPO. Does anybody else want to jump in before I ask another question?

Pursuing this line a little bit further, it seems to me that we do have a question of jurisdiction, of whether what the EPA is seeking to achieve here is something that they are authorized by law to achieve.

I am not sufficiently trained in the legal background of this particular aspect of the law to know how the precedent has developed.

But if you look at, say, the skid trails that do, you know, in their appearance appear to be a path by which a distinct point source of water could be created; has that historically been determined, been called a point source or has even that kind of thing been treated as a nonpoint source?

Ms. BUCCINO. Well, the reason it has not is because there has been a regulation that categorically says it is not. Just to step through the legal authority real quickly, you look at the statutory language first. There is no explicit exemption for silviculture under the definition of point source.

That is limited to agricultural storm water runoff. Therefore, EPA has the authority, courts will defer to an agency to interpret ambiguous statutory language. In the past they decided that they would not include these things within the definition of point source.

Now, they have decided in part, because of the impact that silviculture is having on water pollution and the need now through the TMDL program to do something about it, that there is a rational basis for changing that prior decision. Courts have deferred to an agency's determination to do that.

Senator CRAPO. And as I look at your picture, I can see the argument that is being made there because there is sort of a very discrete source of travel for water to a water body there.

But as I hear the testimony of Mr. Olszewski and Mr. Thomson, they indicate that what is being included here is very broad and I assume much broader than something that is like a channel that is being created.

Ms. BUCCINO. But in my point of view they are not. In fact, I don't think courts would include them because you still fall back to the statutory definition, a discrete, discernible conveyance.

If something like planting a tree doesn't involve a channel or conveyance, then it is not a point source and it is not going to require a MPS permit and nothing in EPA's proposal requires that.

Senator CRAPO. Mr. Olszewski.

Mr. OLSZEWSKI. Even if I was to buy the argument, a couple of lines from my testimony,

> The section 319, 1987 amendments revised the 208 program that required States to develop a process to identify silviculturally related nonpoint sources of pollution and so forth procedures and methods to control to the extent feasible such sources.

In November 1990 EPA promulgated storm water regulations, 3 years after the 1987 amendments were enacted. At that time EPA

declared silvicultural point sources do not include the very same activities they are claiming today are point sources.

Then as recently as 1995 EPA Phase II storm water report presented to Congress did not identify silviculture activities as appropriate for regulation under the storm water program.

I am puzzled by what has changed here. Why this history of 27 years that we looked at these forestry sources as nonpoint sources and EPA has continuously supported those thoughts. Even if I bought the argument—which I don't—what has changed here at this point in time to declare, and the list is clear, I mean it is in the broadest sense essentially everything we do, Senator.

Senator CRAPO. Did you say that you had something, Mr. Thomson?

Mr. THOMSON. I just wanted to point out again that the water quality, and this is from EPA, in 1996 silviculture was removed from the leading streams and rivers of impairment and the same year silviculture had contributed only 7 percent to the total stream impairment.

The argument I just heard sounded like it was going the other way. The fact of the matter is that it is not. Two days ago in my meeting in New England with Ron Manfredonia, EPA's regional administrator that Senator Smith referred to in his statement, and I asked him twice, if I could quote him in Washington because I told him I was coming here. The fact of the matter is he said that there is no problem in New England whatsoever as far as forestry is concerned.

We can all search around and find a picture like that. That individual, shouldn't be doing that. But that does not indicate what is going on in the forest today by good land stewardships. It clearly is not.

Senator CRAPO. Sharon.

Ms. BUCCINO. It is important to look at what is happening in individual locations. While the overall figure may be small—I don't know the accuracy of that figure—but even if it is only 7 percent, which to me is still significant, there are areas where silviculture is a significant source of the problem, like Idaho, for example.

It is those areas that EPA is proposing to do something. The statement about New England, yes, in New England there are other industrial sources that clearly contribute and contribute more than silviculture to water pollution problems.

But there are areas of the country where silviculture is a significant part of the problem.

Senator CRAPO. Thank you. I have another meeting that I have to get to really fast here. But I wanted to ask one more question and then I am probably going to have to wrap it up.

The question is for you, Sharon. So I can understand where you are coming from on this, if you were to have, say, a skid row like we have seen today that did comply with best management practices so under the State approach it was being managed in such a way that it was acceptable for the standards that the State was applying and was presumably meeting the water quality standards that were applicable.

Would that, in your opinion still be regulatable by EPA as a point source?

Ms. BUCCINO. Well, under EPA's proposal they have explicitly said that that situation would not require a permit because what they have said is that they would only consider requiring a permit where the water quality is impaired.

So you have a violation of the water quality standard and it has been shown that the silviculture activity has been contributing to that problem.

Senator CRAPO. But I can see where you would have an impaired water body and a BMP being met and EPA would then still consider it regulatable as a point source?

Ms. BUCCINO. Well, if the BMP is being met and the silviculture activity, the skid trail, is still contributing to violations of water quality, then a permit is appropriate in that case.

Perhaps really the solution is to make the BMP better. It is not getting the job done in protecting water quality.

Senator CRAPO. OK. Well, I realize that we could go through this a lot more and I would like to, actually, but I am being told that I have urgent things I have to get to.

So, I want to thank you all for coming here. I would encourage you to continue to work with us. We are going to in some way deal with this. You can obviously see that it has stirred up enough around the country that we are going to be resolving it, if we can, in some way.

I want to understand it well enough that we do what is going to be the best for the water quality of the country and has the most minimal cost impact on the people.

You can have the last word, Mr. Thomson.

Mr. THOMSON. Senator, I just want to congratulate you and Senator Smith and the other members for considering, and it sounds like Senator Smith is going to have a field hearing outside of the Beltway.

I really encourage you and others to come outside the Beltway and see what we are doing.

On my tree farm you are more than welcome and even if you want to bring Administrator Carol Browner, I would enjoy that because I can prove to her that the proposed rule is wrong.

Senator CRAPO. Well, we appreciate that invitation. You might be interested to know that when the idea of having some field hearings out in different parts of the country was first floated by Chairman Smith, we were inundated by members around the country who wanted to have it in their area.

It was not just because they wanted to have a hearing in their area, but because the issue is so big nationwide. I have rarely seen an issue that is as important as you heard it was in Arkansas today and Idaho and New Hampshire and so forth around the country.

So this clearly has the attention of the people around the country. That is why I am so convinced that we will be doing something to address it here and we want to be sure we do the right thing.

So we appreciate your time and effort to be here testifying with us. I apologize that we are going to have to wrap it up before we all have everything said that I am sure we would like to say.

Don't hesitate to continue contacting us and working with us as we proceed.

This hearing will be adjourned.

[Whereupon, at 1:50 p.m., the subcommittee was adjourned, to reconvene at the call of the chair.]

[Additional statements submitted for the record follow:]

STATEMENT OF HON. TIM HUTCHINSON, U.S. SENATOR FROM THE STATE OF ARKANSAS

Mr. Chairman, I thank you and the entire subcommittee for allowing me to speak on behalf of my Arkansas constituency.

I am here because of the outcry from my State in response to the EPA's August 1999 proposal to expand the Total Maximum Daily Load (TMDL) and National Pollutant Discharge Elimination System (NPDES) permitting programs. I believe it is the intent of the EPA to treat traditional agriculture and forestry activities as potential point source polluters. I also believe this is a deliberate attempt to circumvent the Clean Water Act and legislate through regulation—directly contradicting Congress' intent when it debated and passed legislation on non-point source pollution.

I remember participating in this debate when I served in the House and recall specifically that States would be granted the ability to define and enforce this matter, absent the intrusion of the EPA. That's why we have a Congressional Record—to remember what was said years ago. I recommend the EPA crack open it's copy of the Congressional Record before launching its next overriding initiative.

Mr. Chairman, farmers, foresters, private landowners, and community leaders across Arkansas are deeply worried that requiring States to enforce stricter TMDL standards will stretch State, local and private resources to the breaking point. In January, I spoke at a public meeting in El Dorado, Arkansas, which drew 1,500 concerned citizens. Weeks later, a meeting in Texarkana, Arkansas, attracted 3,000 landowners. Last week, I spoke to a crowd of 3,300 in Fayetteville, Arkansas—numbers that Senator Lincoln can confirm as true. She, too, was there.

This unprecedented public turn-out begs the question as to who is driving this policy. It is clear that implementing the EPA's new proposal will only divert already limited funds and resources away from successful State implementation programs and hand them over to bureaucratic Federal procedures and oversight.

While testifying before the House Appropriations Committee, Administrator Browner said she felt the EPA was forced to act in response to lawsuits brought by environmental groups, like the Sierra Club, who were dissatisfied with the Agency's lack of enforcement at the State level. The fact that special interest groups are driving Federal policy by intimidating States and the EPA with litigation runs completely contrary to how I believe our government should be run. It is not democratic and it is not fair to Arkansans who work hard to manage their land.

The thousands of people who attend these meetings have families, busy schedules, and many other responsibilities, but they are willing to sacrifice their time to learn more about this proposed regulation and how it will effect their livelihood. One of the core issues motivating Arkansans to attend public meetings by the thousand is trust. Ultimately, the people of my State do not trust the EPA. In other words, the EPA has not earned the trust of my constituents.

The EPA has done an incredibly poor job communicating their proposal to those whom it will effect the most. During my time in public service, I have never seen this kind of public outcry to anything the EPA has done and it is our job as their elected representatives to address this matter legislatively to ensure that our initial intent when passing the Clean Water Act is preserved.

In terms of States handling this matter, Arkansas alone has put forth a tremendous effort to implement State-wide Best Management Practices and other water quality regulations. Our Poultry Litter Management Plan is a model for other State-level plans. Arkansas' forest industry has reduced its impact on local watersheds by 85 percent. Simply put, the States are getting the job done and must continue to have the freedom to handle this matter on the local level—not from Washington. That is why I have introduced legislation to prevent this proposed rule from impacting two of my State's most important industlies—agriculture and timber.

My bill, S. 2130, consists of two simple parts. First, it restores the exemption for silviculture operations and exempts agriculture stormwater discharges from EPA's NPDES permitting requirements. Second, it defines non-point source pollution relating to both agriculture stormwater discharges and silviculture operations. The EPA under the current Administration has never ceased in its efforts to impose stricter, more expensive Federal environmental regulations on hard working Arkansans. In

the end, I fear that this proposed rule will not only harm agriculture and forestry, but impede the water quality gains being made by States and private landowners.

Mr. Chairman, the foresight of our Founding Fathers established a system of checks and balances by which the Federal Government must govern. The EPA is acting as though it is not accountable to either Congress or the American people. I encourage this committee to act on the people's behalf to ensure that this Agency will not implement rules outside the Clean Water Act.

Again, I want to thank you for holding hearings on this important issue and fully intend to work with Senator Lincoln and our colleagues in the Senate to prevent the EPA from implementing this burdensome and unnecessary regulation.

STATEMENT OF HON. BLANCHE L. LINCOLN, U.S. SENATOR FROM THE STATE OF ARKANSAS

Thank you, Mr. Chairman for allowing me to testify before the Senate Environment and Public Works Committee this morning on the Environmental Protection Agency's new extension of the Total Maximum Daily Load regulations. This is an issue that will affect thousands of my constituents directly and immediately.

Our State Motto, "The Natural State," reflects our dedication to preserving the unique natural landscape that is Arkansas. We have towering mountains, rolling foothills, an expansive delta, countless pristine rivers and lakes, and a multitude of timber varieties across our State. From expansive evergreen forests in the South, to the nation's largest bottomland hardwood forest in the East, as well as one of this nation's largest remaining hardwood forests across the Northern one-half of the State, Arkansas has one of the most diverse forest systems in the United States. Most streams and rivers in Arkansas originate or run through these timberlands and are sources for water supplies, prime recreation, and countless other uses.

In Arkansas, we enjoy a healthy and sustainable private forestry industry. Private forestry is an important part of the economy and infrastructure of Arkansas and this nation. My home State of Arkansas has a total land area of 33.3 million acres. Over 50 percent of this land area, 18.4 million acres, is forested. Today, 98 percent of the forest land is classified as timberland that can produce a harvestable crop of timber, and some type of harvesting activity is conducted on 530,000 acres of private timberland annually in Arkansas. This represents approximately 3 percent of the State's private timberland.

Key to our private forestry industry is preserving our forests, lands, and streams to ensure that forestry can continue in Arkansas. We have instituted Best Management Practices (BMP) and Sustainable Forestry Initiatives (SFI) to ensure that proper techniques are used to protect our water quality. These plans are voluntarily adhered to by over 85 percent of our private timberland owners. In fact, Arkansas has been recognized nationally for having some of the most successful BMP plans in the nation. Whether it's in our forestry industry or our poultry and pork industries, all of our agriculture and livestock industries are already doing what's right to ensure that Arkansas' rivers, lakes, and streams remain clean and safe for many generations to come.

On August 23, 1999, the EPA issued new regulations to extend the Total Maximum Daily Load (TMDL) point-source regulations over some traditional non-point sources. This new regulation seeks to require normal forestry, animal feeding, and aquatic animal operations to obtain a point-source permit under the National Pollutant Discharge Elimination Program (NPDES).

While the EPA maintains, and we all agree, that the EPA does not have the authority to regulate non-point sources of water pollution, this regulation seeks to change the definitions of point and non-point sources with regards to a few traditional non-point sources. Notably for forestry activities, the traditional definition of non-point source associated with the actions of harvesting, thinning, reforestation, and the like have been changed to that of a point source. So while this regulation does not seek to regulate non-point sources, it does seek to redefine some non-point sources as point sources.

Mr. Chairman, in passing the Clean Water Act amendments of 1977 and 1987, Congress sought statutory clarification for the traditional non-point sources of agriculture storm water and agriculture irrigation return flows.

None of us here seek to inhibit the goal of cleaning up and maintaining this nation's clean water supply. But merely requiring a point source permit for traditional non-point sources of water pollution is not the best answer to the problem of cleaning up our nation's rivers, lakes, and streams. In other words, these new regulations would require permits on the very things we want to promote in forestry—respon-

sible harvesting and thinning operations, best management practices, and reforestation.

We in Congress have already realized the potential impact of these new regulations. In November, 1999, we passed legislation that was signed into law to extend the required comment period on the new TMDL regulations until January 20, 2000. We did this knowing of the potential massive impact of this new extension of TMDL regulations.

As stated in the announcement of the new rule, this extension of the TMDL regulations could have an economic effect of over $100 million on the silvicultural industry. While the EPA does not expect the rules to affect small businesses, I would assert that the majority of Arkansas' and the nation's private timber industry is considered to be small business. Many of Arkansas' private timberland owners consider themselves "tree farmers." In addition, Arkansas Department of Environmental Quality of finials have said they do not have the manpower or the resources to comply with the proposed rule.

In addition to the extended comment period, now closed, we have held three public meetings in Arkansas where thousands of concerned foresters and farmers have voiced their opinions on how the new Total Maximum Daily Load regulations could affect them. In El Dorado over 1,500 farmers and foresters came out to learn about potential impacts of this regulation and over 3,000 came out in Texarkana, and over 2,000 in Fayetteville.

Responding to the concerns raised by my constituents, on February 7, 2000, I introduced S. 2041 to statutorily classify silviculture sources of water pollution as non-point sources. This legislation will allow states like Arkansas to continue to use their successful voluntary Best Management Practices, Sustainable Forestry Initiatives, and current State regulations and law programs to reduce pollution from forestry-related activities while not adding unnecessary regulations. This legislation is not intended to undermine the EPA's ability to ensure that our Nation maintains a clean water supply; in fact, it accomplishes quite the opposite. It is an effort to enforce the fact that many forestry related activities are already adequately policed at the State level to ensure that water supplies do not become impaired. Many silviculture activities that benefit the environment, such as conducting responsible harvesting and thinning, voluntarily following best management practices, and promoting reforestation will actually be discouraged by the proposed regulation.

My bill, very simply, follows the lead from the 1977 and 1987 Clean Water Act amendments and statutorily exempts forestry non-point sources of water pollution from being covered by the TMDL point source permitting regulations. My bill will statutorily designate the forestry activities of site preparation, reforestation, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, road construction and maintenance, and nursery operations as non-point sources.

We must ensure that the original Congressional intent remains with regard to the authority of the EPA over point and non-point sources of water pollution. Congress has always intended rainwater runoff from agriculture, forestry, and small animal feeding operations to be considered as non-point sources of water pollution. It was not in 1972 when the Clean Water Act was passed, nor is it currently, congressional intent or law for the EPA to regulate non-point sources of water pollution. However, this regulation seeks to change that. This regulation takes certain traditional non-point sources and moves them into the point source category.

Mr. Chairman, I believe we can find ways to ensure that Congress, the EPA, the States, and our private property owners can continue to improve clean water throughout the nation. We should be promoting what works—voluntary best management practices, responsible care of our land, and each State's current ability to enforce non-point source pollution controls through the appropriate measures.

Mr. Chairman, merely extending a point source permitting program over non-point source activities will only cause more problems with implementation and enforcement rather than getting at the problems of maintaining clean water.

Mr. Chairman, my bill will merely keep the EPA from extending point source regulations over normal forestry non-point activities.

I am committed to working with this committee, the Administration, and the Senate to find the right approach to assisting the States in their efforts to address diverse sources of pollution. I want to do so in a way that will enhance the work done in the States to date, and not simply overburden them with a Federal regulatory approach that does nothing to help achieve the objectives that we all have—clean water.

Thank you, Mr. Chairman.

STATEMENT OF HON. SLADE GORTON, U.S. SENATOR FROM THE STATE OF WASHINGTON

Mr. Chairman, I appreciate this opportunity to convey the strong concerns of many of my constituents in Washington regarding the Environmental Protection Agency's proposed regulations to revise the Total Maximum Daily Load (TMDL) program under Section 303(d) and proposed modifications to the National Pollutant Discharge Elimination System (NPDES) permit program under Section 402 of the Clean Water Act.

EPA's proposed TMDL rules represent yet another example of a Federal agency having good intentions, but having little sensitivity to the potentially bad effects its actions may ultimately cause. The goal of identifying polluted waters across the Nation and making them cleaner is one we all share. No one here today disagrees with that idea. That is a particularly important objective in my own State of Washington, where citizens are now struggling to keep Pacific Northwest salmon from going extinct in streams, lakes, and rivers throughout the Puget Sound.

My primary concern is that if these rules were enacted as written, EPA, despite its good intentions, would undermine sincere efforts by Washington property owners, tribes, States, and local governments to comply with the Endangered Species Act and would slow down local efforts to successfully restore endangered and threatened salmon runs. Specifically, these rules would interfere with the Washington Forests and Fish Agreement—a plan that took 2 years to negotiate, was agreed to by Federal, State, local, tribal entities and small forest landowners, had the full support of Governor Gary Locke, the Washington Department of Ecology and was approved with bipartisan support in the Washington State legislature. This plan was adopted to ensure that eight million acres of non-Federal lands would be in compliance with both the Endangered Species Act and Clean Water Act requirements.

Unfortunately, the proposed TMDL changes could jeopardize the Forests and Fish Agreement by suggesting that EPA regulators be given authority to treat silviculture as a "point source." This would reverse policies affecting the forestry industry that have been in place for 27 years. It would further shift regulation of forest management activities from the State level to the Federal level, and require Federal clean water permits for a wide variety of forest management practices that would already by adequately regulated under the Forests and Fish Agreement.

I am also very concerned that individual property owners who have worked hard to negotiate smaller-scale habitat conservation plans and candidate conservation agreements with the U.S. Fish & Wildlife Service and the National Marine Fisheries Service would nevertheless be required to obtain a permit from EPA under the NPDES rule change. This would create an unduly burdensome process for small private property owners and small communities. Federal agencies should be working together to ensure that Endangered Species Act and Clean Water Act processes don't make it more difficult for local efforts to protect salmon.

Finally, I share the concern of the Washington Department of Ecology and others that these proposed TMDL regulations would add more responsibilities than EPA is capable of managing. The Director of the Washington Department of Ecology correctly pointed out in his comments to the rules that the clear Congressional intent in implementing the Clean Water Act was to provide for a much more streamlined approval process. If enacted, these rules would delay many activities simply because EPA is not capable of managing the approval process.

The Administration should ensure that the heads of the Federal agencies that propose these new rules and regulations should first talk with one another, and talk with the States before they move ahead with implementing them. Like me, the citizens of Washington believe that better coordination amongst the Federal agencies as well as better coordination between the Federal and State agencies would ensure that the goals we all share—cleaner water and preserving endangered salmon—are achieved in the most efficient and expeditious manner.

STATEMENT OF HON. GORDON SMITH, U.S. SENATOR FROM THE STATE OF OREGON

Mr. Chairman, I appreciate the opportunity to appear before the subcommittee today to discuss the Environmental Protection Agency's proposed rules regarding the Total Maximum Daily Load (TMDL) program under Section 303(d) of the Clean Water Act. These rules, proposed last August, would be a radical rewrite of the TMDL program, and would affect how States implement the entire Clean Water Act.

I also appreciate your leadership on this issue, Mr. Chairman. I think that the Environmental Protection Agency (EPA) has exceeded its statutory charge in pro-

posing these rules, and congressional oversight is therefore required. As you know, last session I led the fight to extend the comment period on these proposed rules. Initially, EPA was only going to provide a 60-day comment period for this complex rulemaking that seeks to regulate a number of industries and activities not previously regulated under the TMDL program.

I authored an amendment, accepted by the managers of the VA/HUD and Independent Agencies Appropriations bill, that extended the comment period by 90 days.

Given the 30,000 comments the agency received, I think that the additional time Congress mandated for the comment period was definitely warranted. It is my understanding that EPA heard from a wide range of interests that were critical of the proposed rules, including: other Federal agencies, State and local governments, manufacturing interests, landowners and others.

In sum, these comments point out that EPA is proposing to use a sledge hammer when a fly swatter would do.

I know that a broad range of stakeholders are testifying before the subcommittee today. Therefore, I want to focus my comments on the concerns raised by private forest landowners in my State, who are already required to operate using best management practices under the landmark Oregon Forest Practices Act.

Under these proposed rules, a number of nursery and forestry practices would no longer be categorically excluded from the definition of "point source." These activities include: nursery operations, site preparation, reforestation and subsequent cultural treatment thinning, prescribed burning, pest anti fire control, harvesting operations, surface drainage, or road construction and maintenance.

Instead of being categorically excluded, selected sources could—on a case-by-case basis—be designated as point sources for regulation under the National Pollution Discharge Elimination System (NPDES) permit program for storm water discharges. This is a complete reversal from the treatment for the last 27 years of forestry practices as non-point sources under the Clean Water Act. The implications of this reversal are staggering for the millions of private forest landowners in my State and across the nation.

I believe that EPA has significantly underestimated both the costs to the landowner and the time that it would take to obtain permits under this proposal.

The specter of a State or Federal permitting system for each management action needed on a stand of trees throughout its rotation is truly frightening. EPA reserves the right to take over any State's TMDL program, which would mean that landowners would then need to obtain a Federal permit, potentially subjecting those permits to consultations under the Endangered Species Act.

Further, under the Act, landowners could be subject to fines of up to $27,500 a day, as well as to citizen lawsuits, for alleged permit violations.

A number of State agencies have raised concerns about the high cost of implementing and administering this program. It is unlikely that sufficient State resources would exist to administer such a permit program in a timely manner. Currently, on the average, it takes several years from the time of making application for an NPDES permit before a landowner receives a permit.

Adding forestry activities to the NPDES pipeline will only exacerbate this problem and reduce effective forest management, since many forestry activities are extremely time sensitive and weather dependent. For example, insect infestations, wildfires, and blowdowns are unpredictable occurrences that must be dealt with in a timely manner.

We all share the goal of clean water, and our Nation has made great strides in cleaning up polluted waterways since the passage of the Clean Water Act.

However, the EPA has failed to demonstrate that changing the treatment of everyday forestry activities to point sources of pollution is warranted. In fact, EPA has recognized forestry activities to be a consistently minor source of water quality impairment, as cited in EPA's 1996 National 503(b) Report.

In my State of Oregon, there are about 28 million acres of forestland, representing 45 percent of Oregon's land base. Sixty percent of Oregon's forestland is publicly owned, while 40 percent is privately owned.

Oregon's private forestland is regulated under the 1972 Oregon Forest Practices Act, which established a visionary new standard for forest management. Public forestland in Oregon is protected at a level at least equal to that provided by the Oregon Forest Practices Act. As a result, all of Oregon's forestlands are already required to provide protection to streams, lakes and wetlands. These regulations are unnecessary and will ultimately be detrimental to forest health.

In closing, let me State that I have concerns about these proposed rules both substantively and procedurally. I have summarized my substantive concerns above. But I am also concerned that EPA has failed to fulfill a number of the requirements for promulgating a major rule such as this.

I am not sure EPA has accurately assessed the costs of these proposed rules on State and local governments, as required under the Unfunded Mandates Act of 1995.

Further, that Act requires the agency to consider reasonable alternatives and to select the least costly, most cost-effective or least burdensome of the alternatives, or explain why such alternatives were not chosen. I am not confident that any alternatives will be considered.

I am not sure the Administration has adequately examined the cost of these rules on small businesses, as required by the Treasury and General Government Appropriations Act for fiscal year 2000.

The arrogance with which EPA initially proposed only a 60-day comment period is exceeded only by the arrogance of claiming it will finalize these rules by the end of June. EPA's statutory authority to promulgate these rules is questionable at best, and too many issues have been raised by the comments to be addressed so quickly.

I believe there is another agenda here at work. The issue isn't clean water, it is the Federal regulation of private lands, which has historically been the purview of State and local authorities.

Every Member of Congress should be concerned about the proposed regulation of forestry under these rules, because if they are successful in regulating nursery and forestry activities, the regulation of agricultural practices is not far behind.

STATEMENT OF PETER F. GUERRERO, DIRECTOR, ENVIRONMENTAL PROTECTION ISSUES, RESOURCES, COMMUNITY, AND ECONOMIC DEVELOPMENT DIVISION, GENERAL ACCOUNTING OFFICE

Mr. Chairman and members of the subcommittee: I am pleased to be here to discuss the adequacy of the data that the Environmental Protection Agency (EPA) and the States have for making critical water quality decisions required by the Clean Water Act. The act has been credited with greatly improving the condition of the waters in the United States. This success comes largely from the control of pollutant discharges from industrial facilities and wastewater treatment plants also called "point" sources of pollution. Despite these strides, however, there are still many waters that do not meet water quality standards. Of particular concern in recent years are "nonpoint" sources of pollution—diffuse sources that include a variety of land-based activities such as timber harvesting, agriculture, and urban development—which are widely regarded as contributing to the largest share of remaining water quality problems. Nonpoint sources must be addressed in order to achieve the nation's clean water goals.

The ability to deal with these problems cost-effectively depends heavily on States' efforts to monitor their waters to identify where their most serious problems are and to develop strategies to address those problems. States submit a list (known as the "303(d) list") to EPA identifying waters that do not meet applicable water quality standards and develop total maximum daily loads (TMDLs) for waters on their lists. TMDLs are intended to help restore water quality by reducing the amount of pollution entering a body of water to a level that will enable it to meet standards. Comprehensive and reliable monitoring data have become particularly important in recent years as national attention has focused on the soundness of regulatory decisions required to deal with the nation's most heavily polluted waters. Attention to our remaining water quality problems has been amplified by numerous lawsuits calling for accelerated cleanup of these waters through the 303(d) and TMDL processes. The basis for many of the lawsuits is that EPA and the States have not implemented these requirements of the Clean Water Act. EPA proposed revisions to its regulations on the management of water quality in August 1999 to strengthen the TMDL program.

At the request of the Chairman of the Subcommittee on Water Resources and Environment, House Committee on Transportation and Infrastructure, we recently completed an evaluation of the adequacy of the data available to States to carry out several key water quality management responsibilities. That evaluation also examined whether the information in EPA's National Water Quality Inventory is reliable and representative of water quality conditions nationwide. We issued our report to the subcommittee last week.[1] Our testimony today discusses the findings from that report as they relate to (1) the adequacy of the data for identifying waters for States' 303(d) lists, (2) the adequacy of data for developing TMDLs for those waters, and (3) key factors that affect the States' abilities to develop TMDLs. During the course

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[1] *Water Quality: Key and State Decisions Limited by Inconsistent and Incomplete Data* (GAO/RCED–00–54, March 15, 2000)

of our work, we conducted a survey of the officials responsible for these water quality management activities in the 50 States and the District of Columbia (hereafter, collectively referred to as States), and interviewed water quality officials in 4 States.

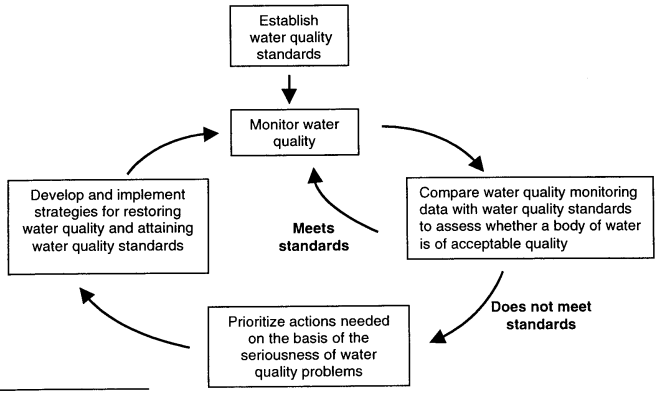
In summary, Mr. Chairman, we found the following:

- Only 6 States reported that they have a majority of the data needed to fully assess their waters, raising questions as to whether States' 303(d) lists accurately reflect the extent of pollution problems in the nation's waters. While the State officials we interviewed feel confident that they have identified most of their serious water quality problems, several acknowledged that they would find additional problems with more monitoring.
- States reported that they have much more of the data they need to develop TMDLs for pollution problems caused by point sources than by nonpoint sources. States can more readily identify and measure point sources of pollution because these sources generally discharge pollutants through distinct points, such as pipes. Conversely, nonpoint sources are difficult to identify and measure because of their diffuse nature. As a result, developing TMDLs for pollution problems caused by nonpoint sources often requires additional data collection and analysis. Only three States reported having a majority of the data they need to develop TMDLs for these types of problems.
- States reported that they have been developing TMDLs for waters polluted by point sources for many years and, therefore, have expertise in analyzing these types of pollution problems. In contrast, however, States told us that their ability to develop TMDLs for nonpoint sources is limited by a number of factors. States overwhelmingly cited shortages in funding and staff as the major limitation to carrying out their responsibilities, including developing TMDLs. In addition, States reported that they need additional analytical methods and technical assistance to develop TMDLs for the more complex, nonpoint sources of pollution.

BACKGROUND

Monitoring water quality is a key activity for implementing the Clean Water Act. The act requires States to set standards for the levels of quality that are needed for bodies of water so that they support their intended uses.[2] States compare monitoring data, or other information, with water quality standards to determine if their waters are of acceptable quality. Figure 1 shows these and other activities for managing water quality.

Figure 1: Process of Managing Water Quality



[2]Under the Clean Water Act, states identify uses for their waters such as for public water supplies, recreation, and protection of fish and wildlife.

States report to EPA on the condition of their waters via two primary mechanisms. First, States report every 2 years on the quality of their waters including information on the percentage of waters they assessed, the number of waters meeting standards, and the primary causes and sources of pollution in their waters. EPA compiles the States' reports, analyzes them, and presents this information in the

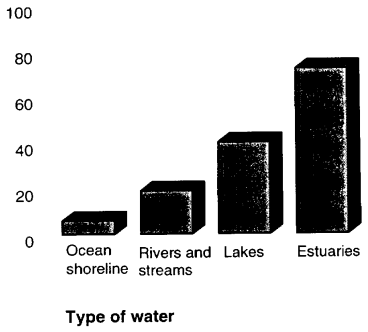
[2] Under the Clean Water Act, States identify uses for their waters such as for public water supplies, recreation, and protection of fish and wildlife.

National Water Quality Inventory, which is EPA's primary tool for communicating about water quality conditions to the public. Second, States identify waters for which existing pollution controls are not stringent enough to enable them to meet applicable standards and place these waters on their 303(d) lists.

The Clean Water Act sets forth a procedure for States to follow in addressing waters that do not meet standards. Specifically, the act requires that States establish TMDLs for waters on their 303(d) lists. A TMDL refers to the maximum amount of a pollutant that a body of water can receive on a periodic basis and still support its intended uses. Generally, TMDLs are developed by (1) analyzing the pollutants and sources of those pollutants causing a water quality problem and (2) determining how much the pollutants need to be reduced in order to enable the body of water to meet standards.

STATES DO NOT HAVE THE DATA THEY NEED FOR THE 303(D) LISTING PROCESS

States' 303(d) lists may not accurately reflect the extent of pollution problems in the nation's waters because many waters have not been assessed. In our survey, only six States responded that they have a majority of the data needed to fully assess all their waters. This response is consistent with the relatively low percentage of waters that States reported assessing for the National Water Quality Inventory. In 1996, for example, States assessed 19 percent of the nation's rivers and streams and 40 percent of the lakes and reservoirs. (See fig. 2.) Despite not having assessed all their waters, the State officials we interviewed said they feel confident that they have identified most of their serious water quality problems. States tend to focus their monitoring on waters with suspected pollution problems in order to direct scarce resources to areas that could pose the greatest risk.



Source: *National Water Quality Inventory* (1996).

Note: The figure for estuaries does not include estuarine waters in Alaska because no estimate was available.

However, studies that have more thoroughly monitored water quality conditions either through monitoring previously untested waters or conducting different types of monitoring tests have identified additional pollution problems. For example, a 1993 EPA-funded study of toxins in lakes showed widespread elevated levels of mercury in Maine lakes, despite Maine officials' assumption that these waters were likely meeting standards because they are in areas with little or no human activity. As a result of these findings, the State issued advisories against consuming fish from all the State's lakes. In addition, a study conducted by Ohio's environmental protection agency found that using additional types of monitoring tests identified a significant number of pollution problems in waters that had been shown by other monitoring efforts to be meeting standards. The State officials we interviewed acknowledged that they would likely find additional problems if more thorough monitoring were conducted.

Data limitations also affect States' abilities to make decisions regarding which waters should be placed on their 303(d) lists. Most States reported that they do not have all the data they need to place waters that they have assessed on their 303(d) lists. State officials said that their inability to make a listing decision stems from the fact that some of their assessments are based on what is called "evaluated

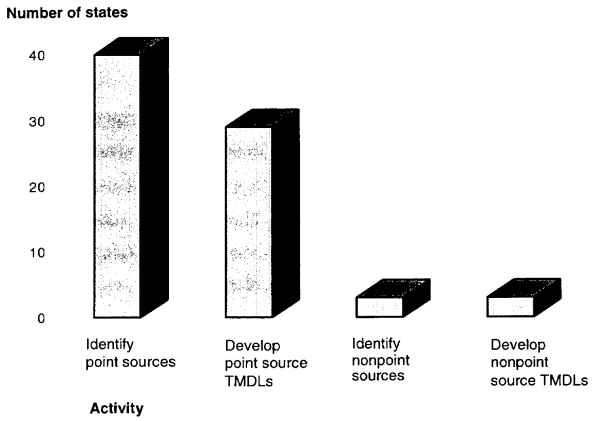
data." Evaluated data include site-specific monitoring data more than 5 years old and information that serves as an indicator to potential water quality conditions, such as anecdotal evidence or reports on wildlife or habitat conditions. EPA and State officials acknowledge that these data sources are less reliable than current, site-specific monitoring data. Some State officials told us that while they may use this information to make an assessment of water quality conditions for the National Water Quality Inventory report, they prefer not to use it for making decisions about whether to place these waters on their 303(d) lists because of the requirement to develop a TMDL for those waters. State officials said that they prefer to conduct additional monitoring in these waters to determine whether they are meeting standards.

While State officials acknowledged that they may not have identified all waters that need TMDLs, they also told us that there are some waters on their 303(d) lists that do not need TMDLs. The reasons for this varied widely. For example, officials in one State said that they mistakenly assessed some waters against higher standards than necessary, which resulted in these waters being placed on their 303(d) list. In another State, officials told us that about half of the waters on their 303(d) list were listed on the basis of evaluated data. Upon additional monitoring of these waters, the State has found that many meet standards and, therefore, do not need TMDLs.

STATES LACK DATA FOR TMDL DEVELOPMENT

Our survey showed that States are much better positioned to develop TMDLs for pollution caused by point sources than nonpoint sources.[3] (See fig. 3.) States generally have better data and capabilities for analyzing point sources of pollution because much of the last 27 years of the Clean Water Act's implementation has focused on addressing this type of pollution. In fact, the State officials we spoke with said they have been following the TMDL process for point sources for many years as a way of achieving water quality standards and developing appropriate pollutant discharge limits. In addition, much of EPA's guidance on developing TMDLs, which dates from the 1980's, has focused on point sources of pollution. Responses to our survey indicate that most States have much of the data needed to address point source pollution. Specifically, 40 States responded that they have a majority of the data they need to identify point sources of pollution, and 29 States reported having a majority of the data needed to develop TMDLs for these problems.

Figure 3: Number of States That Reported Having More Than Half of the Data Needed to Address Waters That Do Not Meet Standards



In contrast, a vast majority of States reported that they do not have much of the data they need to address nonpoint sources of pollution. Addressing nonpoint source pollution is essential to meet the nation's clean water goals because there is wide agreement that most remaining water quality problems are caused, at least in part, by nonpoint sources. Unlike point sources, whose pollutant contributions can be di-

[3] Current and proposed EPA regulations require that States develop TMDLs for waters polluted by non-point sources.

rectly measured as they come out of a pipe, nonpoint source pollution may come from many disparate sources. For example, rainwater may carry fertilizer, manure, pesticides, and soil with it as it runs off of farm fields into bodies of water. Measuring how much pollution comes from these various sources can be extremely difficult and frequently requires the use of analytical methods, such as mathematical models.

Developing TMDLs for nonpoint source pollution often involves data collection and analysis beyond what is done by routine water quality monitoring. An EPA study of 14 TMDL development efforts—all but one of which included nonpoint sources of pollution—found that each entailed additional data collection. This additional data collection accounted for an average of about 40 percent of the total cost of developing the TMDL.[4] Responses to our survey show that most States lack the data they need to address pollution caused primarily by nonpoint sources. For example, only three States reported that they have a majority of the data they need to identify nonpoint sources causing pollution, and 29 States reported having much less than half or almost none of the data needed. In addition, only three States reported having a majority of the data needed to develop nonpoint source TMDLs. Officials in some States told us that because they lack the data needed for certain TMDL projects, they are focusing on TMDLs that are relatively easy to develop, rather than those that are of higher priority. These officials said this is due to the pressure they feel from EPA to show they are making progress on TMDL development.

Several State officials told us that because most of the TMDLs they must develop are for pollution caused by nonpoint sources, they prefer to use methods that require less initial data collection and analysis before implementing pollution control strategies. Two-thirds of the State officials responded in our survey, for example, that using a phased TMDL approach—a process described in EPA's current guidance—is very helpful for addressing pollution problems.[5] The State officials said that such a phased approach enables them to apply best management practices to nonpoint sources identified as contributing to a problem while, at the same time, gathering additional monitoring data to better understand the relative contributions of sources.[6] Several officials said they see this as a way to address water quality problems sooner, rather than to study problems extensively before taking any remediation actions.

While data collection is often required to develop a TMDL, additional data are also needed after a TMDL is established. Current EPA guidance and proposed TMDL regulations discuss the need for monitoring after pollutant controls or other activities are implemented to determine if the TMDL is working and the body of water is attaining water quality standards. This means that significant new monitoring efforts will be needed, particularly for TMDLs addressing nonpoint sources of pollution, because the effectiveness of controls to reduce such pollution can be affected by site-specific conditions.

OTHER FACTORS LIMIT STATES' ABILITIES TO ADDRESS POLLUTED WATERS

In addition to the data gaps that States face in developing TMDLs, States also identified several factors that limit their ability to conduct monitoring and analyses to fully address the listing of polluted waters, TMDL development, and other key water quality management activities. Almost all States identified a need for additional funding and staff to carry out their duties. Most States also cited the need for additional analytical methods and technical assistance to analyze complex pollution problems and develop TMDLs.

Resource Shortages

Forty-five States reported that the lack of resources was a key limitation to making more progress on improving water quality. In addition, several States pointed out that they are operating under State-imposed staffing level ceilings, and other States said they are limited in how many samples they can analyze because of

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[4] See TMDL Development Cost Estimates: Case Studies of 14 TMDLs, USEPA (1996). One effort did not provide separate cost data on additional data collection conducted.

[5] As described in EPA guidance, a phased approach involves developing a TMDL on the basis of available data so that pollution reduction strategies can begin while additional data collection and analyses are conducted.

[6] Nonpoint sources are largely addressed through the use of best management practices, the effectiveness of which varies with site-specific conditions, such as soil type and climate. Best management practices are generally changes in the way in which individuals use land. Examples include (1) leaving strips of farmland next to waters uncultivated to minimize erosion and (2) using man-made ponds or basins to detain stormwater runoff from roads to minimize the velocity of water reaching nearby waters during storms and to allow sediment and other pollutants to settle.

shortages in lab funding. EPA officials told us that overall, less resources are being devoted to monitoring and assessment at the State level than ever before. EPA is conducting a study of funding shortfalls in States' water quality programs and plans to identify alternative approaches for addressing the anticipated gap. On the basis of a preliminary analysis of 10 State programs, EPA found that States have shortfalls in most areas of water quality management, including water quality monitoring and TMDL development. The agency plans to finalize its methodology for estimating these shortfalls in spring 2000.

Analytical Methods and Technical Assistance

EPA has taken steps toward providing assistance in TMDL development, but the agency's current level of assistance falls short of States' needs. EPA's efforts have included issuing multiple guidance documents over the past 15 years on developing point source TMDLs, and, more recently, producing a watershed model and analysis tool to be used in developing TMDLs for more complex pollution problems, such as nonpoint source and combination point-nonpoint source pollution.[7] EPA has also provided a compendium of models that are available for States to use in analyzing pollution problems.

Yet a majority of the States responded in our survey that they need additional technical tools and assistance to help them with TMDL development. States are particularly concerned about their ability to develop TMDLs for nonpoint sources because they have little experience in using the advanced methods required for addressing nonpoint source problems. In addition, officials told us that they need assistance from EPA personnel in selecting appropriate watershed models for specific problems and in model troubleshooting and refinement.

Officials in two States told us that they previously had obtained such assistance from experts in EPA's modeling lab in Athens, Georgia. This assistance, however, is no longer available because of reductions in funding, according to an official in EPA's TMDL branch. Moreover, this official told us that there is no formal mechanism for providing assistance to States for developing TMDLs. He said that assistance is provided largely in an ad-hoc fashion by EPA staff in headquarters, regions, and labs.

Some States suggested that EPA should develop sample approaches or templates that States could use to guide them through certain types of TMDLs, such as templates that indicate what type of data and analyses are needed for particular pollutants. In addition, several States pointed out the need for States to share information on TMDL projects in order to learn from the experiences of others, rather than "reinventing the wheel."

EPA ACTIVITIES UNDER WAY COULD ADDRESS SOME STATE NEEDS

Several activities currently under way at EPA could help States in some of these areas. Perhaps most directly relevant to States' needs are EPA's efforts to provide guidance, or templates, for developing TMDLs for some of the more common pollutants causing waters to not meet standards—sediment, nutrients, and pathogens. The guidance is intended to provide States with an organizational framework for completing the technical and programmatic steps in the development of TMDLs for specific pollutants. EPA issued a guidance document for sediment in October 1999 and one for nutrients in November 1999. These documents appear to provide some of the information and specific guidance that States identified as needed, such as the suggestions for the kinds of data and analyses necessary to develop a TMDL. How useful these documents are will become clearer after they have been used in several TMDL development efforts.

In addition, EPA is conducting two pilot studies to examine methods for taking airborne sources of pollution into account when developing TMDLs by looking at mercury contamination. The studies will examine techniques for determining (1) the amount of mercury reductions needed to meet water quality standards, (2) the relative contributions of mercury from various sources, and (3) the geographic extent of sources contributing mercury. A legal analysis of Federal and State programs to address airborne sources of mercury deposited in bodies of water will also be conducted. EPA plans to issue a "lessons learned" report on the findings of the pilots in spring 2000. EPA is also working on guidance to assist States in developing criteria for nutrients (i.e., measures for determining if waters containing nutrients are of an acceptable quality) that are appropriate to different geographic regions. The need for these criteria was highlighted in 1998 in the Administration's Clean Water

[7] Watershed models are often used to analyze non-point source pollution because they can take into account many of the factors that influence such pollution such as land use, climate, and geographic features.

Action Plan because assessments of the seriousness and extent of pollution problems caused by nutrients are often based on subjective criteria.

While EPA has several activities under way in areas that States cited as problems, the agency does not have an overall strategy for identifying and addressing States' needs for developing TMDLs. EPA officials told us that EPA regions are in the process of assessing States' TMDL programs in order to identify areas in which assistance is needed and to develop regional strategies to support States' programs. Without an overall strategy, however, EPA cannot be certain that it is addressing these needs in the most cost-effective manner.

Additionally, EPA is not addressing one of the key needs the States identified—technical assistance in using watershed models and other analytical methods. EPA officials responded that each State can obtain such assistance from contractors. However, a more coordinated approach could be more efficient, given the fact that many States will need to develop TMDLs for similar pollutants and will likely go through similar analytical processes. Such an approach may be a more cost-effective alternative for both EPA and the States as they address this challenging problem.

This concludes our prepared statement, Mr. Chairman. We would be pleased to address any questions that you or other members of the subcommittee may have.

STATEMENT OF CLAUDIA COPELAND, SPECIALIST IN RESOURCES AND ENVIRONMENTAL POLICY RESOURCES, SCIENCE, AND INDUSTRY DIVISION, CONGRESSIONAL RESEARCH SERVICE, THE LIBRARY OF CONGRESS

EPA'S TOTAL MAXIMUM DAILY LOAD (TMDL) PROGRAM: HIGHLIGHTS OF PROPOSED CHANGES AND IMPACTS ON AGRICULTURE

SUMMARY

In August 1999 the Environmental Protection Agency (EPA) proposed regulations to clarify and strengthen the Total Maximum Daily Load (TMDL) program under section 303(d) of the Clean Water Act (CWA). Section 303(d) requires States to identify surface waters for which wastewater discharge limits are not stringent enough to achieve established water quality standards, even after application of required pollution controls. For each of these waterbodies, States are required to set a total maximum daily load of pollutants at a level that ensures that applicable water quality standards can be attained and maintained and to allocate further required pollutant reductions among sources. EPA is required to take these actions if a State fails to do so.

The TMDL process consists of two elements: (1) identifying waterbodies where standards are not being attained and (2) establishing TMDLs. EPA's TMDL proposal addresses both elements. These changes directly affect States, territories, and Indian Tribes authorized to administer CWA programs. It is up to these entities to identify waters that do not meet the Act's goal of attaining and maintaining water quality standards and adopt policies and measures applicable to individual sources, in order to attain water quality standards. EPA believes that impacts on agriculture and forestry, if any, will occur through State implementation, not directly from these rules. As States implement the TMDL program, where agriculture sources are identified as responsible for water quality impairments, agriculture may be required to adopt control actions (for those in agriculture which are point sources) and/or management measures (for nonpoint sources) to help clean up waterways. Determinations of impairments and required actions will be site-specific and variable. EPA concurrently proposed related changes to permit and water quality standards program regulations to complement the revised TMDL rules. Two parts of the latter proposal could directly impact some agriculture and forestry sources. Interest groups representing agriculture and forestry criticize the possibility that many of their activities will become subject to CWA regulation and enforcement, as a result of implementation of the proposal. EPA, however, expects to use the authority in the proposed rule to affect agriculture and forestry only in limited circumstances and only where other means of working with a State to develop an effective TMDL program have failed.

This report discusses the major changes in EPA's August 1999 proposals, compared with existing regulatory program requirements. The key changes include: a new requirement for a more comprehensive list of impaired and threatened waterbodies; a new requirement that States, territories and authorized Indian tribes establish and submit schedules for establishing TMDLs; a new requirement that the listing methodologies be more specific, subject to public review, and submitted to EPA; clarification that TMDLs include 10 specific elements; a new requirement for

an implementation plan as a necessary element of a TMDL; and new public participation requirements.

INTRODUCTION

In August 1999 the Environmental Protection Agency (EPA) proposed regulations to clarify and strengthen the Total Maximum Daily Load (TMDL) program under section 303(d) of the Clean Water Act (CWA). Section 303(d) requires States to identify surface waters for which wastewater discharge limits are not stringent enough to achieve established water quality standards, even after application of required pollution controls. For each of these waterbodies, States are required to set a total maximum daily load of pollutants at a level that ensures that applicable water quality standards can be attained and maintained and to allocate further required pollutant reductions among sources. EPA is required to take these actions if a State fails to do so.[1]

The TMDL process consists of two elements: (1) identifying waterbodies where standards are not being attained and (2) establishing TMDLs. EPA's TMDL proposal addresses both elements. These changes directly affect States, territories, and Indian Tribes authorized to administer CWA. programs. EPA believes that impacts on agriculture and forestry, if any, will occur through State implementation, not directly from these rules. EPA concurrently proposed related changes to permit and water quality standards program regulations to complement the revised TMDL rules. Two parts of the latter proposal could directly impact some agriculture and forestry sources.

This report discusses the major changes in EPA's August 1999 proposals, compared with existing regulatory program requirements. The discussion of regulatory modifications is necessarily based on EPA's August 1999 proposals, but it should be recognized that final regulations, which EPA hopes to publish later in 2000, could be changed based on comments received during the public comment period (which closed January 20, 2000).

TMDL PROPOSALS[2]

The TMDL process consists broadly of two elements: (1) identification or listing of waterbodies where water quality standards are not being attained and maintained, followed by (2) establishment of TMDLs. EPA's proposals address both of these elements. The key changes include: a new requirement for a more comprehensive list of impaired and threatened waterbodies; a new requirement that States, territories and authorized Indian tribes establish and submit schedules for establishing TMDLs; a new requirement that the listing methodologies be more specific, subject to public review, and submitted to EPA; clarification that TMDLs include 10 specific elements; a new requirement for an implementation plan as a necessary element of a TMDL; and new public participation requirements.

The proposed changes to the TMDL program will directly impact States, territories, and Indian Tribes which are authorized to administer the Clean Water Act. It is up to these entities to identify waters that do not meet the Act's goal of attaining and maintaining water quality standards. As States implement the TMDL program, where agriculture sources are identified as responsible for water quality impairments, agriculture may be required to adopt control actions (for those in agriculture which are point sources) and/or management measures (for nonpoint sources) to help clean up waterways. Determinations of impairments and required actions will be site-specific and variable.[3]

Definition of TMDL.—Under current regulations, a TMDL is defined as the sum of wasteload allocations (for point sources) and load allocations (for nonpoint sources) which do not violate the loading capacity of a waterbody, i.e., do not violate water quality standards.

EPA proposes to define a TMDL as a written analysis of an impaired waterbody established to ensure that water quality standards will be attained and maintained throughout the waterbody in the event of reasonably foreseeable increases in pollut-

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[1] For additional background, see CRS Report 97–831, "Clean Water Act and Total Maximum Daily Loads (TMDLs) of Pollutants."

[2] U.S. Environmental Protection Agency. "Proposed Revisions to the Water Quality Planning and Management Regulations." 64 Federal Register No. 162, Aug. 23, 1999: pp. 46011–46055.

[3] Because EPA believes that the proposed TMDL rule does not directly apply to any discharger, including small entities, and since impacts on non-government entities are indirect and highly speculative, the Agency did not prepare an initial regulatory flexibility analysis under the Regulatory Flexibility Act. Impacts on the private sector would flow from requirements already established by section 303(d) and the States' water quality standards, not from these proposals, according to EPA. Id. pp. 46041–46042.

ant loads. The definition also States the 10 minimum elements of a TMDL necessary for EPA approval (see below). Added definitions in the proposal include a definition of "impaired waterbody:" "a waterbody that does not attain water quality standards."

Listing process—Data for listing of impaired waterbodies.—Current law and regulations require States[4] to assemble and evaluate all existing and readily available data and information. Regulations also require a description of the methodology used to develop the 303(d) list,[5] data and information used, the rationale for any decision to not use any existing and readily available data, and any other information requested by EPA.

EPA's proposal retains these general requirements but identifies sources of data and information specifically (e.g., CWA sec.305(b) water quality assessment reports, CWA sec. 319 nonpoint source assessments, Safe Drinking Water Act source water assessments). EPA also proposes to require that States include a description of the methodology or factors used to assign priority rankings for waterbodies in the list and to submit the listing methodology for EPA review 8 months prior to submission of the 303(d) list. The proposal deletes the existing requirement to identify the rationale for not using particular data.

Listing process—Scope of impaired waters list.—The law requires identification of waterbodies for which effluent limitations (technology-based pollution controls or more stringent for point sources) are not stringent enough to attain water quality standards. Current EPA regulations require identification of waterbodies in need of TMDLs, wasteload allocation reductions (from point sources), and load allocation reductions (from nonpoint sources) in order to attain standards. Existing rules also require identification of pollutants causing or expected to cause water quality standards violations. The statute uses both the broad term "pollution" and narrower term "pollutant" in section 303(d)[6] EPA guidance has been unclear, hence State implementation has been inconsistent, on whether lists should cover impairments due to pollution or pollutants.

EPA's proposal would clarify that States must list waterbodies impaired or threatened by point sources only, nonpoint sources only, or a combination of point and nonpoint sources. States must list waterbodies whether the cause of impairment or threat is individual pollutants, multiple pollutants, or pollution from any source. Under the proposed rule, "threatened" means a waterbody that currently meets water quality standards, but adverse declining trends indicate that standards will not be met by the next listing cycle.

Listing process—Components of a list.—Existing regulations require that the 303(d) list consist of water quality-limited segments still requiring TMDLs, but the rules recognize that certain impaired or threatened waterbodies do not require TMDLs and therefore those waterbodies need not be listed (e.g., those already attaining or expected to attain water quality standards with application of required pollution controls). No specific format for the list is currently required.

EPA proposes to require States to list all impaired or threatened waterbodies whether or not required pollution controls will attain water quality standards. The list would be required to have a specific format, identifying waterbodies in four categories. A TMDL would be required only for waterbodies on Part 1 of a State's list.

- Part 1. Waterbodies impaired or threatened by one or more pollutants or unknown cause.
- Part 2. Waterbodies impaired or threatened by pollution but not impaired by one or more pollutants.
- Part 3. Waterbodies for which EPA has approved or established a TMDL and water quality standards have not yet been attained.
- Part 4. Waterbodies that are impaired, for which implementation of technology-based controls is expected to result in attainment of water quality standards by the next listing cycle.

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[4] The term "State" is used here to mean States, territories, and Indian Tribes that have been authorized to establish lists of impaired waters and TMDLs pursuant to section 303(d). Currently, however, no Tribes have sought this authority, and part of EPA's proposal is a clarification that Tribes may apply to EPA for such authority.

[5] The term "list" is used here to refer to the list of impaired or threatened waterbodies that States are required to submit to EPA pursuant to CWA sec. 303(d).

[6] Under the Act, "pollution" is defined as "the man made or man-induced alteration of the chemical, physical, biological, or radiological integrity of water." The statutory definition of "pollutant" is narrower and means "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water." (CWA sec. 502)

Existing regulatory requirements do not address when States can remove listed waters, but 1997 EPA guidance does, saying waterbodies can be removed if they are expected to attain water quality standards in the next 2 years, or if the original basis for listing was wrong. EPA now proposes that waters remain listed until water quality standards are attained. A waterbody could be removed only upon attainment or based on information that the original listing was wrong.

Listing process—Priorities and TMDL schedule.—Current law and regulations require that States assign a priority ranking to each listed waterbody, based on the severity of pollution and uses of the waterbody, including identification of pollutants and identification of waterbodies targeted for TMDL development in the next 2 years (i.e., before the next listing cycle). The law and regulations contain no requirement for submitting a schedule for developing TMDLs for all listed waterbodies, but 1997 EPA policy guidance directed States to establish TMDLs 8–13 years after listing.

EPA's proposal affirms the requirement for priority ranking. It requires States to assign "high," "medium," or "low" priority for all Part I listed waters. EPA suggests that high priority be assigned to waters used for public drinking water supply where there is violation of a drinking water standard or waters in which a threatened or endangered species is present. The Agency identifies factors States may consider to define medium and low priority (such as the value of particular waterbodies or the recreational, economic and aesthetic importance of particular waterbodies) but does not mandate specific priorities. The proposal eliminates the existing 2-year targeting requirement in lieu of a requirement that States submit a comprehensive schedule for establishing TMDLs for all Part I listed waters "at a reasonable pace" but not later CRS–5 than 15 years. EPA recommends but does not mandate that States establish TMDLs for high-priority waters within 5 years.

Listing process—Submission of list to EPA.—Current law and regulations require submission of lists for EPA review and approval; if EPA disapproves the list, EPA is required to prepare the list.

EPA proposes no change to these basic requirements but proposes to add regulatory language that EPA may establish the 303(d) list if asked to do so by a State or if the Agency determines that a State will not do so consistent with the required schedule for submission.

Listing process—Listing cycle.—Existing regulations require States to submit 303(d) lists on April 1 of even-numbered years. EPA proposes to require submission of a State's listing methodology for Agency review (EPA may comment on but does not formally approve or disapprove methodologies and proposes no changes here) on January 31 and 303(d) lists on October 1 of listing years. In the proposal, EPA retains the current 2-year listing interval, but seeks comments on other options, such as 4-year or 5-year intervals.

TMDL—Minimum elements of a TMDL.—Current law and regulations require that TMDLs be established at levels necessary to meet water quality standards with seasonal variation and a margin of safety. EPA proposes to require that 10 minimum elements be included in a TMDL.

- Waterbody name and geographic location.
- Identification of the allowable pollutant load for the waterbody.
- Identification of the amount or degree by which the current pollutant load deviates from the allowable pollutant load.
- Identification of the source categories, subcategories, or individual sources for which the wasteload allocations and load allocations are being established.
- Waste load allocations for pollutants from point sources.
- Load allocations for pollutants from nonpoint sources, including atmospheric deposition and natural background.
- Margin of safety.
- Seasonal variations.
- Allowance for reasonably foreseeable future loadings.
- Implementation Plan with eight minimum elements listed below.

TMDL—Implementation plan.—Currently there is no requirement that States develop a TMDL implementation plan. EPA now proposes to require that States develop a plan consisting of eight minimum elements.

- For point sources, a list of discharge permits and a schedule for revising the permits to be consistent with the TMDL is required. For nonpoint sources, a description of best management practices or other management measures is required.
- Timeline.
- Reasonable assurance that the implementation activities will occur. For nonpoint sources, reasonable assurance means that nonpoint source controls are specific to the pollutant of concern, implemented according to an expeditious schedule and supported by reliable delivery mechanisms and adequate funding.

- Description of the legal authorities under which implementation will occur.
- An estimate of the time required to attain water quality standards.
- A monitoring or modeling plan to determine effectiveness of the actions.
- Milestones for attaining water quality standards.
- A description of when TMDLs must be revised.

A TMDL implementation plan, like other elements of a TMDL, would be subject to EPA approval and disapproval.

TMDL—EPA authority.—The law and regulations require submission of TMDLs for EPA review and approval; if EPA disapproves a TMDL, EPA is required to establish the TMDL. EPA proposes to retain the existing basic review and approval process but proposes that EPA may establish a TMDL if asked to so by a State, if the Agency determines that the State will not do so consistent with its schedule, or if EPA determines it should do so for interstate or boundary waterbodies.

TMDL—Transition.—EPA's proposal includes provisions to address the transition period between the existing and new regulatory program. For TMDLs under development now (by States or EPA) and for 12 months after issuance of final regulations, EPA proposes use of either the old TMDL rules or new rules, and if the TMDL is approvable according to the applicable rules, EPA will approve.

For TMDL development underway as a result of settlement agreements and consent decrees to resolve litigation, EPA requests public comments on two options: (1) to phase in some of the new requirements, especially for decrees with short timeframes, to accommodate added workloads, or (2) on case-by-case basis, EPA may ask courts to modify the current schedule.

General—Public participation.—Currentlythere are no specific requirements for public participation, except that regulations do require that calculations to establish TMDLs shall be subject to public review, as defined by a State, and EPA must seek public comment when it disapproves and establishes a list or TMDL.

EPA proposes to require States to provide the public with at least 30 days to review and comment on all aspects of 303(d) lists, schedule of TMDLs, and TMDLs, and to provide EPA with a written summary of public comments.

General—Endangered species considerations.—Currently the TMDL program includes no specific requirements concerning endangered species concerns. However, EPA proposes to require that TMDLs include a description of how endangered or threatened species were considered.

EPA also encourages States to establish processes with Fish and Wildlife Service, National Marine Fisheries Service for early identification and resolution of endangered species concerns. Agencies will be given the opportunity to comment, along with the public, on lists and priority rankings. States will be required to consider resource agencies' comments.

General—Public petitions to EPA.—There is no provision on this topic in existing program requirements. However, EPA proposes to codify a specific petition process, available under the Administrative Procedure Act sec. 555(b), for citizens to petition EPA directly to perform 303(d) duties imposed on States. Under the APA, this petition process has been available but has not been used by citizens who, instead, have brought legal actions in court.

WATER QUALITY STANDARDS AND NPDES REGULATIONS

In a concurrent proposal in August 1999, EPA proposed related changes to existing National Pollutant Discharge Elimination System (NPDES) and water quality standards program regulations.[7] In it, EPA proposed several key changes affecting discharges to impaired waters, which are intended to complement the revised TMDL rules. Two provisions of the proposal could directly impact some agriculture and silviculture sources, although no estimate of the numbers of affected sources is available or possible at this time. Two others are likely to have minimal effect on agriculture and silviculture sources.

Designation of additional sources of pollutants as subject to the NPDES program-animal production facilities.—CWA section 402 prohibits anyone from discharging "pollutants" through a "point source" into a "water of the United States" unless they have an NPDES permit. The permit contains limits on what can be discharged, monitoring and reporting requirements, and other provisions to ensure that the discharge does not harm water quality or human health. In essence, the permit translates general requirements of the Clean Water Act into specific provisions tailored

[7] U.S. Environmental Protection Agency. "Revisions to the National Pollutant Discharge Elimination System Program and Federal Antidegradation Policy in Support of Revisions to the Water Quality Planning and Management Regulation." 64 Federal Register No. 162, Aug. 23, 1999: pp. 46057–46089.

to the operations of each person discharging pollutants. Permits are issued for 5-year terms and thereafter must be renewed.

Point sources are generally industrial and municipal facilities that discharge from discrete, identifiable outlets such as pipes or ditches. Most agriculture and silviculture activities are considered to be nonpoint sources, since they do not discharge from pipes or outlets, and thus are not subject to NPDES requirements. Under CWA section 510, States may impose more stringent requirements than those in Federal law or regulations, including designating nonregulated sources for NPDES program requirements.

Since 1973, existing regulations have allowed permitting authorities (authorized States and/or EPA) to designate previously non-designated sources to be subject to NPDES program requirements, where necessary to attain water quality standards. Animal production facilities (terrestrial animal feeding operations or aquatic animal production facilities) may be designated for inclusion in the NPDES program, where it has been determined that the facility is a significant contributor of pollutants to U.S. waters. In the case of States that have been delegated the authority to issue NPDES permits,[8] currently only the State permitting authority may make such a designation. EPA may do so in the States where it is responsible for NPDES permitting.

EPA proposes to modify regulations to allow the Agency to designate animal feeding operations and aquatic animal production facilities in authorized NPDES States as point sources on a case-by-case basis. Issuance of permits would still be the responsibility of the appropriate permitting authority (i.e., EPA would not issue permits to designated sources in NPDES-delegated States).

This proposal would apply to animal feeding operations (AFOs) currently not designated as concentrated animal feeding operations (CAFOs), since CAFOs already are subject to NPDES requirements.[9] It also would apply to aquatic animal production facilities, e.g. hatcheries or fish farms, which confine aquatic stock in a man-made pond or tank system (but not aquaculture facilities which confine aquatic stock in waters of the United States).

EPA expects to use this authority only in limited circumstances and only where other means of working with a State have failed. EPA could do so where the Agency has disapproved a State's TMDL (i.e., if EPA finds that the TMDL implementation plan lacks reasonable assurance that facilities will achieve and maintain pollutant load allocations); EPA has then established a TMDL in the authorized State; finds that these operations are significant contributors of pollutants to the impaired waterbody; and finds that designation as a point source is necessary to provide reasonable assurance that pollutant load allocations in the TMDL will be achieved.

Designation of additional sources of pollutants as subject to the NPDES program—silviculture.—Certain silviculture activities are currently designated by regulation as point sources subject to NPDES requirements: discharges from rock crushing, gravel washing, log sorting, and log storage facilities. EPA proposes no changes to these requirements.

Other silviculture activities are excluded by regulation from NPDES requirements because they are considered to be nonpoint sources: runoff from nursery operations, site preparation, reforestation, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, and forestry road construction and maintenance.

EPA proposes to remove the categorical exemption from silviculture activities which are now exempt from NPDES requirements. Under this proposal, on a case-by-case basis, sources could be designated for NPDES regulation by a State or EPA based on a determination that the source contributes to a violation of water quality standards or is a significant contributor of pollutants to waters of the United States. Designation would be discretionary, not automatic.

Unless a State acts on its own to designate a silviculture activity as a point source, such sources would only be subject to NPDES requirements (1) upon designation by EPA and (2) if the source discharges to a waterbody for which EPA es-

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[8] Currently, 43 States and one territory are authorized to issue NPDES permits. In this memo, the terms "authorized State" and "delegated State" refer to these 44 jurisdictions . EPA is the permitting authority in the remaining States (Alaska, Arizona, District of Columbia, Idaho, Maine, Massachusetts, New Hampshire, and New Mexico) and five territories.

[9] In March 1999, EPA and USDA announced a Unified Animal Feeding Operation Strategy to achieve improved animal waste management nationwide. One element of the strategy is revision of existing CWA regulations that govern CAFOs. These revisions are expected to expand the regulatory coverage of AFOs which are defined as CAFOs and thus are subject to NPDES permitting and enforcement. The AFO strategy is separate from EPA's proposals to revise the TMDL program. For additional background, see CRS Report 98–451, "Animal Waste Management and the Environment: Background for Current Issues."

tablishes a TMDL. EPA could make a designation in any State (NPDES-authorized State or not) but would do so only when EPA prepares the TMDL. According to the proposal, EPA expects to use this authority only in limited circumstances and only where other means of working with a State have failed. EPA estimates that this will happen "extremely rarely" and "as a last resort," because the Agency assumes that States will make every effort to develop effective TMDLs and employ their existing programs and legal authority to ensure compliance. Again because under CWA section 510 States may impose more stringent requirements than those in Federal law and regulations, NPDES-authorized States may designate silviculture point sources outside of the TMDL context.

Pollutant discharge offsets.—EPA proposes to require all large new discharges and existing discharges undergoing significant expansion that are proposing to discharge pollutant(s) of concern to an impaired waterbody to offset the new or increased discharge by reducing loads of the same pollutant from existing sources discharging into the same waterbody. Neither the CWA nor its regulations currently provide for such pollutant offsets.

The new requirements would apply to new and expanding dischargers which are not defined as a "small entity" under the Regulatory Flexibility Act (4 USC 601(6)). Significant expansion means a 20 percent or more increase in discharges above current permit limits. The new offset requirement would apply to discharges to impaired waters for which there is not yet a TMDL either established or approved by EPA. Once a TMDL is established or approved by EPA, measures to implement the TMDL would be incorporated in NPDES permits and would supersede offset requirements. The required offset would generally be 1.5: 1, but could be modified so long as the general purpose is observed: to ensure reasonable further progress toward attaining water quality standards (i.e., better than 1:1).

Offsets could be obtained from point sources or nonpoint sources discharging into the same waterbody. If from a point source, that discharger's permit would contain any necessary monitoring and reporting requirements for purposes of accountability. If obtained from nonpoint sources, these requirements would be included in the new or expanding discharger's permit. EPA states that the basis for this proposal is not specifically contained in the CWA, but cites Clean Air Act section 173 (offset requirements for air pollution sources) as a statute with "similar statutory goals and similar circumstances," therefore a similar requirement in the CWA is reasonable, in EPA's view.

It is likely that this proposed change would affect few agriculture sources and,if so, would be limited to silviculture sources subject to NPDES permits, assuming that such permits allow for pollutant discharges and do not require zero discharge. Existing agriculture sources subject to the NPDES program (CAFOs) are prohibited from discharging wastewater into navigable waters, except those caused by the worst 24-hour storm that would occur in a 25-year period. Because of this prohibition in EPA regulations, it is unlikely that an existing or new CAFO could seek a permit allowing discharges. Thus, CAFOs are unlikely to be in the position to need to find offsets. However, point source dischargers might seek offsets for their operations from agricultural and other nonpoint sources.

EPA authority to reissue State-issued expired and administratively continued permits.—Under CWA section 402, EPA may review, and has 90 days to object to, State-issued NPDES permits that fail to meet guidelines and requirements of the Act. State law often provides that, if a source makes timely reapplication before the 5-year time when its permit expires, but the State is unable to act, the existing permit terms remain in effect until the State makes a final decision. Called administrative continuance, this protects permittees who have acted on a timely basis. As a matter of resources, States (and EPA) often are unable to reissue permits on a timely basis: an estimated 35 percent of the 350,000 NPDES permits nationwide are currently backlogged for reissuance. Currently there is no express authority in law or regulations for EPA to object to and veto a permit that is expired or administratively continued.

EPA believes that administrative continuance of expired permits may allow for inappropriate delay in implementing pollutant controls, including those in TMDLs for impaired waterbodies. EPA now proposes to treat expired permits as equivalent to a State submission of a permit that the State proposes to re-issue, thus allowing the Agency to comment on, object to, or recommend changes. Under the proposal, if the State fails to respond, EPA can veto the permit and issue a permit in lieu. EPA states that it would use this discretionary authority only in limited circumstances: (1) if the discharge is subject to a TMDL established or approved by EPA and the expired permit does not reflect the TMDL, or (2) if the permit authorizes discharge of pollutant(s) of concern to an impaired waterbody for which there is no TMDL and other means of working with the State have failed.

Like the discharge offset proposal, this revision likely would affect few agriculture sources. Again, CAFO permits essentially prohibit discharge of wastewater into navigable waters, so existing CAFO permits presumably already require pollutant controls. EPA thus might determine that an administratively continued CAFO permit provides adequate controls to protect water quality. However, EPA might use this procedure to address practices not covered in a CAFO's existing permit, such as discharges that occur from wastewater or solid manure mixtures which are applied to soil (EPA's current CAFO regulations do not specifically address land application; if regulated at all, these types of discharge are subject to varied State and local laws). Under the limited circumstances that EPA foresees for using this authority, some silviculture sources with NPDES permits (see page 8) could be affected by this proposed revision, but the number of potentially affected sources is unknown.

STATEMENT OF ROBERT J. WITTMAN, ON BEHALF OF THE VIRGINIA AND MARYLAND ASSOCIATIONS OF MUNICIPAL WASTEWATER AGENCIES AND THE RAPPAHANNOCK RIVER BASIN COMMISSION

Mr. Chairman and members of the subcommittee, I am Robert Wittman and I am pleased to testify today on the U.S. Environmental Protection Agency's proposed changes to the National TMDL program. My testimony is offered on behalf of the Virginia and Maryland Associations of Municipal Wastewater Agencies, and the Rappahannock River Basin Commission—on which I serve as Vice-Chairman.

In addition to my statement, Mr. Chairman, I ask that you accept into the hearing record a brief set of written comments from VAMWA and MAMWA, on Chesapeake Bay Program issues raised in the proposed TMDL rules. These written comments provide a detailed discussion, with specific recommendations, on several Chesapeake Bay Program issues that I will cover only generally this morning.

I should also mention that I serve on the Westmoreland County Board of Supervisors and as Chairman of the Montross, Virginia Water and Sewer Authority. Finally, I work for the Virginia Department of Health in the State's Shellfish Sanitation program. Thus, I work daily to address water quality issues at the local and regional levels. As with many of your constituents, EPA's proposed changes to the national TMDL program will affect me in each of the capacities in which I serve the public.

VAMWA and MAMWA comprise almost 60 local governments that own and operate public wastewater treatment facilities in Virginia, Maryland, and the District of Columbia. Their members are major stakeholders in the Chesapeake Bay Program—which stands as a highly successful alternative to the traditional Clean Water Act command-and-control approach.

The Chesapeake Bay Program is unique in many ways, not the least of which is the inclusive, cooperative relationship that exists between its many partners, including the Bay Program signatories (the Commonwealths of Virginia and Pennsylvania, the State of Maryland, the District of Columbia, the Chesapeake Bay Commission, and U.S. EPA), environmental advocacy groups, local governments, agriculture, industry, and others with a stake in the future of the Chesapeake Bay. The essence of a partnership such as the Bay program, and the element that makes it work, is its reliance principally on agreement, rather than mandate, to achieve its goals.

That said, the Bay Program shares several key similarities with the TMDL program. For example, each Bay Signatory jurisdiction is implementing a tributary strategy process geared toward identifying and achieving stakeholder-developed restoration goals. Toward that end, the tributary strategies account for all loading sources and are blueprints for achieving and maintaining desired pollutant reductions from a wide array of point and non-point sources. However, while the Bay Program will achieve the same endpoints as would a properly implemented TMDL program, it will do so without resort to a Federal mandate. That means greater flexibility to develop and implement the most cost-effective controls—at a much faster pace—than would be possible under the TMDL program as we know it.

The Rappahannock River Basin Commission is a forum in which local governments, State legislators and citizens can work cooperatively to address issues affecting the Basin's water quality and quantity. The membership consists of one member of each County and City governing body within the Basin, and all State Delegates or Senators whose district incorporates any part of the Basin, and one member from each Soil and Water Conservation District in the Basin. Our mission is to provide guidance and foster cooperation in the stewardship and enhancement of the water quality and natural resources of the Rappahannock River Basin.

EPA's proposed TMDL rules raise many significant issues. However, there is one overriding opportunity—and challenge—before us all. EPA's response to this issue

may well affect the continuing viability of efforts like the Bay Program and the River Basin Commission.

As we seek to maintain and accelerate the water quality improvements that we have achieved since the Clean Water Act was passed almost 30 years ago, our challenges are increasingly complex and difficult. While the command and control point source programs under the CWA have been effective—not necessarily cost-effective, mind you, but effective nonetheless—in addressing point sources of pollution, a substantial majority of the remaining impairments are attributable to nonpoint sources or a combination of point and nonpoint sources.

The societal investments necessary to address these water quality impairments will dwarf our investments over the last 30 years. Accordingly, one thing is certain: implementation of CWA programs by EPA and its State partners, must evolve toward a performance-based system rather than continuing the long-standing command-and-control approach. A performance-based approach will stimulate innovation and stakeholder-initiated water quality solutions that will accelerate the protection and restoration of water quality nationwide. This is exactly what we have been doing through the Bay Program for more than a decade.

However, in order to move toward a performance-based system, EPA's TMDL rules must accept and *encourage* non-traditional, stakeholder-initiated efforts such as efforts under the Chesapeake Bay Program and those of the Rappahannock River Basin Commission. These innovative, stakeholder-led programs are the CWA's present and future success stories. These are the only programs that can bring together the resources and the political will that it will take to address and eliminate the difficult water quality challenges that lie ahead.

Fortunately, examples like our highly successful and nonregulatory Chesapeake Bay Program and the efforts of the Rappahannock River Basin Commission exist in every State. However, their ongoing viability is threatened by EPA's proposed TMDL rules.

While the existing TMDL rules acknowledge and afford some stature to what it terms "alternate pollution control programs," EPA's proposed rules inexplicably would eliminate this provision. Doing so will effectively deny recognition of non-command and control approaches to addressing water quality impairments. In our judgment, this is the single most important—and counterproductive—change that EPA proposes.

Rather than running the TMDL program out of Washington, EPA should use the opportunity of updating the TMDL program to expressly empower State and local governments as well as other stakeholders nationwide engaged in water quality restoration efforts. It has been my experience in Virginia, that community-based, cooperative programs can be highly successful in achieving significant water quality improvements.

I hope every member of this subcommittee agrees that EPA's final TMDL rule should clearly accommodate and encourage the development of non-traditional water quality initiatives. These initiatives are vitally important to your constituents as they seek to address water quality impairments in their watersheds. These programs augment efforts by EPA and the States and will surely accelerate water quality protection and restoration nationwide. EPA's proposed rule should (1) recognize the vital role that alternative programs, like the CBP, play today in our water quality restoration efforts, (2) promote an even greater role for existing and similar initiatives going forward, and (3) ensure that the States will have the flexibility to integrate effective, non-traditional approaches into the TMDL program.

In response to concerns about the impact of the TMDL program on the CBP, last summer, the signatories to the Bay Agreement agreed to embark on the unprecedented process of integrating the TMDL program into the Bay Program.

By committing to this integration process, the Bay Program partners have agreed, in essence, to give the CBP a chance to remove the impairments before establishing one or more TMDLs for the Bay. In so doing, they have charted a course that will not only avoid the waste, confusion, and delay of overlapping and conflicting programs, but also provide the opportunity to obviate the need for a Bay TMDL by removing the impairments before a TMDL would be established. Avoiding TMDL establishment is a powerful incentive for the expeditious implementation of water quality controls under the Bay Program.

The CBP/TMDL integration process is federalism and innovation in action. In concept, this process reflects one of the best approaches to water quality management that EPA and the States have to offer.

We commend EPA Region III and EPA's Bay Program Office for their participation and leadership to date in this integration effort. However, we ask this subcommittee, and the full Environment and Public Works Committee, to join us in encouraging EPA Headquarters to ensure that the final TMDL rule allows the seam-

less integration of the Chesapeake Bay program—and the stakeholder-based programs in your States—with the TMDL program.

Two particular obstacles to this integration effort deserve mention. First, for integration to succeed, EPA and the States must not be required to use NPDES permits as the sole mechanism for implementing TMDLs for point sources.

This is not to say that the Bay Program, for example, relies entirely on voluntary pollution control measures or that sources of pollution may do as they please. Rather, it means that the individual Bay States have retained considerable discretion to choose the appropriate means of achieving the goals established by the Bay Program's Executive Council. Not surprisingly, a wide variety of mechanisms have been successfully employed to achieve the Bay Program's nutrient reduction goals—some are regulatory in nature, some are not, but none are Federal mandates. Examples include, State and local sediment control statutes and ordinances, State and local stormwater management programs, phosphate detergent bans, agricultural cost share programs, and State point and non-point source grant funding. NPDES permit limits have been employed, but only at the States' discretion, in special circumstances.

Both Maryland and Virginia have utilized grant agreements as the mechanism to implement biological nutrient removal ("BNR") at POTWs in accordance with their approved Chesapeake Bay tributary strategies. To date, dozens of POTWs in Virginia and Maryland have signed such agreements (which provide 50-percent grant funding), and have either installed, or are in the process of installing, BNR at costs totaling hundreds of millions of dollars. Not one POTW in either State has refused to execute a grant agreement when offered the opportunity to participate. Other POTWs have installed BNR voluntarily with the expectation that they will be reimbursed in the future for 50 percent of the cost.

The point source grant agreement programs in Virginia and Maryland are remarkable, not only for the millions of pounds of nutrient reductions they have achieved to date, but also for the speed and efficiency with which they are administered. For example, in 1998, some 14 agreements calling for the installation of over 3100 million in nutrient controls were negotiated and executed in a matter of weeks in Virginia. It would have taken months, if not years, and countless public resources, to issue NPDES mandating similar reductions.

The proposed TMDL rules threaten to replace the cooperative point source grant agreement programs in Virginia and Maryland with NPDES permit limits for nitrogen and phosphorous for all point sources in the Chesapeake Bay watershed. This would fundamentally alter the Chesapeake Bay Program by imposing, for the first time, a broad Federal mandate that would effectively override alternative State approaches to implementing nutrient controls.

The integration process is about giving the Bay Program—and similar programs nationwide—an opportunity to remove the impairments before a TMDL is established. The Bay Program has little meaning if one of its most accepted and successful implementation mechanisms is replaced with federally mandated permit limits. The effect will be to slow the pace of nutrient reduction, drive up costs, and waste Federal, State, and local resources, which could be far more effectively utilized elsewhere.

For these reasons, VAMWA and MAMWA urge EPA to improve on its draft proposal by restoring the Bay States' discretion to continue to utilize grant agreements as the primary mechanism for implementing point source nutrient controls. We want to emphasize that we are not proposing that the States be precluded from utilizing nutrient limits in appropriate cases, only that their discretion to use grant agreements or other mechanisms be preserved. In fact, we believe there may well be instances where nutrient limits in NPDES permits are appropriate, such as those rare cases where sources refuse to install nutrient controls called for in a final tributary strategy.

The second noteworthy obstacle to the integration process is EPA's proposed offset requirement. The offset proposal is unnecessary in the context of the Chesapeake Bay/TMDL integration process because the signatories to the Bay Agreement are developing an "interim cap" strategy that has the same goal as EPA's offset proposal; namely, to avoid increased loadings of pollutants contributing to the Bay's impairment until loading capacities for the Bay and its tidal tributaries are identified and allocated. Significantly, the Bay Programs loading cap will apply to far more sources than would be possible under EPA's TMDL program.

In addition to being unnecessary, EPA's offset proposal also threatens to bring a halt to continued voluntary point source nutrient reductions. POTWs in the Bay watershed have, and continue to, voluntarily install nutrient controls based on Federal and State assurances that they will not be penalized for their efforts. Unfortunately, EPA's offset proposal suggests that their reliance on these assurances may have

been misplaced, and that POTWs voluntarily installing nutrient controls risk losing offsets from these upgrades that they may need for future growth. Although EPA's proposal does not say that voluntary reductions now may not be applied as future offsets, it also does not say they can be used for this purpose. Consequently, the resulting uncertainty is sure to slow, if not halt, continued commitments by point sources to voluntarily reduce their discharge of nutrients. The integration process has no chance of working unless this problem is clearly addressed in the final rule.

It is also worth noting that EPA's proposed offset requirement is wholly inconsistent with the promising concept of "smart growth." The reality today is that most urban waters do not consistently, and will never, meet the very stringent water quality standards currently in place. That means the offset requirement will provide a strong disincentive or prohibition to renewal projects in typical smart growth areas. The offset requirement will have the counterproductive result of driving new development to green field areas and, thereby, promote sprawl and the degradation of more healthy and productive watersheds EPA should eliminate the offset requirement until the Agency develops a more integrated policy that takes into account competing programs such as smart growth.

Finally, Mr. Chairman, we urge you and your colleagues to require EPA to hold a second public comment period on the Agency's proposed revisions to the TMDL rules. A second opportunity for comment is warranted given the sheer number of comments that EPA received as well as the number of open-ended questions on which EPA sought and received public input. Providing a brief second public comment period, hopefully, on a more focused proposal from EPA, is a matter of fundamental fairness in these circumstances.

Thank you.

COMMENTS OF THE VIRGINIA ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, INC. AND THE MARYLAND ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, INC.

The Virginia Association of Municipal Wastewater Agencies, Inc. ("VAMWA") and the Maryland Association of Municipal Wastewater Agencies, Inc. ("MAMWA"), whose municipal members serve the vast majority of the sewered population in Virginia, Maryland, and the District of Columbia, appreciate the opportunity to submit these comments on the captioned proposals as they relate to and affect the ongoing process for integrating the Chesapeake Bay Program into the Total Maximum Daily Load ("TMDL") program.

These comments supplement comments submitted today by VAMWA and MAMWA on all aspects of the captioned proposals.

I. BACKGROUND

On May 3, 1999, EPA, Region III, over the objections of the Commonwealth of Virginia, VAMWA, and others, listed the Virginia portion of the Chesapeake Bay and its tidal tributaries as impaired for dissolved oxygen ("D.O.") and aquatic life pursuant to section 303(d) of the Clean Water Act, 33 U.S.C. 1313(d). Excessive nutrients were identified by EPA as the cause of the impairments.[1] Among their objections to the listing decision, the Commonwealth and VAMWA expressed grave concerns over the impact of the listing decision on the Chesapeake Bay Program's long-standing nutrient and sediment reduction initiatives. Specifically, Virginia, VAMWA, and others pointed to the redundancy, waste, confusion and delay that would result from overlapping and conflicting programs directed at the same water quality issues.

In response to these concerns, the Chesapeake Bay Agreement signatories[2] agreed during the summer of 1999 to embark upon a process of integrating the Chesapeake Bay Program into the TMDL program. The goal of this process is to remove the impairments that are the basis for the listing decisions in both Virginia and Maryland utilizing the Chesapeake Bay Program rather than TMDLs. To achieve this goal, the impairments must be removed and the Bay and its tidal tributaries delisted prior to May 2011, which is the court ordered deadline for the establishment of TMDLs for all currently listed Virginia water segments: otherwise, they would be subject to TMDL establishment.

Although the details of the integration process are still under development, its basic elements have been identified. The process begins with development of scientifically based, ambient water quality endpoints (use designations and criteria to

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[1] Maryland had previously listed its portion of Chesapeake Bay and tidal tributaries as impaired for D.O. caused by excessive nutrients as part of that State's 303(d) list.

[2] The Bay Agreement signatories include EPA, the States of Virginia, Maryland, Pennsylvania, the District of Columbia, and the Chesapeake Bay Commission.

support the designations), which, when achieved, will eliminate the impairments identified by EPA and provide the basis for delisting. Once the endpoints are developed, the individual Bay States will revise their water quality standards to incorporate the endpoints. The existing Chesapeake Bay Program tributaries strategies processes will then be used to identify and allocate the nutrient and sediment load reductions required to meet the revised water quality standards. A Bay-wide ambient monitoring program will track progress toward attainment of the revised standards, and, as the standards are attained, the Bay or segments of the Bay, as appropriate, will be delisted. Bay TMDLs will be established only to the extent the Bay or segments of the Bay have failed to attain one or more of the revised standards by May 2011.

While the endpoint development process is underway, EPA and its Bay Program State partners will develop and implement an "interim cap" strategy to maintain the Chesapeake Bay Program's long-standing year 2000 forty-percent nutrient reduction goal until permanent caps are developed based on the endpoints discussed above.

By committing to this integration process, the Bay Program partners have agreed, in essence, to give the Chesapeake Bay Program a chance to remove the impairments before establishing one or more TMDLs for the Bay. In so doing, they have charted a course that will not only avoid the waste, confusion, and delay of overlapping and conflicting programs, but also provide the substantial benefit of providing an opportunity to obviate the need for a Bay TMDL by removing the impairments before a TMDL would be established. Avoiding TMDL establishment is a powerful incentive for the expeditious implementation of nutrient and sediment controls.

In summary, the Chesapeake Bay Program integration process is federalism and innovation in action. In concept, this process reflects one of the best approaches to water quality management that EPA and the States have to offer. EPA should do everything possible in this rulemaking to promote the integration process and remove any obstacles to its successful implementation. Indeed, EPA will have failed to follow through on its commitment to the integration process unless it clears the way for this process in this rulemaking.

II. IMPACT OF THE PROPOSED RULES ON THE INTEGRATION PROCESS

Unfortunately, in their present form, the proposed rules are a potentially serious obstacle to successful implementation of the integration process, both for what they do and what they do not do in two critical areas.

A. If the Integration Process is Going to Work, the Bay States Must have the Discretion, Not the Mandate, to Require Nutrient Limits in NPDES Permits Prior to TMDL Establishment

The Chesapeake Bay Program is unique in many ways, not the least of which is the inclusive, cooperative relationship that exists between its many partners, including the Bay Program signatories, environmental advocacy groups, local governments, agriculture, industry, and others with a stake in the future of the Chesapeake Bay. The essence of a partnership such as the Bay program, and the element that makes it work, is its reliance principally on agreement, rather than mandate, to achieve its goals.

This is not to say that the Bay Program relies entirely on voluntary pollution control measures or that sources of pollution may do as they please. Rather, it means that the individual Bay States are given considerable discretion to choose the appropriate means of achieving the goals established by the Bay Program's Executive Council. To date, a wide variety of mechanisms have been successfully employed to achieve the Bay Program's nutrient reduction goals—some are regulatory in nature, some are not, but none are Federal mandates. Examples include, State and local sediment control statutes and ordinances, State and local stormwater management programs, phosphate detergent bans, agricultural cost share programs, and State point and non-point source grant funding. NPDES permit limits have been employed, but only at the States' discretion in two instances within the framework of the Chesapeake Bay Program's nutrient reduction initiatives. First, phosphorous limits have been imposed on selected dischargers to certain water segments identified as nutrient enriched in the State water quality standards. Second, the tributaries strategies process has used the threat of NPDES nutrient limits for those point sources unwilling to voluntarily implement the nutrient controls called for in the tributary strategies.

Both Maryland and Virginia have utilized grant agreements as the mechanism for implementing biological nutrient removal ("BNR") at POTWs in accordance with their approved Chesapeake Bay tributary strategies. To date, dozens of POTWs in Virginia and Maryland have signed such agreements (which provide 50-percent

grant funding), and have either installed, or are in the process of installing, BNR at costs totaling hundreds of millions of dollars. Not one POTW in either State has refused to execute a grant agreement when offered the opportunity to participate, while many other POTWs have proceeded to install BNR voluntarily with the expectation that they will be reimbursed in the future for 50 percent of the cost. The point source grant agreement programs in Virginia and Maryland are remarkable, not only for the millions of pounds of nutrient reductions they have achieved to date, but also for the speed and efficiency with which they are administered. For example, in 1998, some 14 agreements calling for the installation of over $100 million in nutrient controls were negotiated and executed in a matter of weeks in Virginia It would have taken months, if not years, and countless public resources, to issue NPDES mandating similar reductions.

As currently proposed, EPA's new rules threaten to wipe away the cooperative point source grant agreement programs in Virginia and Maryland presently used for achieving nutrient load reductions in Maryland and Virginia, and in their place, require nitrogen and phosphorous limits for all point sources in the Chesapeake Bay watershed. Combined with the listing decisions, it could fundamentally alter the Chesapeake Bay Program by imposing, for the first time, a broad Federal mandate that would effectively override State decisions regarding the appropriate mechanisms governing the implementation of nutrient controls.

The integration process is about giving the Bay Program an opportunity to remove the impairments before a TMDL is established. The Bay Program has little meaning if one of the Bay Program's most accepted and successful implementation mechanisms is replaced with federally mandated permit limits. The effect will be to slow the pace of nutrient reduction, drive up costs, and waste Federal, State, and local resources, which could be far more effectively utilized elsewhere.

For these reasons, VAMWA and MAMWA urge EPA revise its proposal to preserve the Bay States' discretion to continue to utilize grant agreements as the primary mechanism for implementing point source nutrient controls. We want to emphasize that we are not proposing that the States be precluded from utilizing nutrient limits in appropriate cases, only that their discretion to use grant agreements or other mechanisms be preserved. In fact, we believe there may well be instances where nutrient limits in NPDES permits are appropriate, such as those rare cases where sources refuse to install nutrient controls called for in a final tributary strategy.

Although there are several ways that the States' discretion could be preserved in the final rule, we believe the best approach would be to revise 40 C.F.R. 122.44(d)(1)(ii), which identifies the factors to be considered by the permitting authority in making reasonable potential determinations, to read, in relevant part, as follows:

> (ii) When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which account for . . . *planned controls on the discharge where the installation and performance of such controls is required and enforceable by the permitting authority utilizing an appropriate implementation mechanism* . . .

B. EPA's Offset Proposal Is Unnecessary and Threatens to Halt Continued Voluntary Point Source Nutrient Reductions

The offset proposal is unnecessary in the context of the Chesapeake Bay/TMDL integration process given the "interim cap" strategy discussed above. Its goal is the same as the goal of EPA's offset proposal; namely, to avoid increased loadings of pollutants contributing to the impairment until loading capacities of the Bay and its tidal tributaries are identified and allocated.

In addition to being unnecessary, EPA's offset proposal also threatens to bring a halt to continued voluntary point source nutrient reductions. POTWs in the Bay watershed have voluntarily committed, and continue to commit, to the installation of nutrient controls based on Federal and State assurances that they will not be penalized for their efforts. Unfortunately, EPA's offset proposal suggests that their reliance on these assurances may have been misplaced, and that POTWs voluntarily installing nutrient controls risk losing offsets that they may need for future growth. Although EPA's proposal does not say that voluntary reductions may not be applied as future offsets, it also does not say they can be used for this purpose. Consequently, the resulting uncertainty is sure to slow, if not halt, continued commitments by point sources to voluntarily controls on the discharge of nutrients. The integration process has no chance of working unless this problem is clearly addressed

in the final Nile. Therefore, we propose that the proposed definition of "reasonable further progress: in the antidegradation rule be revised as follows:

> [T]o authorize a new discharger or an existing discharger undergoing a significant expansion . . . reasonable further progress shall be made toward attaining the water quality standard. Reasonable further progress for these dischargers means, at a minimum, that any increase in mass loadings of the pollutant(s) causing the nonattainment will be offset by pollutant(s) load reductions of the pollutant(s) causing the nonattainment by a ratio of at least equal to 1.5:1. *In the case of any increase in mass loadings of any pollutant(s) causing the nonattainment of any water quality standard applicable to the Chesapeake Bay any of its tributaries. reasonable further progress may be made by the discharger agreeing to install controls on the new discharge or significantly expanded discharge and any existing discharge of such pollutant(s) in accordance with a tributary strategy developed pursuant to the Chesapeake Bay Program where the installation and performance of such controls is required by and enforceable by the permitting authority utilizing an appropriate implementation mechanism.*

Again, thank you for the opportunity to submit these comments. If you have any questions, please do not hesitate to contact James T. Canaday (VAMWA) at 703–549–3381 or email jcanaday@alexsan.com or Cy Jones (MAMWA) at 301–206–8831 or email cjones1@wssc.dst.md.us.

STATEMENT OF DAVID SKOLASINSKI, ON BEHALF OF MINNESOTA IRON MINING ASSOCIATION AND THE NATIONAL MINING ASSOCIATION

Mr. Chairman and members of the subcommittee. My name is David Skolasinski. I am pleased to testify on behalf of the National Mining Association (NMA), and as the Chairman of the Environmental Committee of the Iron Mining Association of Minnesota (IMA). The NMA's members include the producers of most of America's coal, metals, industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment and supplies; transporters; financial and engineering firms; and other businesses related to coal and hardrock mining. The Iron Mining Association of Minnesota (IMA) is a trade association representing iron ore producers and the businesses that supply goods and services to the iron mines. Both NMA and IMA members have a substantial interest in these rulemakings because most either own or operate facilities requiring NPDES permits under the Clean Water Act.

I have a Bachelor of Sciences degree in Aquatic Biology and a Masters of Sciences degree in Fisheries and Wildlife Management, both from Michigan State University. In addition, I have 26 years of environmental management experience in the mining industry with mines producing base metals, precious metals, and iron. I spent 12 of these years working in five of the western States. During that time, I was responsible for permitting and environmental management. I have extensive experience with programs for addressing acid rock drainage at both old and new mines. Thereafter, I spent 14 years in the Midwest, gaining extensive experience with water quality permitting and management. I also have experience with the Great Lakes Initiative and the Bi-National Program.

INTRODUCTION

I will begin by saying that the organizations I represent today support the development of a more comprehensive program that can effectively address multi-source water quality impairments through a watershed approach. Furthermore, I believe that EPA's continued focus on basin-wide planning, addressing both point and nonpoint sources, provides the best approach for achieving maximum water quality. However, TMDL development must work in tandem with other watershed provisions of the Clean Water Act (CWA). Such a program must be based on a sound understanding of (1) the limits of scientific knowledge, particularly with regard to complex watersheds; (2) practical ramifications, i.e. impacts on local economies and interim restrictions on point source discharges; (3) legal requirements; and (4) effective public policy. Finally, and most important, EPA must give States the flexibility to implement their programs in a manner reflecting each State's unique and complex local circumstances.

The TMDL Program must be both focused and flexible. The broad listing requirements EPA proposes will dissipate the already scarce resources necessary to prepare technically and legally defensible TMDLs. We agree that EPA should require States to develop a methodology to determine when waters should be listed as impaired.

However, as proposed, the rule fails to adequately ensure that the individual States methodologies will yield listing decisions that are clear, objective, and scientifically valid. Furthermore, States must have the flexibility to focus their 303(d) listing and TMDL development efforts on those waters that are "pollutant-impaired." Other waters should be dealt with through alternative lists and programs specifically intended for tracking their progress toward attaining standards. Section 305(b) is the proper place for tracking such waters that may not currently be attaining water quality standards but for which TMDLs are not the appropriate solution. In this way, the 303(d) list would be reserved for those waters as to which implementation of TMDLs is an effective means to bring about attainment of standards.

The CWA and its implementing regulations consistently stress Congress' intent to provide the States with broad discretion to develop policies and procedures to implement water quality standards. The Proposed Regulations therefore should incorporate options that will provide States with the flexibility to address site-specific issues. For example, EPA's failure to include phased TMDLs in the proposal could significantly limit the flexibility provided to the States. In addition the proposal contains new, severe restrictions on new and increased discharges from point sources. We have serious concerns about these inflexible provisions, the arbitrary offset requirements, the timing of the offsets, and the liability of some sources for reductions by other sources. The ultimate impact of these inflexible provisions is that the dischargers will be discouraged—rather than encouraged—from implementing voluntary early reductions.

The TMDL program, as crafted by EPA, will be very expensive for the States and regulated parties to implement and the resulting environmental benefits of such a program remain questionable. For example, the proposal fails to recognize the difficulties and uncertainties regarding historic or legacy pollutants—where non-attainment is due in part, or entirely, to historic problems such as contaminated sediments, acid rock drainage, air deposition including deposition from naturally occurring sources such as forest fires, volcanoes, natural wind-blown silt from glaciers, and naturally occurring background levels of metals in certain geographic locations. Pursuant to the proposal, it is likely dischargers will be required to purchase and install control equipment before it can be determined that the load reductions requiring the control equipment are necessary and in some instances where such drastic reductions from point sources will not significantly contribute to attainment of the water quality standard. For example, the practical result of EPA's proposal is that States will be forced to develop TMDLs based upon limited or inadequate scientific data, resulting in stringent NPDES permit limits that ultimately may be relaxed once additional data are developed. Thus, EPA's proposed rules may force significant capital expenditures to achieve load reductions from existing discharges that ultimately may prove totally unnecessary. We believe it is irresponsible for regulators to require current discharge to comply with the excessive burden of permit reductions unless such reductions would be expected to significantly improve water quality for the pollutant of concern within the next 5 year NPDES permit cycle.

303(D) LISTING AND TMDL DEVELOPMENT ARE IMPROPERLY SUITED FOR WATER BODIES IMPAIRED PREDOMINANTLY BY HISTORIC OR LEGACY POLLUTANTS AND CERTAIN OTHER NON-POINT SOURCES

In the proposed rules, EPA requires States to list waters that are impaired due to air deposition, acid rock drainage and other sources, even if those sources are not regulated as point sources under the Act. We agree with a number of members of this subcommittee that not only is this requirement not supported by the statute, but it is illogical and without scientific basis. It is currently scientifically impossible to model nonpoint source impairments with any degree of certainty. Furthermore, according to a February 10, 2000 statement of Mr. Peter Guerrero on behalf of the General Accounting Office (GAO), the States themselves report a need for additional analytical methods and technical assistance to develop TMDLs for the more complex, nonpoint sources of pollution. Therefore, requiring States to expend resources developing defensible TMDLs for such impairments is futile.

Further, many sources of pollutants originating from air deposition will likely be located outside the State and even outside the country. Individual States have no authority to control these sources. Consequently, no amount of effort by the State through the TMDL program will result in improvement of the impaired waterbodies. Unfortunately, under the proposed TMDL program, point sources discharging to the impaired waters will be subjected to discharge restrictions imposing considerable costs and impairing future growth opportunities. New point sources would likely be prohibited from discharging to impaired waters which would further restrict growth

in the State. I suggest that all of this would occur with little if any improvement of water quality.

I am very familiar with an example that illustrates this point existing in Northeastern Minnesota. Virtually all of the lakes and streams in the Lake Superior watershed are listed as impaired for mercury. Aside from the fact that the State's impairment determination is scientifically unfounded, as much as 90 percent of the mercury entering the State comes through air deposition and (other nonpoint sources of mercury) from sources outside the State. Under the current proposal, point source dischargers, both municipal and industrial, would be severely impacted and growth throughout the entire region would virtually come to a halt. Yet, mercury from air deposition (and other nonpoint sources) would continue to contribute the same amount of mercury to the State's impaired waters, thereby precluding achievement of water quality standards.

This same scenario exists with regard to elements aside from mercury that exist ubiquitously throughout the earth's crust. Background levels in soils typically exceed acceptable criteria in certain ore bearing regions. There are numerous geologic studies and historical records demonstrating that surface ore deposits and metals-enriched soils contribute to natural background conditions. Therefore, despite drastic reductions or zero discharge requirements imposed on point source dischargers coupled with restrictions on all new or increased dischargers, water quality standards simply cannot be achieved in these situations. We suggest that it is illogical to impose such reductions on point source dischargers in the face of evidence clearly showing that eliminating all point source discharges from a waterbody will not result in achievement of water quality standards. Yet, this is the practical effect of EPA's proposal. Aside from the unwarranted restrictions on point source dischargers, EPA is setting States up to fail by requiring them to develop TMDLs in situations where the TMDL is not the appropriate mechanism for addressing such unique problems.

EPA's process for downgrading water quality standards to reflect natural background pollutants is not the solution. EPA's proposed rule virtually ignores the downgrading process, which should be considered as a mandatory requirement before any waterbody is listed. States developed their water quality standards very generally without respect for the TMDL process about to unfold and they need time to adjust those standards with far greater specificity. Moreover, EPA's downgrading process, aside from its inherent deficiencies, is unclear as to its applicability to pollutants that, while man-induced, originate from airborne sources or historical practices.

For these reasons, the practice of adopting a TMDL prior to the development and implementation of a plan for addressing non-point source pollution may actually cause degradation of the water quality in parts of the waterbed. This could occur if current discharges are substantially reduced or completely eliminated. For example, consider a point source currently discharging metals in concentrations higher than its assigned loading but below the concentrations in the receiving waters. If the only means of achieving its assigned load allocation is to stop the discharge altogether, the receiving water's metals concentration below the discharge will actually increase. In other words, elimination of a "cleaner" discharge will result in "dirtier" flow once the "cleaner" discharge is removed from the total flow. Accordingly, it makes no sense to ratchet down on point source discharges prior to addressing the overall non-point source metals contributions.

An even more perverse result would occur where the TMDL has assigned loadings to point sources that require discharges at concentrations lower than the water quality standards. Again, if the only way to achieve the load allocation is through elimination of the source of the discharge altogether the TMDL would in effect be taking away from the waterbed a certain amount of assimilative capacity that the point source is contributing.

OFFSETS

Under the current proposal, new and significantly expanding dischargers to impaired waters would face excessively onerous burdens as a prerequisite to obtaining an approved NPDES permit. EPA suggests that the proposed mandatory offset provisions are designed to provide opportunities for such discharges to impaired waters. Without elaborating on all of the reasons we believe the offset proposal is unworkable, I will point out the most obvious. EPA fails to consider situations like the Northeastern Minnesota mercury example I referred to earlier where virtually all waters in the region have been deemed impaired. In this situation, if all dischargers are subjected to a "no detectable" discharge requirement, offset credits simply will not be available throughout the entire region. Further, even if a point source had

credits available, it would not likely offer them for sale but rather would hold onto them because of the uncertainty as to what load reduction it will face in the forthcoming TMDL, or for its own future growth. In certain regions of the country, particularly in regions plagued by historic or legacy water quality problems, all future growth and development activities involving a pollutant causing impairment will be brought to a halt. We suggest that EPA has not done a thorough analysis of the practical implications of this drastic mandatory provision and therefore, the provision should be removed from the rule.

Alternatives to Offsets

We suggest alternatives to the mandatory offset requirements whereby States would have the flexibility to develop their own local solutions to bringing waters into compliance should be encouraged. Here, the operative principle must be progress toward standards over time and across the watershed. EPA's requirement that an offsetting reduction must occur at the same time as the new or increased discharge is unnecessary and, in fact, will be counterproductive. This requirement, by giving no credit for long-term reductions, will discourage sources from participating in voluntary reduction activities in their watersheds that may yield real water quality benefits.

Although the proposed rule mentions that TMDLs may be developed on a watershed basis, the case-by-case offset provisions outlined in the rule appear to prohibit a watershed approach. A watershed approach, which centers on a voluntary efforts should be the preferred approach for obtaining the desired reductions.

An example of such a voluntary approach to obtaining offset reductions for a specific pollutant has been successful in Minnesota. Minnesota currently has two watershed based initiatives, the Mercury Reduction Initiative and the Watershed Unification Initiative. When fully implemented, these will provide significant reasonable further progress from point and nonpoint sources. According to the Minnesota Pollution Control Agency (MPCA), baseline data for mercury indicates nearly a 50 percent reduction in mercury releases from 1990 to 1995 as a result these programs. An additional 60 percent is expected by the end of 2000 and 70 percent by 2005. It is anticipated that the reductions through 2005 will be obtained primarily through voluntary efforts by municipal and industrial sources. It is important to note that this voluntary effort is consistent with EPA's Great Lakes Bi-National Program and the Bi-National Toxics Strategy, nevertheless, we believe its future is threatened by EPA's proposed offset requirements.

A similar effort is also underway at the local level in Northeastern Minnesota. Stakeholders—including non-governmental organizations, business and industry, municipal and local governments, research and education institutions, and the general public within the St. Louis River Watershed are developing a watershed group. Although this initiative is in its early stages, it is expected to result in reasonable further progress as stakeholders, through cooperative efforts, will make pollutant reductions. However, many fear that the proposed offset provision in EPA's proposed rule will be a disincentive and likely prohibit this effort from moving forward unless this alternative approach is allowed.

The TMDL program proposal also threatens to be a disincentive to a proposed municipal wastewater consolidation project. The project anticipates piping minimally treated municipal wastewater from a number of small communities to a regional treatment facility where improved treatment is provided. The consolidation would result in an increased discharge at the regional facility in excess of the 20 percent significant expansion threshold, triggering the requirement for mercury offsets. Unfortunately, offsets will likely never be available due to historic mercury impairments and therefore, this environmentally beneficial local watershed project will never be realized.

CONCLUSION

In conclusion, States in conjunction with stakeholder groups should be provided the flexibility to develop water quality improvement programs that will yield reasonable further progress in a practical manner emphasizing long-term load reduction potential rather than rigid restrictions that apply unless immediate offsets can be achieved. The foundation for such programs should be technically sound water quality standards and high quality data and tools for addressing achievement of those standards. Those State programs should focus on action that will yield significantly enhanced water quality, rather than imposing arbitrary load reductions on the sources not responsible for contributing to the impairment.

Mr. Chairman, I commend you and the subcommittee for providing this forum for discussing EPA's proposed revisions to the regulatory requirements under the Clean Water Act. We urge Congress to encourage EPA to reconsider the June, 2000 dead-

line for finalizing this rule proposal. These oversight hearings and the more than 30,000 public comments indicate that EPA has failed to adequately consider all of the impacts of this proposal. It would be a mistake to move forward at such a rapid pace in the face of all these uncertainties.

STATEMENT OF NINA BELL, EXECUTIVE DIRECTOR, NORTHWEST ENVIRONMENTAL ADVOCATES

Mr. Chairman and members of the committee: My name is Nina Bell. I am the Executive Director of Northwest Environmental Advocates, a 31-year-old organization working in Oregon and Washington on issues related to energy and the environment. We have been working since 1987 to promote implementation of the Clean Water Act's water quality-based approach to protecting public waters. To this end, we have actively participated in the review and development of State water quality standards and State water quality rules, State policies for Total Maximum Daily Load (TMDL) programs and individual TMDLs, U.S. Environmental Protection Agency (EPA) rules on water quality standards and TMDLs, individual and general discharge permits, and State nonpoint source programs. We also have been engaged in litigation regarding the inadequate TMDL programs of Washington and Oregon, since 1991 and 1994 respectively, as well as citizens suits seeking enforcement of discharge permits. At the State level we have participated in a wide range of advisory committees in Oregon and Washington, including triennial reviews of water quality standards, State rules and policies for water quality management, and programs focused on data collection such as the Lower Columbia River Bi-State Water Quality Committee of which I was a Co-Chair. I was a member of EPA's Federal Advisory Committee on TMDLs[1] and prepared extensive comments on EPA's proposed TMDL rule.[2]

INTRODUCTION

The benefits to be derived from the Clean Water Act's water quality-based approach, and the TMDL program in particular, are clear: each pollution source must take responsibility for keeping its share of the cumulative impacts on the human, fish, and wildlife uses of a given waterbody to a "safe" level. That is what it means for a waterbody to meet water quality standards, which is the interim goal of the Act and the goal of every TMDL. This rule of law protects all waters, regardless of how big or small their flow, and therefore their capacity to dilute pollution. It applies regardless of how many other point and nonpoint sources discharge or generate polluted runoff to it. Key to meeting water quality standards in waters that have become impaired is the TMDL, a scientifically based method of evaluating the cumulative impacts of multiple pollution sources in order to allocate responsibility to each source. The TMDL is simply a process by which the government, with public assistance, establishes how much pollution a waterbody can tolerate, determines what must be done to reduce pollution inputs so that level is not exceeded, and ensures to the extent possible that those responsible will carry out needed actions. As I will discuss below, the "extent possible" is limited by the nature of nonpoint source programs in place in each State, because the TMDL program itself does not create any new regulatory authority over otherwise non-federally regulated sources.

By marrying the inputs of point and nonpoint sources with natural contributions and changes in seasonal flows, the TMDL can integrate the legal requirements of the National Pollutant Discharge Elimination System (NPDES) program with the multiplicity of nonpoint source programs that exist. These programs range from vol-

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[1] Widespread litigation by citizens groups to enforce the mandatory provisions of the Clean Water Act's TMDL program led EPA to seek ways to strengthen this water quality clean-up program. CWA §303(d), 33 U.S.C. §1313(d). The agency has worked to improve technical support to States and has issued a number of policy memoranda. *See, e.g.,* Memorandum dated August 8, 1997 from Robert Perciasepe, Assistant Administrator [for Water], U.S. Environmental Protection Agency, to Regional Administrators and Regional Water Division Directors, New Policies for Establishing and Implementing Total Maximum Daily Loads. In 1996, EPA established a subcommittee of its National Advisory Council for Environmental Policy and Technology (NACEPT) to develop recommendations to strengthen the TMDL program. At the conclusion of nearly 2 years of weekly conference calls and six full committee meetings, the FACA Committee issued over 150 specific recommendations to EPA. U.S. Environmental Protection Agency, Report of the Federal Advisory Committee on the TMDL Program, EPA 100-R–98–006 (July 1998).

[2] Letter to EPA Comment Clerk for the TMDL Program Rule Re: Proposed Revisions to the Water Quality Planning and Management Regulation, 40 C.F.R. Part 130, 64 Fed. Reg. 46012 (August 23, 1999), from Nina Bell, Northwest Environmental Advocates, dated January 20, 1999.

untary to regulatory, from local to Federal, from user-friendly to relatively useless, and vary widely between States.[3] The end result of a TMDL should be a fair, measurable, scientifically based plan for how to bring impaired water back to attainment of water quality standards—how to reduce pollution loads to safe levels. This goal is consistent with the interim goal Congress sought for polluted waters in 1972 and with the desires of the American public in the year 2000.

TMDLs play a critical role in the efficacy of the NPDES program. In the absence of TMDLs, States and EPA cannot properly establish the pollution controls necessary for either point or nonpoint sources, as I will discuss below. The control of nonpoint source polluted run-off itself is central to the regulation of point sources. In the absence of reliable nonpoint source control programs, measurable goals for reducing nonpoint source contributions to impaired waters, and commitments by nonpoint sources to significantly reduce pollution inputs to streams, States cannot properly establish discharge levels for point sources that meet legal requirements and are fair.

POINT SOURCE REGULATION

The development of effluent limitations for NPDES point sources over the last 25 plus years should have been based on the concurrent application of the two prongs of the Clean Water Act: the technology-based approach and the water quality-based approach. I have frequently heard a different interpretation, namely the view that when Congress passed the Act in 1972, it "essentially abandoned the water quality-based approach."[4] That could not be farther from the truth. Instead, in its wisdom, Congress fashioned the two-pronged regulatory scheme, one to assure each point source would use a minimum of pollution prevention technology and the other to ensure the use of what ever additional pollution controls were necessary for the protection of public health and the environment. Rather than abandon the water quality-based approach, Congress embraced it in the 1972 Act and in subsequent amendments.[5]

The water quality-based approach of the Clean Water Act creates explicit restrictions for NPDES-permitted sources, restrictions that are tied to the quality of the water receiving the discharge. NPDES permits, which are first required to meet technology-based requirements, also must contain "any more stringent limitation, including those necessary to meet water quality standards . . . or required to implement any applicable water quality standard established pursuant to this chapter."[6] Likewise, the Act requires that where a permitting authority determines that "discharges of a pollutant from a point source . . . would interfere with the attainment or maintenance of [applicable] water quality standards, . . . effluent limitations (including alternative effluent control strategies) for such point source . . . shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality."[7]

EPA's implementing regulations mirror these statutory restrictions. In general, the issuance of permits is prohibited "when the conditions of the permit do not provide for compliance with the applicable requirements of CWA, or regulations promulgated under CWA."[8] This includes "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States."[9] The regulations spell out the implications for existing NPDES sources that are discharging into impaired streams. When NPDES permits are issued or reissued, EPA regulations require that the effluent limitations incorporated therein "include conditions meeting [w]ater quality standards and State requirements."[10] Specifically, permits must contain "any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under [other sec-

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[3] For example, Oregon has an agricultural management planning law, Senate Bill 1010, that mandates agricultural plans for waters requiring TMDLs. No other State has a comparable law. Likewise, while many Western States have forest practices acts, many Southeastern States do not.

[4] EPA's failures to implement the water quality-based approach, including TMDLs, are not testimony to Congressional intent. As discussed below, one could make the exact same argument about the technology-based approach, based on EPA's failure to implement that aspect of the Act.

[5] *See, e.g.*, CWA Secs. 302, 303(d), 303(c), 402, 304(l).

[6] CWA Section 301(b)(1)(C). The statute includes two distinct requirements: what is necessary to meet standards and what is required to implement standards. A TMDL is necessary to determine what is needed to implement standards, a more complicated and cumulative analysis.

[7] CWA Section 302(a).

[8] 40 CFR Sec. 122.4(a).

[9] 40 CFR Sec. 122.4(d).

[10] 40 CFR Sec. 122.44(d).

tions of the CWA] necessary to: (1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality."[11]

These required effluent limitations must control all pollutants that may cause or contribute to violations of water quality standards.[12] In order to determine whether a discharge causes, has the reasonable potential to cause or contribute to an in-stream excursion above either narrative or numeric criteria, "existing controls on point and nonpoint sources, the variability of the pollutant or polluting parameter in the effluent . . . and where appropriate, the dilution of the effluent in the receiving water" must be accounted for.[13] In other words, EPA's regulations contain an implicit reference to the need for TMDLs to evaluate appropriate effluent limits by taking the cumulative effects of multiple sources into consideration.

In addition, EPA's regulations specifically address the issuance of permits for new sources or increased loads from existing sources that propose to discharge into impaired streams. These new loads are prohibited if they would "cause or contribute to the violation of water quality standards."[14] In contrast to its own regulations which are soundly rooted in the statute, EPA has stated that new discharges can meet the terms of this restriction—in other words be deemed to meet water quality standards—if a so-called pseudo-TMDL, otherwise known as a wasteload allocation, has been developed.[15]

In fact, for both new and existing sources, EPA has long clung to the view that such wasteload allocations, developed outside the context of TMDLs, are a sufficient regulatory basis upon which to develop water quality-based effluent limits for NPDES permits.[16] However, terming a wasteload allocation a "pseudo-TMDL" is extremely misleading. EPA's reference is to an evaluation of how an individual discharge will impact a waterbody, a far cry from the TMDL analysis that considers the cumulative impacts of multiple sources, including that individual discharge. EPA has repeatedly countered environmental advocates' complaints about the failure of NPDES permits to meet water quality-based requirements by noting that States have been developing wasteload allocations since 1972. Only very recently has the agency admitted that permit writers preparing these wasteload allocations "neglected" to factor upstream pollution into their models and calculations. In other words, EPA has now tacitly conceded that wasteload allocations to meet legal requirements cannot be developed without a TMDL for impaired waters.

Despite the clear legal requirements for issuing NPDES permits for discharges into impaired waters, EPA and the States have issued thousands of individual and general permits that do not meet these criteria and thus cause or contribute to water quality standards violations. The reason is that NPDES permit writers have failed to take into account the two fundamental ways in which a point source discharge can affect the water quality in a stream. First, the source can cause violations of water quality standards at or near the point of discharge simply by overwhelming a stream. The common way to evaluate this potential is a dilution analysis calculation. The results of modeling demonstrate how wide and long the plume of pollution will be after it leaves the discharge pipe and before it thoroughly mixes with the water in the stream. The phrase "mixing zone" is often applied to this analysis, referring to an area at and around the point of discharge in which EPA's regulations allow for the suspension of water quality standards. This permitted violation

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[11] 40 CFR Sec. 122.44(d)(1).

[12] "Limitations must control all pollutants or pollutant parameters (either conventional, non-conventional or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." 40 CFR Sec. 122.44(d)(1)(i).

[13] 40 CFR Sec. 122.44(d)(1)(ii).

[14] "[An applicant] proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by sections 301(b)(1)(A) and 301(b)(1)(B) of CWA, and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that: (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and (2) The existing dischargers into that segment are subject to compliance schedules designed to bring that segment into compliance with applicable water quality standards." 40 CFR Sec. 122.4(i).

[15] In practice, EPA and the States have almost entirely ignored the prohibition on the addition of new loads to already impaired waters, despite its statutory basis and that to ignore it makes clean-up of waters pursuant to a TMDL more difficult and expensive.

[16] EPA has even defended lawsuits alleging the agency's failure to meet its mandatory duty to promulgate TMDLs by stating that wasteload allocations are the equivalent of TMDLs. Presumably, with EPA's recent recognition that their calculations are deficient, it will no longer be asserting that claim.

of water quality standards is further regulated by State rules, many if not most of which are exceedingly vague and therefore subject to abuse.[17]

Problems arise from EPA's having restricted its analysis of point source discharges on water quality to this dilution analysis, thereby ignoring the second way in which point sources affect water quality, namely in combination with the discharges of other point sources along with contributions from nonpoint sources and natural background. This cumulative analysis of multiple sources is the product of the TMDL, without which a water quality-based permit that meets Federal requirements cannot be properly issued. In the absence of a TMDL, determining acceptable point sources loadings is a guessing game, albeit one that has gone on for over a quarter of a decade. Both the localized and the cumulative analyses must be done in order to determine the most restrictive effluent limitations required.

Seen another way, the dilution analysis has been treated as an academic exercise to analyze where a discharge will cause a violation of standards in a hypothetical unpolluted stream of a certain flow. Instead, permit writers should be analyzing the effects of a proposed or existing discharge on a real stream with all of its existing or projected impairments. The conclusion that a discharge hypothetically would dissipate if the stream were clean is the substitution of wishful thinking for accurate analysis and therefore is not an appropriate basis for issuance of an NPDES permit. Reliance on this fiction is exactly why so many permits, contrary to statute and regulations, do currently cause and/or contribute to violations of standards throughout the country. That means that TMDLs will result in changes to NPDES permits; it also means that the degree of reductions required for point sources will depend upon the level of pollution controls exercised by nonpoint sources.

What are these effects of TMDLs and nonpoint source controls on point sources? There are three general scenarios. First, there are impaired waters whose pollution is predominately from nonpoint sources, such that if all point source discharges were removed from the waterbody, nonpoint sources would continue to cause violations of water quality standards. A State could choose not to curtail the nonpoint sources, in which case point sources would continue to contribute to standards violations, remaining vulnerable to NPDES permit challenges and third party lawsuits. Over regulation of these point sources is costly and ultimately ineffective. Second, there are impaired waters where the pollution from point sources so predominate water quality that if the discharges were removed completely, the water would attain standards. In this situation, dramatic reductions in point source discharges are unavoidable. Third, point and nonpoint sources are both substantial contributors to impairment. Attainment of standards might or might not be able to be achieved by reducing discharges or removing point sources entirely, depending on the degree of impairment. However, by expecting point sources to bear the brunt of pollution controls, socioeconomic costs could potentially be much higher than requiring nonpoint sources to reduce their contribution. However, without a TMDL to quantify the expected reduction by nonpoint sources, States have no basis upon which to determine what level of point source reduction is appropriate. Moreover, not adequately addressing nonpoint sources in this context may well result in failure to achieve the desired environmental protection leading eventually to an increased and inequitable burden on the point sources. In all three scenarios, TMDLs represent a science-based approach to determine who should do what, subject to full public participation and scrutiny. This public process creates the greatest likelihood of achieving both equity and environmental protection.

BENEFITS OF A TMDL PROGRAM

Simply put, the law that governs NPDES point sources makes no sense without the development of TMDLs. While the most absurd and inequitable scenario results in severe reductions in or elimination of point source discharges that fail to result in attainment of standards because nonpoint sources are not required to reduce loadings, other bad policy results may occur over the long term. For example, if the allocations in a TMDL are set based on nonpoint source controls that are not imple-

[17] State regulations can be as vague as the circular mandate to make the mixing zone "as small as practicable." Other States have restrictions on the width, depth, and/or length of the discharge plume relative to the dimensions of the waterbody, e.g., 50 percent of the stream width. Vague restrictions on mixing zones result in abuses such as a 13-mile long mixing zone in an Oregon stream, which required a citizens lawsuit to remedy. States often fail to consider the rationale for mixing zones, namely that the beneficial uses of a waterbody can avoid the plume of unsafe water. Thus, mixing zones that extend from bank to bank prevent fish passage and should not be allowed. Likewise, mixing zones for pollutants that threaten public health (e.g., human pathogens in raw sewage) should not be allowed because people do not have the ability to detect and avoid exposure to them.

mented because of insufficient incentives and/or pressure, years later point sources will be required to retrofit yet again, even if placing the burden on them makes little economic or environmental sense. In the interim, the benefits of clean water to the public and public resources have been forgone.

TMDLs should also provide a benefit to States that are attempting to regulate nonpoint sources or tailor their incentive programs to meet the needs of impaired waters. State regulatory agencies whose mandate in some States is to establish Best Management Practices (BMPs) that are sufficient to attain water quality standards need the site-specific analysis provided by TMDLs. In other States where there are no such mandates, the voluntary and incentive programs are operating in the dark. Insufficiently protective non-constructed solutions, such as buffers, are not cost effective for taxpayer supported incentive programs. Lack of a TMDL poses a particular problem to sources that must reduce pollution by building structures, such as waste lagoons for animal feeding operations. Likewise, commitments to using buffers—whether for urban streams or logging—should be based on long-term needs. It is far easier to leave a buffer in place than try to grow it back again and it is less damaging to water quality. For example, buffers on streams in the Pacific Northwest that are needed to restore stream temperatures for the protection of threatened and endangered salmon, will take decades to grow. Multiple retrofits are not good for business, whether point or nonpoint, or for the environment and public health.

The development of a TMDL also creates an environment in which all sources are working in the same timeframe to achieve the same end. This is far preferable to having the permits for certain point sources come up for renewal, without a clear picture of what will happen with other point sources.[18] In this way, point sources can have a sound technical basis for their effluent limits and understand the policy decisions that give them greater or less responsibility for cleaning up a waterbody relative to other point and nonpoint sources. Clean-up programs that rely on tax- and rate-payer support and public cooperation, such as urban stormwater, are more likely to be sustained and successful if all sources are working to achieve the same goal, and that goal is attainment, not just reductions.

EPA'S PROPOSED RULES

In my opinion, EPA's proposed rules attempt to a limited extent to address the fundamental inequity between point and nonpoint sources that arises from the highly federally regulated status of point sources in contrast with the Act's emphasis on State programs for nonpoint sources. The agency's proposal does not go beyond what the statute allows and create a Federal nonpoint program, despite the various allegations made by nonpoint source representatives. Instead, EPA's proposed rules are consistent with the Clean Water Act, with much of the FACA recommendations,[19] and with sound public policy. Although much of the rule merely memorializes EPA's current policies and guidance, the salient feature of the proposal is the incorporation of TMDL Implementation Plans in the definition of a TMDL. It is worth noting that, although the FACA Committee did not agree on the convention for Implementation Plans, it did agree unanimously to recommend that EPA require Implementation Plans, as key to a worthwhile TMDL program.[20] The committee also agreed unanimously on the content of Implementation Plans, submitting over four pages of detailed recommendations on what such a Plan should include.

It was well understood then as now that TMDL Implementation Plans are necessary primarily to coordinate and align the multiplicity and diversity of nonpoint source programs. However, Implementation Plans will also help States to set out clearly when NPDES permits will be revised in order to incorporate new load restrictions determined by the TMDL and the timeframe in which load reductions will

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[18] An example of the benefits of looking simultaneously at all point sources contributing a pollutant is EPA's Columbia River Basin Dioxin TMDL. There, EPA made allocations to all bleached kraft pulp mills in the basin based on an equitable formula.

[19] EPA's rules are inconsistent with the FACA Committee recommendations only in that they fail to address issues upon which the committee made recommendations (not all of which were amenable to rulemaking) and issues on which the committee failed to come to agreement.

[20] Although the committee's report addresses a myriad of issues related to TMDLs, it has one overarching theme: if the Nation is to embark on a serious effort to meet the requirements of section 303(d), it should ensure the program makes real progress toward meeting States' water quality standards. Thus, despite the majority representation by industry, land owner, municipal, and State governments, the committee underscored the critical nature of implementing pollution controls, not just generating paperwork.

be obtained.[21] For States that are suffering from a backlog of unrenewed permits, it is particularly necessary and appropriate that a TMDL Implementation Plan demonstrate to the public and to other pollution sources when NPDES permits will be revised and point sources meet their allocated loads. Nothing slows clean-up efforts programs more—especially those that are non-regulatory and/or require sustained efforts over long periods of time—than providing one or more pollution source with the opportunity to point to other sources that aren't doing their fair share. This can come in the form of downstream sources complaining that the benefits of their pollution reductions will be overridden by the unstemmed pollution coming from upstream, as well as upstream sources arguing that the benefits of their activities will be negated by the pollution produced by downstream sources.[22] In addition, the TMDL Implementation Plans are the right place to begin the public discussion about permits that address storm-driven loads, such as those for urban stormwater and animal feeding operations, that incorporate many attributes of nonpoint source type controls such as Best Management Practices (BMPs) and post-BMP monitoring for adaptive management.

However, it is the wide array of voluntary, incentive-driven, quasi-regulatory, and regulatory programs that may be used to obtain or mandate nonpoint source controls that require an Implementation Plan. There are several reasons. First, although TMDLs will set clear loading goals for nonpoint sources, because the causality between control/restoration actions and water quality improvements is not well known, the clarity to nonpoint sources will be lost without an Implementation Plan. The Plan, in contrast to the TMDL, will spell out more easily understood expectations for nonpoint sources. Second, the Implementation Plan will include solutions to this lack of understanding, such as monitoring, setting out the process by which adaptive management techniques will employ monitoring results to improve controls if necessary, how and when enforcement actions will be taken pursuant to State or local programs, use of incentive programs, and the timeframe in which nonpoint sources will be expected to take various actions. Last, the development of Implementation Plans will increase the certainty that needed nonpoint source controls will occur, thereby reducing the likelihood that the burden for pollution reductions will fall entirely on point sources.

Of course, the inclusion of an Implementation Plan does not make a TMDL directly enforceable by EPA, States, or third parties. An Implementation Plan does not mean that EPA has created a Federal nonpoint source program. It simply means that there will be heightened scrutiny by all agencies and the public to the issue of whether nonpoint source reductions called for by the TMDL are sufficient, likely to occur, and equitable.

EPA's proposal to include Implementation Plans in the TMDL achieves the very important end of ensuring that TMDLs and TMDL Implementation Plans are both prepared and submitted to the public and EPA for review concurrently. Some argue that by decoupling the two, States could develop TMDLs faster than if they are slowed by the process of determining how the TMDLs will be implemented. While this is no doubt true, the real purpose of TMDLs is to achieve standards by sharing the load between sources. TMDLs without Implementation Plans will lead to greater burdens placed on point sources, both initially and in the future. Although the primary value of a TMDL with regard to point sources are the wasteload allocations that must be incorporated into NPDES permits, those allocations are highly dependent upon the load allocations made to nonpoint sources. Moreover, the long term value of those wasteload allocations will stem from the certainty that load reductions will be achieved by nonpoint sources. Therefore, by increasing the likelihood of nonpoint source load reductions, through concurrent submission of TMDLs and their Implementation Plans, EPA enhances the value that TMDLs offer point sources. This value Is an equitable sharing of the load and a greater degree of certainty for the future.

Concurrent submission of TMDLs and Implementation Plans is also important to the public and to a wide variety of reviewing agencies (such as State Departments of Agriculture and Forestry, the National Marine Fisheries and U.S. Fish and Wild-

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[21] The public process for issuing NPDES permits addresses how loads are incorporated into effluent limits.

[22] An example of this debate is demonstrated by tensions between agricultural interests upstream of the city of Portland in the Willamette River Basin and the City with its Combined Sewage Overflows (CSOs) and stormwater discharges. The City argues that removing its raw sewage discharges from the Willamette River will not make a substantial difference to the river's water quality because the river is already so polluted by the time it runs through Portland. Agricultural interests, on the other hand, argue that the City's interest in lessening its commitment to reducing raw sewage discharges means rural sources are expected to reduce pollution inputs while big city interests exercise their political clout.

life Services, and local governments) in order to assure appropriate nonpoint source reductions will take place. I had the good fortune to review a draft TMDL prepared by EPA that, while not meeting the definitions of the proposed rules, included some level of implementation planning. This was the South Steens TMDL for grazing in Oregon.[23] I learned firsthand about the benefits of evaluating a TMDL with an Implementation Plan, as well as evaluating an Implementation Plan with a TMDL in hand. If the two are not side-by-side, it will be virtually impossible for any party, including EPA, to determine that either one has been done appropriately. Both the public and EPA benefit from the closest possible connection between the scientific analysis of the TMDL and actions set out in Implementation Plans, providing better assurance to the public that its tax dollars funding the TMDL program will be productive. Without concurrent submission, it is virtually impossible to evaluate whether the TMDL's analysis and load allocations to nonpoint sources is correct and will be meaningful in the real world.

The reasons are obvious. If a TMDL is reviewed by EPA prior to the State's having analyzed the proposed solutions to implement load allocations to nonpoint sources, EPA will be forced to take approval/disapproval action without the benefit of that information. Likewise, members of the public, including point and nonpoint sources, cannot judge the fairness and economic impact of a TMDL's relative allocations without having in hand the practical ramifications for nonpoint sources that will be spelled out in the Implementation Plan.

The technical analysis for assessing the necessary levels of nonpoint source control actions is difficult and in its infancy. That makes difficult drawing a bright line between analysis of problems of the TMDL and proposals for solutions contained in the Implementation Plan. That is why Implementation Plans will include monitoring and measures that will be taken to respond to the results of monitoring, if existing and proposed controls for nonpoint sources do not prove to be sufficient. Implementation Plans will need to evaluate the efficacy of previous and current attempts to remedy identified problems to better understand what is needed. To address the universally recognized problem of determining what constitutes adequate controls for nonpoint sources, Implementation Plans should include three types of monitoring: (1) Implementation monitoring to evaluate whether actions are taking place; (2) Effectiveness monitoring to see if controls are meeting allocations; and (3) Validation monitoring to determine if TMDL goals have been met.

The point of tying TMDLs and Implementation Plans together is to ensure that the analysis of the TMDL is translated into the changes that are necessary to control sources. Analysis by itself does not lead to appropriate control actions. That is what we will get if we have TMDLs and no Implementation Plans. Control actions proposed without analysis is what we have already; politically wrangled determinations of how much some land owner/user is willing to do regardless of whether it is sufficient. Neither one of these options is desirable if the TMDL program is to meet the goals of the Clean Water Act and be worth the significant taxpayer and private resources that will need to be invested. Neither option supports the needs of point sources.

HABITAT CONSERVATION PLANS

In discussing the effectiveness of nonpoint source programs to achieve attainment of standards, many point to existing programs. One type of ostensible nonpoint source program is Habitat Conservation Plans (HCP) prepared pursuant to the Endangered Species Act. While there may well be some HCPs that could meet the requirements of a TMDL, for the most part HCPs do not perform the same function as a TMDL. The vast majority of HCPs do not fully address Clean Water Act issues, including whether and when they will lead to attainment of water quality standards. The FACA Committee specifically discussed the idea of "TMDL substitutes" and rejected the concept, noting that if HCPs or other nonpoint source programs constituted the equivalent of a TMDL they could be submitted as such to EPA. One particular limitation of HCPs is the "no surprises" policy that locks in maximum required controls for 50 or even 75 years. This alone renders HCPs absolutely incompatible with TMDLs and the Clean Water Act in general. Everybody knows that the initial controls for nonpoint sources will likely be insufficient and require adjustment. That is why nonpoint sources have talked for years about the need to use the "iterative approach" and "adaptive management." In contrast, HCPs do not require that nonpoint sources followup insufficiently effective programs with increasingly stringent controls.

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[23] South Steens Water Quality Management Plan, dated June 22, 1998, and Total Maximum Daily Load, Public Notice Dated: July 10, 1998.

DATA ISSUES

Another complaint is that there simply are not enough data to support the TMDL program. States are under pressure from citizens who are concerned that data deficiencies will lead to polluted waters not being listed and TMDLs that are not adequately protective, as well as industries that fear being "over regulated." There is no question but that there are insufficient data; the issue is what to do about it. The implication of some point and nonpoint sources appears to be that because the system is not perfect, EPA and the States should take no action to reduce pollution. However, in the face of water pollution problems that make people sick and bypass drinking water treatment facilities, that contribute to the imminent extinction of aquatic species, and that cause reproductive failure in birds and mammals, we cannot afford to take no action because we do not have sufficient data. Instead, we must collect more data and use the data we do have in a sensible, scientific manner. We must also keep in mind that no amount of scientific information will answer all questions to the satisfaction of all parties. The TMDL program rests on science to the extent possible, but counts on public policy to fill in the gaps. In 1972, Congress gave States and EPA direction on how to address the lack of knowledge: use a margin of safety.[24] Many point sources understand that they can benefit from a reduced margin of safety and by choosing to collect data to assist States in developing TMDLs.

States do not collect adequate data on pollutants and their effect on people, fish, and wildlife and monitoring budgets for all agencies have steadily decreased over the last 10 years. The data States do collect are neither comprehensive in geographic scope nor in sufficient depth on individual waterbodies to develop TMDLs and to improve water quality standards. Many States have access to additional data but, despite Federal requirements, choose to ignore other sources such as Federal and State agencies, tribes, academic institutions, and private citizens.

Differences in the effort expended by States to seek out "all readily available" data and information from other sources is one reason that States have extremely inconsistent section 303(d)(1) listings.[25] Differences between States naturally also reflect differences between their water quality standards and listing criteria (methodology). There are a number of regions where there are stark contrasts between States, including between Oregon and Washington, according to EPA's analysis that cannot be attributed solely to differences in standards.[26] The new rule has some measures to improve consistency between States.

EPA's current regulations address the issue of whether data are sufficient to determine standards violations by establishing a listing process that takes place every 2 years. This schedule allows citizens and government bodies to both identify previously unidentified impaired waters and to demonstrate that listed impaired waters are not impaired. In other words, it meets the needs of all interest groups. That is why the FACA Committee did not recommend a change to the frequency of the listing cycle.

There are also complaints about States' water quality standards that are applied to the data collected to generate section 303(d)(1) lists. Congress addressed the issue of whether State water quality standards are set correctly by requiring their review and revision every 3 years. This 3-year cycle is an appropriate time period in which to address changes in scientific understanding of the effects of pollution and incorporate those changes in States' standards.

TECHNOLOGY-BASED POINT SOURCE REGULATION

In evaluating the TMDL program, EPA's proposed rules, and the regulation of point sources, the committee should recall that EPA also has a long history of failing to implement the technology-based prong of the Clean Water Act. The tech-

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[24] CWA Sec. 303(d)(1)(C).

[25] "Percent Impaired Waters in 1998," a colored map prepared by EPA in 1999.

[26] When Oregon prepared its 1994/96 section 303(d)(1) list, under the terms of a consent decree with us, the State actually visited the field of rices of agencies such as the U.S. Forest Service, thus obtaining data that would otherwise not have been made available. Washington, on the other hand, merely sends out a notice saying it will accept data. By taking this approach, Washington avoids using data that are readily available, thereby not listing streams that are impaired, not listing waters for all impairments for which data exist, and avoiding building relationships with other agencies that could support the TMDL program by better understanding their role with it.

New York's low percentage coincides with remarks made by a representative of that State in a presentation to the FACA Committee. He noted that many waters identified by New York as unsafe for fish consumption due to toxic contamination were not placed on the State's section 303(d)(1) list.

nology-based approach is sheer pollution prevention, designed to meet the zero discharge goal of the Act by requiring the use of ever-improving clean-up technologies. The water quality-based approach, by requiring more pollution controls or prevention strategies than current technology-based requirements for streams with insufficient dilution capacity to accommodate all sources is technology-forcing. In this way, the water quality-based approach supports the technology-based approach, just the way that pollution control technology advances in other countries support meeting the zero discharge goal of the Clean Water Act. However, EPA has resisted full implementation of this approach, just as it has TMDLs. As a result, numerous lawsuits were filed by environmental organizations to force EPA to develop the technology-based approach[27] as has been the case with TMDL program.[28]

SOLUTIONS AND NEXT STEPS

The committee has welcomed recommendations on solutions and next steps for EPA's TMDL rule. EPA should be encouraged to continue evaluating the many public comments it received and promulgate a final rule. There is no need for Congress to intervene. EPA has not overstepped its statutory authority. It has proposed rules that seek some modicum of consistency between State programs and some modicum of equity between point and nonpoint sources. EPA has demonstrated some interest in using the TMDL program to achieve attainment of water quality standards. Even so, in my opinion the proposal leaves a lot to be desired in all three of these areas. However, given the constraints of the statute and EPA's desire to give States substantial flexibility to design their own TMDL programs, the proposal represents a tolerable compromise. The need for the improved clarity in the TMDL program is very great, considering the ever increasing number of consent orders and consent decrees signed by Federal courts mandating the timely development of TMDLs. Delay of TMDL development and/or delay of EPA's proposed rule also will have a negative effect on point sources, for which NPDES permits must continue to be issued. In sum, to delay promulgation of the rule is to create an inferior program in which the stark differences between the States remain accentuated and unresolved. It will also postpone the development of TMDLs that effect both equitable apportionment of responsibility and environmental protection.

CONCLUSION

We cannot restore our impaired and over polluted waters without maintaining current statutory and regulatory restrictions on point sources. However, in order to apply these restrictions meaningfully, we need to complement the point source restrictions with significant improvements in nonpoint source controls, and timely development of TMDLs to assess relative responsibilities for clean-up. To retain current restrictions on point sources without a viable TMDL program that encourages States to maximize nonpoint source controls is to saddle EPA and the States with a system that is broken at the outset. To retain NPDES restrictions without effective and adequate nonpoint source programs is inequitable, costly, and often will not meet environmental goals. Congress clearly chose to place responsibility for establishing nonpoint source programs in the hands of the States, to be supported by Federal subsidy, data collection, and incentive programs, but it did not envision States doing nothing to control nonpoint sources. TMDLs are the mechanism by which States can allocate responsibilities between sources and act to clean up impaired waters.

The alternative is to completely abandon the water quality-based approach of the Clean Water Act in favor of solely pollution prevention. The predictable outcome will be a marked increase in human health problems, endangered species, shellfish bed closures, reproductive failures in birds and mammals, and loss of livelihood of commercial and recreational fishing interests. The Clean Water Act will no longer offer hope to the American people that rivers, lakes, streams, and estuaries ever will be safe for fishing and swimming, for fish and wildlife.

There is no doubt that EPA has postponed the TMDL program as long as it could. Propelled by citizens suits, it finally has acted to improve the program. Its actions are generally consistent with the recommendations of its FACA Committee, having applied its own judgment where the committee reached no agreement or failed to address an issue. Given the restrictions of the Clean Water Act—namely that it does not create Federal regulatory programs for nonpoint sources—EPA has done its best

[27] *NRDC* v. *Reilly*, Civ No. 89–2980 (D.C.D.C.); *EDF* v. *Thomas*, Civ No. 85–0973 (D.C.D.C.) *NRDC* v. *Thomas*, Civ No. 79–3442 (D.C.D.C.).

[28] *NEDC* v. *Thomas*, Civ No. 86–1578-BU

to fashion a program that will provide clean water through a fair means. The agency should be encouraged in this mission.

Thank you for providing me with the opportunity to testify before you today on the future of the Nation's water quality programs. I will be happy to answer any questions you may have.

STATEMENT OF W. JEFFREY PARDUE, DIRECTOR OF ENVIRONMENTAL SERVICES, FLORIDA POWER CORPORATION

Mr. Chairman, Mr. Baucus, members of the subcommittee, my name is Jeff Pardue, Director of Environmental Services at the Florida Power Corporation. I am testifying on behalf of Florida Power Corporation, the Edison Electric Institute (EEI) and its member companies, and the Clean Water Industry Coalition (CWIC).

Florida Power Corporation is the second largest investor-owned electric utility in Florida, and serves approximately 1.4 million accounts—or about 5 million people—in a service area of 20,000 square miles in central and north Florida. This includes the cities of St. Petersburg and Clearwater, and much of the area around Orlando. The company has 59 generating units; its fuel mix in 1999 was 35 percent coal, 17 percent oil, 14 percent nuclear, 13 percent natural gas and 21 percent purchased power.

EEI is the association of United States shareholder-owned electric companies, international affiliates and industry associates worldwide. EEI's U.S. members serve 90 percent of all customers served by the shareholder-owned segment of the industry. They generate over 70 percent of all the electricity generated by electric companies in the country and service nearly 70 percent of all ultimate customers in the nation.

CWIC is an ad hoc, multi-industry coalition. The CWIC membership is comprised of more than 250 companies and associations representing the nation's major manufacturing and service industries, including automobile, chemical, food processing, glass, mining, oil, plastic, forest and paper, real estate, steel, surface finishing, textile, electric and water utilities, agribusiness, transportation and associated industries.

Mr. Chairman, I'd like to commend you for holding these hearings on EPA's proposed TMDL rules. To say, as EPA does, that the proposed rulemaking "revises, clarifies, and strengthens" current regulatory requirements is to substantially understate the scope and magnitude of EPA's new direction on TMDLs. The proposed revisions, if adopted, will radically transform the TMDL program and how states implement the entire Clean Water Act.

The number and length of the comments submitted to the docket and the testimony provided during the previous five Congressional hearings are a good indication of the depth and breadth of concern about EPA's proposed changes. Comments critical of EPA's proposals were submitted by Federal agencies, States, Governors, State organizations, local governments, manufacturing interests, land-based industries, landowners, and others. A review of the comments and testimony demonstrates a striking commonality among the expressed views. A large majority of stakeholders raise similar issues. They seek substantial changes in the proposed rules.

I am here today to represent a point source perspective on the proposed rules. It is important to note, however, that like the many other point sources I am representing, some of the activities of Florida Power Corporation are categorized as point sources, while others fall into the non-point source category. We are rarely either just one or the other. Furthermore, our electric customers can be point sources, non-point sources, or both. While the identity of interests between point and non-point sources is not perfect, on the most important issues raised by EPA's proposed rules—for example, data quality, offsets, implementation plans, and the bases for listing—we have significant agreement. We especially agree that we do not favor a framework that is purely regulatory or establishes a confrontational, zero-sum approach, pitting all the sources of pollutants to a waterbody against one another. Instead, we favor a problem-solving approach to water quality that encourages stakeholders to work together toward win-win solutions.

During the first hearing held by the House Water Resources Subcommittee, Chairman Boehlert expressed the concern that EPA is missing a great opportunity to move in the direction of a "performance-based approach" to environmental protection and that the Agency's proposed framework will discourage "innovative, stakeholder solutions." We agree, Mr. Chairman. We hope that the subcommittee hearings will reach the broader policy issues—as well as the more technical and practical issues—raised by the unilateral decisions the Agency is making in what, we

would argue, is a very hasty fashion. The rulemaking should address the broader policy issues wisely, within statutory authority, and do so effectively and with clarity.

I am not the first person to note for this subcommittee that as a Nation we have made substantial progress in cleaning up our waters. The progress has not been easily accomplished, however. It took 25 years and a significant investment of resources by the Federal Government, certainly by the States and local government, and especially from the private sector. As a company with many activities regulated under the Clean Water Act, Florida Power Corp. is proud of our continuing contributions to improving water quality in the areas where we are located. It is an effort we take seriously. For example, at our Crystal River coal plant we have completed a voluntary initiative to change the method by which we convey coal ash. By changing from a wet to dry conveyance system we have eliminated two ash pond point source discharges. Our commitment to water quality is also why, in 1999, Florida Power Corporation worked hard to help the State of Florida develop a TMDL statute that has been proposed as a model elsewhere in the country.

With 40 percent of the nation's waters still experiencing some form of impairment, we believe further progress is necessary. The nation's remaining water quality problems should be evaluated, addressed, and resolved. The present water quality challenges, however, are technically more challenging, complex and varied than their predecessors were. Their resolution depends heavily on better analysis, which in turn depends on valid and accurate data collection, an area of serious programmatic weakness under the Clean Water Act. Their resolution also requires time, an unprecedented commitment of resources from all stakeholders, and a flexible iterative approach that can accommodate changes in our understanding of aquatic ecosystems and the tremendous variations that occur from one waterbody to the next—even from one stream segment to the next. Their resolution further requires finding the right bridge across the gap between the improvement that we have gained to date and the remaining improvement that is necessary to meet water quality standards—when those water quality standards have been appropriately set.

EPA has crafted proposed rules that make the TMDL provisions of the Clean Water Act the tool of choice to bridge the gap in every instance of water quality impairment, including cases where impairment does not yet exist but might at some point in the future. We understand why the Agency has chosen to do this. It is not only under pressure from numerous lawsuits for a general failure to implement the TMDL provisions of the Clean Water Act, but from those who are frustrated that from their perspective progress seems so slow.

Yet, we would argue that State and local governments—in partnership with the private sector—are making important progress on complex water quality problems. They have been and are developing successful watershed strategies, which build a profound base of knowledge about a given watershed and rely on bottom-up, stakeholder driven processes to establish targets and milestones for achieving success. Education and voluntary measures play an important role in these watershed strategies.

The most promising advances have come in the last 5 to 6 years, despite a decline in Federal funding. For example, in Florida, the Tampa Bay estuary program is a voluntary program involving point and non-point sources to reduce nitrogen loadings in the Bay. Also, Florida's water management districts have developed Surface Water Improvement and Management (SWIM) Plans, which are a comprehensive watershed planning tool to resolve Florida water quality problems. These programs are in addition to existing regulatory tools such as individual permits, best management practices, antidegradation policies, and other traditional pollutant reduction measures. Successful voluntary programs, like the Chesapeake Bay program, are being conducted elsewhere in the country.

We think successful watershed strategies will continue to emerge at the local level. They will do so not because of any particular Federal hammer but because of a slow but steady alignment between public values, better knowledge and evolving stakeholder commitment.

The total maximum daily load provisions have been part of the Clean Water Act since it was enacted in 1972, when the view of water quality problems was quite different from today. The few stakeholder groups who generally support the thrust of EPA's rulemaking have argued the proposed rules are necessary because the States have fallen down on the job. Until recently, however, the States rightly focused their attention on primary or first tier issues of concern. They are now moving forward to fulfill their TMDL obligations. Consent decrees and court orders that impose unrealistic deadlines are making the challenge next to impossible—at least to do right. Furthermore, EPA is not helping when, at the very moment the States are

moving forward, it proposes a sweeping rewrite of the program, including many new interpretations of the existing requirements.

We believe that TMDLs can be a useful tool to improve water quality. For one thing, they can establish a clear, quantitative water quality target by defining the total amount of a pollutant that can be discharged into a water and still have that water meet water quality standards. In doing so, they can be helpful to States in the exercise of other programmatic authorities under the Act, such as Section 319 for agriculture and Section 303(e), which defines the States' continuing planning process. We don't believe, however, that Congress intended the TMDL provisions to be the central mechanism for coordinating and resolving all water quality problems or for implementing watershed management. We worry that, as configured, the EPA proposals will be an impediment to further development of successful watershed strategies.

The most successful watershed strategies are largely—though not exclusively—non-regulatory in nature. They use education, funding, flexibility on timing, and consensus-building stakeholder processes to win voluntary reductions to achieve water quality objectives. Even though they may take more time than regulatory approaches to initiate, the strategies are successful because not only do they gain the needed pollutant reductions, they win the hearts and minds of the stakeholders brought to the table during the process. More importantly, they are successful because they allow a State to move forward on difficult water quality problems in the face of uncertainty. This is because costs on stakeholders are not imposed from the top, but are undertaken voluntarily—often at the stakeholder's own initiative—to solve a problem perceived collectively, even though the problem and its causes may not yet be fully understood.

Successful watershed strategies require both regulatory and non-regulatory approaches, and it makes a lot of difference how these two approaches are combined. EPA's proposed rules, with their mandated load allocations, implementation plans as a formal part of the TMDL, and approval processes open to lawsuit, establish a heavily regulatory watershed approach. Even if the Agency grafts into this structure an accommodation for voluntary initiatives, as it talks about doing, it will still be imposing a regulatory approach that loses the best features of today's on-the-ground successful watershed strategies. As significant, the scope and mandates of the program defined by EPA and the extraordinary workload it will impose on the States have the potential to crush any voluntary watershed strategies and may make it impossible for them to co-exist along side the newly configured TMDL program. While the Clean Water Act's TMDL provisions were developed in a different era, EPA's all-inclusive and prescriptive interpretation of them makes them particularly ill-fitting, unworkable, and anachronistic.

In Florida, we are committed to using TMDLs as effectively as possible. Florida has over 700 waters listed under Section 303(d). The data used for listing these waters was highly variable and in many cases of questionable quality and accuracy. Furthermore, existing Federal TMDL regulations provide little guidance to States on how to move through the TMDL process. As a consequence, in 1999, Florida legislators, legislative staff, agency officials, regulated interests, and environmental groups dedicated enormous amounts of time and energy to the development and enactment of legislation intended to facilitate compliance with the TMDL requirements of Section 303(d).

Together, we set out to develop a statute that would be good law and guidance for implementing Section 303(d), consistent with principles of due process and good science. We sought to incorporate stakeholder safeguards into the process for listing and TMDL development. We sought a more equitable basis for delisting waters and an approach that would not lead to an inequitable burden on any one category of sources. We also tried to ensure the program would be scientifically based, use data that are valid and credible, and set priorities based on State, regional and local factors. The Florida statute lays out the process to be used in making both listing decisions and for setting priorities. The State Department of Environmental Protection sets the priorities and schedules based on basin assessments and using data that have been assembled according to a specific set of criteria. This process involves broad stakeholder input, which allows for priorities to be set in consideration of a variety of factors, many of which are site specific. These decisions are best made at the State or regional level, not by the EPA.

In developing the statute, EPA Region IV was consulted and their comments addressed through amendments to the proposed legislation. Based on EPA's comments, it was understood that Florida's new TMDL law met Federal requirements. EPA, however, later entered into a consent decree that had the effect of undermining key features of Florida's 1999 legislation. In particular, the Agency committed to a Federal usurpation of the Florida Department of Environmental Protection's ac-

tivities in the event that the State fails to comply with overly ambitious deadlines. The problem is the deadlines, which are unattainable under Florida's Administrative Procedures Act. Unrealistic deadlines are setting up Florida to fail, with the result that the EPA will be responsible for developing the TMDLs on Florida's listed waters.

Florida nevertheless is proceeding in a good faith effort to develop the necessary implementing regulations for the program. Now, at a critical juncture, EPA's proposed regulations threaten to change the essential features of the Federal program. If the proposed regulations are finalized in their current form, much of Florida's 1999 legislation will be rendered obsolete. From a Florida perspective, EPA's initiative to transform the TMDL program, at the exact moment when Florida and other States are intensifying their efforts to implement the existing program, is unjustified by any deficiencies in the existing program or environmental policy considerations. Governor Racicot of Montana raised the same issue in his testimony a few weeks ago before this subcommittee. David Struhs, Secretary of Florida's Department of Environmental Protection, also made these same points in a letter to Administrator Browner on January 19, 2000. He further stated that the State of Florida opposes the proposed rules as:

> "needlessly bureaucratic, trapped in an archaic regulatory framework, loaded with unrealistic demands and completely unfunded. EPA needs to reconsider the entire proposal and initiate renewed efforts to work with the States to create a viable approach, especially to address non-point source pollution."

We agree, the goal should be to strengthen, rather than compromise, State programs. Mr. Chairman, I would like to ask that Secretary Struh's letter be included in the record of this hearing.

We have serious concerns with the proposed rules. I would like to outline our specific concerns now.

TIMING

I understand that in testimony before this subcommittee, Mr. Chuck Fox, EPA's Assistant Administrator for Water, has indicated that the Agency intends to finalize the proposed rules by June 30, 2000. Mr. Chairman, we hope the Agency can be prevailed upon to take the time to get this most important rulemaking right. The Federal Advisory Committee Act (FACA) TMDL Committee looked at the issue for several years to produce their recommendations. EPA then considered the FACA Committee's report for over a year. In many key and significant areas, the Agency's proposed rules depart from the FACA recommendations. Yet, the public has had little time to evaluate these proposals, which are complex and changes dramatically the approach for implementing the Clean Water Act. Furthermore, a quick review of the 30,000 comments reveals areas of the proposed rules that need a lot more work. For example, the proposals do not begin to address how the revised TMDL program will integrate with decisions made under other environmental statutes such as Superfund or the Endangered Species Act. If the June 30—or even a late summer deadline—is to be met, we do not believe that EPA can credibly address these and the other serious concerns raised by the thousands of comments.

The Agency is under no obligation to propose rules, nor is it under any obligation to so by a certain date. This is a discretionary rulemaking, which we believe will take more time to do well if it is to achieve the Agency's stated goals of bringing more consistency, clarity, and effectiveness to the TMDL program. We hope the subcommittee, by whatever means necessary, can prevail on the Agency to take the time to do the rulemaking right. A hastily prepared rule will invite litigation and retard water quality progress.

LISTING

While we approve of EPA's effort to require that States develop through a transparent process—the methodologies they will use to identify and list streams under Section 303(d), we think the Agency should be required to provide feedback to the States on their proposed methodologies. Instead, EPA proposes to reserve its option to object to a State's list based on EPA objections to the listing metholodoloy. A State's methodology should not then be used later as a basis for EPA disapproval of a State list if the Agency's concerns with the methodology were addressed. We also strongly believe that EPA has set a threshold for listing of waters under Section 303(d) that is too low. The quality and type of data that EPA would have the States rely on cannot ensure the credible and accurate identification of water impairments, let alone the development of sound TMDLs. For example, EPA encourages the use of "evaluated data," which can be something as simple as a drive-by

windshield inspection or looking upstream and seeing two farms and a plant and concluding there must therefore be impairment. EPA also requires the listing of waters based on fish advisories. We consider these to be wholly inappropriate, inasmuch as fish advisories are developed for a totally different purpose and through varied State processes, which most often are not adequate to support regulatory actions. In their current form, we do not think fish advisories are an appropriate surrogate for State water quality standards when listing a stream for impairment.

From here on out, the listing of a water under Section 303(d) will have major regulatory and economic consequences. It will be analagous to designating an area as "non-attainment" under the Clean Air Act. Growth is likely to be curtailed, if not halted, on or upstream of a listed water. If growth is not curtailed directly, it definitely will be affected indirectly when lenders hesitate to provide capital for business, commercial or other development on or upstream of a listed water. I'd like to point out that since a good many listed waters are in urban areas, redevelopment efforts will be most adversely affected. It may not be too much of a stretch to think of the impact of listings under the Superfund National Priorities List when thinking about the impact of Section 303(d) listings.

Consequently, the Agency has the obligation to insist on the use of high quality, monitored data for listing and TMDL development. These data should be collected pursuant to a State's quality assurance, quality control protocols. Before incurring the direct and indirect adverse consequences of a listing, EPA and the States should be sure that waters proposed for listing are truly impaired.

EPA should also not convert the 303(d) list into the comprehensive inventory of all water quality problems, as the Agency has proposed. The statute gives that role to the Section 305(b) reports. So-called "threatened" waters, waters impaired by pollution (as opposed to pollutants), and waters impaired by unknown causes can and should be managed under Section 303(e). Legal issues aside, other problems, such as impairment from air deposition or flow characteristics are not suitable for TMDL development. The science for air deposition is at such an early stage that there is simply no way to identify the specific impacts that particular air sources have on particular waterbodies, nor to attribute an impairment problem back to a specific emissions source. Furthermore, air deposition cannot jurisdictionally be reached by a State developing a TMDL. Where a valid impairment by a pollutant comes from sources that include air deposition, the impairment needs to be addressed through non-traditional methods. We are not far enough along to know what the appropriate and effective legal, technical, and policy elements of such a non-traditional method would be. I understand that this is not a satisfying answer for the subcommittee, but it underscores our concern about EPA's approach to this rulemaking, which prematurely seeks to craft a framework for this unique problem.

Just as important, it is imperative that a workable procedure for delisting waters that are not truly impaired be incorporated into the proposed regulations. Within the next 15 years, States are required to develop upwards of 40,000 TMDLs for the 20,000 waters currently on the States' lists. It is common knowledge that many of those waters do not belong on the lists. They were placed there based on inadequate or no data, or old and poor quality data; or they simply were put on the Section 303(d) lists because they were on another Clean Water Act list, such as the Section 319 list. Setting aside for the moment the resource implications of these statistics, there should be a straightforward procedure for taking waters off the list and for addressing, in a prioritized fashion as determined by the States, only those waters that are clearly impaired. In light of the potentially crippling regulatory consequences for permittees and the impacts on growth that will flow from a listing, which I will discuss in a moment, 4 or 5 years is simply too long to wait to get a water off of a Section 303(d) list if it should not have been listed. The Florida statute provides for immediate delisting of waters when data comparable to the data required for listing a water demonstrates that the water quality standards are being met.

REDEFINITION OF TMDL

The proposed rules expand the elements of a TMDL. Under the proposals, a TMDL is more than a number defining the total amount of a pollutant that can go into a water and still have it meet water quality standards. It is even more than the "pollution budget" discussed by the Agency. Under the proposed regulations, a TMDL will now include an implementation plan that lays out the most basic on-the-ground, local decisions about who will do what, when, where, and how to implement the TMDL. As a consequence, the proposed changes will dramatically expand EPA's regulatory reach, since the EPA will approve the implementation plans. Endangered Species Act Section 7 consultations with the Federal wildlife agencies on

all these detailed decisions may also be triggered if an endangered species might possibly be affected. EPA"s "implementation plan" proposal cannot be supported by any language in Section 303(d) of the Clean Water Act.

A reading of the proposed rules and statements by Agency officials, including those of Mr. Fox in hearing testimony, indicates that the Agency believes it has laid out a TMDL framework that makes the program an effective watershed management tool, preferred over the Section 303(e) continuing planning process presently used by the States. Yet, in prescriptively redefining the elements of a TMDL, EPA has devised a program that is a more rigid, inflexible framework—not at all like the State watershed initiatives that are proving so successful on the ground. Once approved, because of all the required Federal agency approvals, a TMDL will be very difficult to modify even if a change is needed to improve water quality or correct misdiagnosis of a problem or the solutions used to solve a problem. We also worry that the framework sets up a confrontational, zero-sum approach to water quality that is antithetical to the current consensus-based watershed approaches. The Superfund statute has often been regarded as a failure because, among other reasons, it has imposed extraordinarily high transaction costs on all parties to the clean up decisions. Recent TMDL consent agreements and the TMDL framework established by the proposed rules have the potential to also impose extraordinarily high transaction costs.

INTERIM RESTRICTIONS/OFFSETS

During his testimony before the House Water Resources Committee on February 10, Mr. Fox articulated a policy objective that we whole-heartedly support. We agree with Mr. Fox that an effective TMDL program should be structured to encourage and allow for the most cost effective pollutant reductions to be achieved. In most instances, these reductions will come from the sources whose contribution of loadings will be less expensive to reduce. We do not agree with Mr. Fox when he asserts that the proposed rules further that policy objective. Our concern becomes even more pronounced when we evaluate some of the decisions being made on the ground today or in unrelated policy statements by EPA.

Under the proposed rules, new or significantly increased dischargers to impaired waters face offset requirements as a prerequisite to obtaining NPDES permit approvals. These provisions, we believe, are likely to be unworkable. On many stream segments, an offset may not be available. On others where it might be available, EPA has structured the offset in a way that becomes a powerful disincentive for the NPDES permittee to enter into an offset arrangement with another party. If the other party fails to perform, not only does the NPDES permittee have its permit reopened, the permittee becomes liable for civil and criminal penalties for violation of its permit. The likely result will be to drive new business or commercial and residential development to pristine areas, rather than encourage redevelopment along waters that are now listed as impaired.

Does this mean that we believe that unfettered new and significant increases of discharges should occur on impaired waters? Of course not. Instead, we think that States are in the best position to make decisions about how to manage an impaired water for growth. EPA should not prescribe rules that prejudge the outcome of a TMDL.

We are concerned that such prejudgments are taking place on the ground right now. In unrelated policy statements, EPA has advocated an outright ban on the use of mixing zones on impaired waters. Some EPA regional offices are pushing point source dischargers to zero for certain substances on an impaired water prior to TMDL development. These decisions are being imposed regardless of whether the action will make any significant contribution to meeting water quality standards and also regardless of the sometime exorbitant costs. The Clean Water Act's anti-backsliding provisions are not likely to allow for a relaxation of the interim measures when a TMDL is later completed.

WATER QUALITY STANDARDS

Mr. Chairman, we have two primary concerns in this area. First, as you pointed out during your first TMDL hearing, in some cases, water quality standards have been set that, for very good reason, cannot always be met. The use attainability analysis that must be completed to change a State water quality standard for a particular water is exceedingly difficult to complete. Obtaining EPA approval is also extremely difficult. EPA makes no accommodation for this in its rulemaking. Nor does EPA's proposal accommodate the moderating provisions such as mixing zones and variances.

Second, EPA aggravates the first problem by allowing for the listing of streams based on noncompliance with narrative standards for which there is no numeric translator. In other words, there is no objective measure for the State or a regulated entity to use for deciding when the standard is not being met. We believe that measures of impairment should be objective and quantifiable. Current regulations and past court decisions support that view. We fear that by encouraging the use of narrative standards as a basis for listing, the proposed rules will lead to more subjective, ad hoc decisionmaking under the Clean Water Act.

RESOURCES

Mr. Chairman, Florida has over 700 listed streams for which it must complete TMDLs. With 20,000 waters currently listed nationwide, requiring 40,000 TMDLs, the States will have to develop one TMDL a week for the next 15 years to get the job done, all of which EPA must approve. The proposed rules will increase the workload by expanding the basis for listing waters under 303(d) and redefining the TMDL to include an implementation plan. The rulemaking is also likely to increase the need for individual permits by making general permits much more difficult to obtain on an impaired water. EPA already admits to a substantial backlog in NPDES permit reissuance, which they expect will increase over the next 2 years.

Yet, Congress and the subcommittee have no good idea about how much this will cost the Federal Government, State and local governments, or the private sector. EPA has decided that either their proposals do not require these analyses, an interpretation that has been disputed by the States and various stakeholders, or has performed an analysis of cost impacts to the States that cannot bear scrutiny. The proposed revisions are substantial enough to warrant a detailed analysis of the costs of the entire program and the revisions, an analysis that should be peer-reviewed and available for public comment prior to the rules being finalized. Under any scenario, increased Federal funding will be needed for States and local governments. We believe, however, that it is possible to craft a rule that improves the TMDL program and does so cost-effectively.

In conclusion, Mr. Chairman, our lawyers strongly believe that EPA lacks the statutory authority to do much of what they are proposing. Beyond the legal arguments, we hope the subcommittee will consider whether EPA's proposal really makes good policy and whether it can work in practice. Part of working in practice is whether it will achieve real and genuine environmental benefits. The other part of "in practice" is will it achieve those benefits in a way that allows the continuing power of our economy to be harnessed and used to support the education, employment, and welfare of all Americans. We value the environmental progress that we've made and want to protect it. We think the way to go about that is a through a flexible, stakeholder-based, watershed approach, which is not achieved by these proposed rules. We believe the proposals fail to achieve the twin elements above.

We thank you for your oversight efforts and hope the subcommittee will take the following important steps. First, we hope the subcommittee will undertake to prevail upon EPA to take the time to get the rule done well and right, and to not let political exigencies drive the timetable. Getting it done right means taking a more focused approach to the listing of waters under Section 303(d) and ensuring that high quality, monitored data is used for both listing and TMDL development. That begins with establishing objective, numeric water quality standards. It means ensuring that flexible, bottom-up watershed approaches continue to develop by not using the TMDL process to override the Section 303(e) continuous planning provisions of the Clean Water Act. It means assuring that due process is accorded stakeholders, that States retain full authority to equitably apportion responsibility for pollutant reductions, and that EPA does not prescriptively prejudge the outcome of a TMDL.

Second, we would encourage the subcommittee to consider stepping in to ensure adequate funding for monitoring and data collection by the States *and* to require that the data used for listing and TMDL development be high quality monitored data. A serious improvement in our knowledge in this area can go a long way to improve on the ground decisionmaking. This effort should not be left entirely in the hands of the Agency, but should be developed jointly with the States or, better yet, with States in the lead, after input by stakeholders.

Third, I believe it was Senator Wyden during the last hearing that raised the issue of State flexibility and one-stop shopping. We believe it would be helpful if the subcommittee would clarify that States have the authority to evaluate and conclude that current watershed strategies, habitat conservation plans, and environmental decisions made under other environmental statutes are adequate to meet water

quality standards and therefore do not have to be reopened under the TMDL program.

Fourth, we would encourage the subcommittee to seriously review the resource needs of State and local governments and the costs likely to be imposed as a result of the TMDL program on them and on the private sector. You will then be better able to evaluate the merits of the Agency's proposals and appropriately address funding needs.

Thank you Mr. Chairman.

DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Tallahassee, FL, January 19, 2000.

Ms. CAROL M. BROWNER, *Administrator,*
U.S. Environmental Protection Agency,
Washington, DC.

DEAR MS. BROWNER: This letter is in response to the U.S. Environmental Protection Agency's proposed revisions to the Federal Total Maximum Daily Load Regulations (40 CFR Part 130), the National Pollutant Discharge Elimination System Program (40 CFR 122, 123, and 124), and the Antidegradation Policy (40 CFR 131), as published in the Federal Register on August 23, 1999. We appreciate the opportunity to review the proposed regulations and have endorsed a wide range of specific comments. Given the scope of our comments and serious concerns about the proposal, I will summarize the key points in this cover letter.

First, we fully support the principle that more can and should be done to control nonpoint sources of pollution. However, the proposed revisions represent a significant, unwarranted expansion of the *regulatory* approach to this problem. A plain reading of the Clean Water Act, supported by numerous Federal court decisions, makes clear that section 303(d) is applicable to waters where point source controls are not adequate to maintain water quality standards. Indeed, section 319 of the Act specifically gives the responsibility for development of nonpoint source controls, including determining the need for regulatory programs, to the States.

EPA should reconsider the expanded regulatory approach if only for practical reasons. There are simply too many potential nonpoint sources of pollution (silviculture alone represents more than nine million private landowners) to address using traditional regulatory techniques. Furthermore, there is too much uncertainty in the relation between individual nonpoint sources and their specific impact on downstream receiving water quality to support a water quality-based approach. States certainly will not be able to allocate loading to individual nonpoint source discharges or monitor the effectiveness of individual pollution control activities.

For these reasons, Florida is a strong proponent of a voluntary, technology-based approach to nonpoint source control. In fact, we have formally adopted this approach in landmark State TMDL legislation (the Florida Watershed Restoration Act, Section 403.067, Florida Statutes), which prescribes a comprehensive voluntary strategy for implementing the nonpoint source component of TMDLs. The law acknowledges that many nonpoint sources are outside of our regulatory authority and establishes a viable alternative that includes incentives for nonpoint sources implementing best management practices. We currently are working with various industries and the Florida Department of Agriculture and Consumer Services to implement these alternatives. Securing industry cooperation is not easy but is the only way we will be able to deal effectively with nonpoint source pollution—and it is bearing fruit. In the Suwannee River basin, around Lake Okeechobee, and elsewhere we are arriving at cooperative strategies to clean up Florida's waterways.

Clearly, the TMDL program has a crucial role to play in point source and nonpoint source pollution control by providing water quality targets that both sources must work to achieve. However, *implementing* the nonpoint source components of TMDLs is best achieved through a combination of regulatory and non-regulatory efforts. Water quality objectives are most rapidly brought about by consensus, with regulators cooperating closely with stakeholders to develop best management practices and other water quality protection measures while accounting for the practical and financial limitations of these stakeholders. We believe the prescriptive approach outlined in the proposed revisions would prove ineffective and serve only to discourage partnerships and cooperation. In addition, the revisions seriously undermine the roles of State and local governments in watershed management. While we understand EPA's concerns about the various lawsuits that have plagued the TMDL program, the proposals aimed at backstopping State permitting and TMDL development efforts are counterproductive.

A second key concern is that EPA has not adequately accounted for the costs associated with implementing the proposed revisions. As required by the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act, the Federal Unfunded Mandates Reform Act, and Executive Order No. 12866; EPA should conduct a full accounting of the costs to implement the proposed revisions, including costs to the private sector and State and Federal Governments. We recognize that EPA need only address the incremental costs of these revisions rather than the costs of the TMDL program as a whole. However, the proposed requirement to develop implementation plans alone will cost States and local governments tens of millions of dollars and the proposed expansion of regulatory authority to silvicultural activities will increase costs to the private sector by even more. If the incremental costs for Federal agencies (both the USDA and EPA) also are included, costs would easily exceed $100 million annually. Both Congress and the States deserve a thorough, accurate evaluation of the costs of the proposed revisions before final decisions on these regulations are made. EPA must recognize States as full partners in water quality protection and focus on funding strategies to support State programs.

Federal funds have been critical to controlling point source pollution in the past and will be even more critical to nonpoint source pollution control. We urge the development of a substantive funding program to underwrite the planning, design, and construction of nonpoint source projects and the development and implementation of effective management practices. We agree with the State of Georgia that it is time to place the financial resources along with responsibilities for water resource protection in the hands of local government.

Our third fundamental concern is that the proposed revisions add many unrealistic expectations to the TMDL program, the rationale for which is not clear. The State of Florida fully understands its responsibilities to develop and implement TMDLs in a timely manner. However, the proposed revisions create a process-laden TMDL program that is not workable, goes well beyond the requirements of Section 303(d), and will impede ours and other States' efforts to improve water quality. A prime example of these unreasonable expectations Is the inclusion of implementation plans as a required element of TMDLs. States simply cannot develop Implementation plans with each TMDL in the proposed 15-year timeframe. Furthermore, the required scope of reasonable assurance for nonpoint source control is not possible given the limited funding for nonpoint source activities and projects. While we agree that implementation plans are important, they should be developed separately from, and subsequent to, TMDL development. Considerable additional time and creative effort will be needed to reach consensus on the most effective set of options to achieve water quality standards in a basin. EPA should give the States at least 18 months after TMDL approval to develop an implementation plan. This time also would give local governments and private entities the time needed to secure funds for restoration activities.

In closing, the State of Florida Department of Environmental Protection opposes the regulations as drafted. They are needlessly bureaucratic, trapped in an archaic regulatory framework, loaded with unrealistic demands, and completely unfunded. EPA needs to reconsider the entire proposal and initiate renewed efforts to work with the States to create a viable approach, especially to address nonpoint source pollution. Florida has developed and adopted in statute a program to restore impaired waters that parallels the best elements in the proposed regulations. EPA should modify the regulations based on our comments and those of our partner States in order to strengthen State programs rather than compromise them. As written now, the regulations cannot be implemented and will hinder the restoration of our nation's waters.

Sincerely,

DAVID B. STRUHS,
Secretary.

STATEMENT OF NORMAN E. LEBLANC, CHIEF, TECHNICAL SERVICES, HAMPTON ROADS SANITATION DISTRICT, VIRGINIA BEACH, VA, PRESENTED ON BEHALF OF THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES

INTRODUCTION

Mr. Chairman, Senator Reid, and members of the subcommittee, my name is Norm LeBlanc. I am Chairman of the Water Quality Committee of the Association of Metropolitan Sewerage Agencies (AMSA). I also have served on the front lines of the campaign to clean up our nation's waters for nearly 30 years, the last 20

years managing the environmental and Clean Water Act permitting and compliance programs for the Hampton Roads Sanitation District in Southeastern Virginia.

I greatly appreciate the opportunity to share with you today the experiences of the wastewater treatment community with regard to the Clean Water Act and, more specifically, the Total Maximum Daily Load (TMDL) program. AMSA represents the interests of more than 240 publicly owned treatment works (POTWs). AMSA's members treat 18 billion gallons of wastewater every day and provide service to the majority of the United States' sewered population. In addition to their primary responsibility for treating the Nation's domestic and industrial wastewater, member agencies play a major role in their local communities, often leading watershed management efforts, promoting industrial/household pollution prevention and water conservation, as well as developing urban stormwater management programs.

AMSA's members hold National Pollutant Discharge Elimination System (NPDES) point source discharge permits under the Clean Water Act. Many of AMSA's members throughout the country are located on water bodies that have been listed as "water quality limited segments" under Section 303(d) of the Clean Water Act. As major point source dischargers, AMSA members have been active participants in EPA's process to develop and implement the TMDL program. An AMSA member served on EPA's Federal Advisory Committee on TMDLs. In fact, this issue is so important to us, that AMSA is now an intervenor/defendant in an important TMDL court case in California *Pronsolino* v. *Marcus.*

AMSA supports a revised TMDL program that would encompass both point and nonpoint sources of impairments to our country's water bodies. We also support requirements for implementation plans and for an open public participation process, as they are essential components of a successful TMDL program.

During the past 30 years, point sources of water pollution—wastewater treatment plants, industry, and others—have been meeting the challenges of the Clean Water Act to achieve our national clean water goals. The investment in wastewater treatment has revived our rivers and streams, and the Nation has experienced a dramatic resurgence in water quality. Point sources are strictly controlled by the Clean Water Act. Discharges without permits are punishable by fines or imprisonment, and wastewater quality is continually monitored and reported to State and Federal regulators. A combination of tough laws and regulations along with Federal, State and local dollars has resulted in the water quality gains of the past 30 years. However, according to the U.S. Environmental Protection Agency (EPA) 40 percent of our waters *still* do not meet water quality standards—due largely to nonpoint sources of pollution.

While point sources of water pollution are easily identified and highly regulated facilities, nonpoint sources are subject to only limited accountability and controls. Agriculture, according to EPA, is responsible for degrading 70 percent of the country's impaired river miles and half the impaired lake acreage. Nonpoint source pollution closes beaches, contaminates or kills fish, destroys wildlife habitat and pollutes drinking water. The current systems to control nonpoint sources include a wide variety of State and Federal regulations that are largely incentive-based, voluntary programs. For the environment and the economy, we must stop the flow of nonpoint source pollution into our nation's rivers and streams by making these sources accountable for their fair share of pollution.

As veterans in the water pollution field, we are sympathetic to gaps in our economic and scientific data, lack of funding and the absence of a consistent, comprehensive mechanism for monitoring and regulating those responsible for nonpoint source pollution. However, point sources in Virginia, or Idaho or New Hampshire—and around the country—can no longer carry the burden alone. POTWs must be joined by others in their communities—the farmers and ranchers, foresters and miners—in a renewed commitment to clean up impaired waterbodies. This effort to achieve water quality goals must include fair share allocation of pollution reduction and enforceable regulations. Let me reiterate, AMSA recognizes the concerns of the nonpoint source community with respect to implementing TMDLs and we fully support the need for flexible, cost-effective and reliable management practices. We also know additional data is needed, as is increased funding to support these watershed efforts. However, true water quality gains can only be realized if nonpoint sources are held accountable for their share of water pollution. Remember that the pollutant load from each nonpoint source that is not controlled must be reallocated to every other source within the watershed.

The inclusion of nonpoint sources of pollution is even more critical considering the amount of money local governments continue to expend in order to meet tough new Clean Water Act requirements. In addition to specifying treatment requirements for domestic, commercial and industrial wastewater, the Act requires cities, towns and counties to reduce the impact of wet weather storm flows and to bring impaired wa-

ters into compliance with State and Federal water quality standards. As POTWs endeavor to finance and meet the latest water quality goals aimed at reducing impairments caused by combined sewer overflows, sanitary sewer overflows and storm water events, they also face the enormous costs associated with maintaining our current wastewater infrastructure.

Although it is hoped that responsibility for attaining water quality standards and requisite pollutant loads will be equitably allocated among point and nonpoint sources of pollutants, POTWs are concerned that a revised TMDL program's additional restrictions on point source discharges are likely to be the most heavily weighted part of the TMDL equation. Failure of a waterbody to meet water quality standards, for any reason, will inhibit the ability of municipal or industrial point sources to expand and grow. If States ultimately are not authorized to develop TMDLs that require load reductions from nonpoint sources, EPA and the States will be forced to rely exclusively upon point sources to secure the pollutant load reductions necessary to meet water quality standards. Such load reductions would be achieved through the imposition of stricter effluent limitations on NPDES permit holders, including POTWs. Cities, towns, counties, and AMSA members would then be forced to find and spend enormous sums of money on additional controls that will not, in many cases, attain water quality standards.

POSITIVE ASPECTS OF EPA'S PROPOSED TMDL RULE

AMSA has identified some positive aspects of the TMDL proposal that should be retained in the final rule. These provisions include the imposition of equitable controls on both point and nonpoint sources, the requirement to include implementation plans as part of a TMDL, and the requirement for States to develop methodologies for listing and priority ranking.

The proposed TMDL rule makes it clear that the control and reduction of loadings from nonpoint sources is a critical component of the TMDL program. Specifically, AMSA recommends that proportionate share responsibilities be adopted in the allocation of pollutant loading reductions. AMSA also recommends that the TMDLs for blended waters (those waterbodies impaired by both point and nonpoint sources) make clear that compliance schedules for both point and nonpoint sources are implemented in parallel.

AMSA supports EPA's proposed requirement that States publicly develop a methodology for evaluating all existing and readily available data and information in the listing and priority ranking process. Dischargers have often questioned the reasons for listing waterbodies and the proposal will allow local stakeholders, who typically are in a good position to provide data and input into the process, to assist in the proper application of data and scientifically valid methodologies.

AMSA also supports requiring implementation plans for TMDLs. However, we believe that States should first be required to review and assess the attainability of the water quality standards for an impaired waterbody prior to developing a TMDL. Once TMDLs are established, implementation plans are critical if the TMDLs are to accomplish their objectives. Without such plans, TMDLs become mere exercises in mathematical modeling, ending up as part of the water quality planning process, and never reaching the administration and enforcement stage. If States fail to implement the plans, EPA should have the authority to enforce TMDL implementation plans on all sources.

It is also critical that sufficient data of appropriate quality and coverage be available as a basis for TMDL listing and development. Considering the implications, it is imperative that TMDLs be developed in a rigorous and scientifically sound manner. The proposed regulations do not specify minimum standards for the quality and quantity of data that is necessary to list waters or establish TMDLs, wasteload allocations (WLAs) and load allocations (LAs). We believe EPA should require that data used in the TMDL process meet certain standards. Neither EPA's current nor proposed regulations and guidance specify minimum data quality or quantity requirements for listing waterbodies as impaired or for establishing TMDLs. Currently, this lack of guidance has led to the listing of many impaired waters based upon outdated and limited data (e.g., one data point) or very poorly developed TMDLs. Minimum data requirements for the listing of impaired waterbodies and the development of TMDLs must be established.

AMSA fully supports all of the Proposed Regulation's public participation provisions, found at § 130.37. The public participation provisions will open up the TMDL process to the benefit of all of the stakeholders. It will allow the public and dischargers to understand the details of how the TMDL was developed.

CONCERNS WITH EPA'S TMDL PROPOSAL

While supportive of some of EPA's proposed changes, AMSA does have major concerns with the overly broad approach EPA has chosen for listing criteria and the expansion of authority in the permit issuance process. AMSA believes EPA's proposal inappropriately expands its authority to require listing of waters under § 303(d) for conditions such as: exceedences of drinking water Maximum Contaminant Levels (MCLs), threatened waters, fish advisories, antidegradation, and pollution. Listings should be limited to impairments caused by pollutants from either point or nonpoint source water discharges that are controllable under the Clean Water Act, and should recognize that a "comprehensive accounting of all water bodies" should be accomplished under § 305(b) rather than § 303(d) in accordance with Congressional intent. Listings must also be based on properly promulgated water quality standards with appropriate public review and comment.

We believe EPA also has expanded its statutory authority in requiring the listing of all waters impaired by either pollutants or "pollution." The TMDL language of the Clean Water Act at § 303(d)(1)(A) does not authorize the listing of water bodies impaired by "pollution." Listings are authorized where effluent limitations are insufficient to achieve water quality standards. Listings should be limited to impairments caused by pollutants from point and/or nonpoint source water discharges that are controllable under the Clean Water Act.

The "comprehensive accounting of all water bodies" should be accomplished under § 305(b) rather than § 303(d). Section 303(d) is only one narrow tool in a much broader toolbox of remedies and/or solutions to water quality problems. The Clean Water Act intended for § 305(b) to be the repository for all State water quality information. It not only requires the States to provide water quality information about all its waters but also requires them to view water quality problems from a broader, more holistic approach. It was Congress' intent that § 305(b) serve as the comprehensive accounting of all water bodies that have water quality problems.

AMSA also has major concerns with the proposed changes to the NPDES Program and Antidegradation Policy. Dischargers wishing to increase loadings to TMDL listed segments should not be bound to a 1.5 to 1 offset as proposed in § 131.12. The "reasonable further progress" concept helps to improve the waterbody pending TMDL completion; the offset requirement conflicts with that goal. Reasonable further progress should be encouraged and should remain as flexible as possible. Further, the decision as to what constitutes "reasonable further progress" should be determined by the States. States should have the flexibility to decide what action to take; if there is little impact from the increased discharge on the waterbody, studies or additional monitoring may be appropriate. The offset provisions in the proposed rule also could cause special problems in suburban areas where growth pressure is the greatest. Small package treatment plants could proliferate. These small systems would be exempt and could create new and unanticipated water quality problems.

When assessing restrictions on new discharges, the regulations should recognize that additional loadings from a point source may or may not affect the impairment of uses due to the relatively low contribution from the point source. Therefore, any offset provision must be pollutant and site-specific. Furthermore, restricting offsets to only "large" POTWs or industries is arbitrary and not related to water quality. EPA should consider any increase less than 20 percent over current *ambient* levels to be imperceptible both analytically (within precision of methods) and environmentally; the size of the facility is irrelevant to the environment.

Existing permit limits should remain in place until a properly developed TMDL is completed and approved. Unfortunately, POTWs are facing revised permit limits as soon as the waters are placed on the 303(d) list—even before the TMDL process has begun. Limits should not be revised until the TMDL is finished and the final allocation is made. Municipalities and POTW operators must have a defined, long-range plan for improvements at the treatment plant. If permit conditions are changed during permit renewal prior to the completion of the TMDL, resources will be wasted. This is due to the possible need to begin construction first for the renewed permit and then again at the completion of the TMDL. The two construction projects that typically last for a few years each may not complement each other but may actually require the removal and installation of different equipment. It is essential that POTW operators have definitive long-term plans that they can act on efficiently.

AMSA also is concerned over the lack of flexibility in implementing control measures in the proposed rules. EPA has emphasized, to the exclusion of all other mechanisms, the requirement that all control measures be implemented as NPDES permit limits. This exclusive reliance on permit limits fails to recognize that there may be more effective and less costly alternatives for implementing TMDL requirements

for both point and nonpoint sources. While we concur that EPA needs the authority to impose permit limits on sources that fail to cooperate in the TMDL process, the imposition of limits should be considered the least favored option and one of last resort.

Finally, AMSA believes that all costs of the proposed rule—to the Federal Government, to State and tribal governments, to local governments, and to point and nonpoint dischargers—must be calculated by EPA. EPA's estimate of the incremental annual cost of both the TMDL and permitting regulations of $90 million ignores the costs to develop TMDLs, which could be upwards of $4 billion (40,000 TMDLs nationwide at a conservative $100,000 each). It also ignores the costs of additional controls on point and nonpoint sources. In some instances, costs may be unquantifiably high. It is essential that the Congress and the American people have an accurate accounting of the costs of the TMDL program.

VIRGINIA'S EXPERIENCE

Hampton Roads Sanitation District in Southeastern Virginia is an active partner in the Chesapeake Bay Program. This program is an excellent example of a cooperative, non-regulatory program that is successfully addressing water quality issues in a large, diverse, interstate watershed. The process has served as a model for determining the causes of water quality impairments and for providing forums on addressing those impairments. The non-regulatory approach of the Bay Program has resulted in a flexible process that allows for new scientific findings to be incorporated into management decisions. In addition, HRSD has been free to explore non-regulatory control strategies. These strategies cost less and can be implemented much sooner than if controls were implemented as NPDES permit limits.

Unfortunately, the EPA 303(d) listing of the Chesapeake Bay for TMDL development is threatening the progress that we have made to date. Some participating sources are now questioning the wisdom of signing agreements with the States to build new infrastructure under the current non-regulatory Chesapeake Bay Program. These sources question whether the expenditure of their resources now will satisfy a TMDL in the years to come. EPA must include in their revised TMDL rule a mechanism for recognizing existing, successful programs like the one that is restoring the waters of the Chesapeake Bay. If the current Program is not allowed under a new TMDL rule, it will delay the implementation of timely, cost-effective controls and could lead to delays in enforceable NPDES permit limits as sources may challenge the basis for the permit requirements.

I want to emphasize that EPA should have the ability to impose NPDES permit requirements on all contributors to water quality impairment, both point and nonpoint sources. The Bay's non-regulatory program works because there exists a firm understanding that all responsible parties must participate in controlling their fair share of pollutants in the Bay. The success of this effort is due, in part, to public education. However, a large part is dependent upon the regulatory backdrop against which the program operates. Currently, point sources that do not participate in the Chesapeake Bay program, who do not sign agreements or implement controls, are subject to the more costly and cumbersome NPDES permit limits. Similar requirements must be applicable to nonpoint sources as well, if the waters of the Bay are to be restored to their beneficial uses. The Chesapeake Bay cannot be restored unless all sources of pollutant loadings participate in a program. The backdrop of NPDES requirements ensures maximum cooperation from all parties.

WATER QUALITY IN THE 21ST CENTURY

EPA's TMDL proposal marks a significant change in emphasis for the national water program and accelerates an ongoing trend from technology to water quality-based approaches to water quality management.

With this shift in program emphasis to water quality-based controls, one critical aspect of the EPA proposal that is notably missing is a clear linkage between the TMDL rule revisions and water quality standards use reviews and revisions. In July 1998, EPA released its Advanced Notice of Proposed Rulemaking (ANPRM) on the Water Quality Standards (WQS) Regulation and solicited comment on the need for regulatory or policy changes to the water quality standards program. One of AMSA's main comments in response to that proposal was that many current water body uses were originally, and still are, inappropriately designated due to a lack of or deficient "attainability" assessments.

The entire focus of the TMDL program is to achieve a specified designated use by achieving the water quality standards necessary for that use to exist. Many uses, and criteria to protect the uses, were established in the 1960's and early 1970's without much scientific analysis, with little or no policy debate and, certainly, with-

out the regulatory consequences that exist today. They were, in essence, "wish lists." Now that those wish lists have become a reality, officials are finding out that, in many cases, the designated uses of individual water bodies don't make any sense. Before we spend billions of dollars and millions of hours nationwide on TMDLs we need to ensure that our water quality goals—our designated uses—are both achievable and sensible from an economic, scientific and political point of view. Further, we need to review our water quality criteria and determine their appropriateness for the designated waterbody. That is why we strongly urge EPA to revisit the water quality standards before we embark on a nationwide TMDL effort.

Unfortunately, under the current and proposed TMDL rules, EPA has made it virtually impossible to re-designate the use of a water body. The agency has set an extremely high burden that must be reached before a standard can be changed. Again, this simply makes no sense. AMSA, therefore, urges *common sense*—that the TMDL program start at the beginning with an unbiased, scientific look at what is achievable in order to understand the costs and benefits of reaching specific water quality goals. EPA has indicated that it will be releasing proposed changes to the water quality standards regulation in September 2000. However, EPA has also indicated that designated use reviews and modifications will not be included in these regulation changes. AMSA has proposed to EPA that final promulgation of the TMDL regulations move forward only when revisions to the WQS program, which include an emphasis on reviewing and refining designated uses, are completed.

CONCLUSION

As we look ahead to future revisions in the water quality standards programs, our focus must shift to a more comprehensive approach to clean water goals. Addressing the control of costly, more complex and diverse sources of pollution will require both creativity and flexibility. Many of those involved in water policy issues believe that continued water quality improvements can only be met by changing the way water programs are managed. Comprehensive watershed management has been identified as the most cost-effective, environmentally sound approach to address the remaining sources of water quality impairment without breaking the bank. Its consistent national application will allow stakeholders to work together to tailor solutions to the problems at each site. Simply put, watershed management targets resources to the highest priorities.

In conclusion, AMSA's member wastewater treatment agencies have consistently and persistently worked to achieve full compliance with the goals of the Clean Water Act. We have learned from experience that the only way to continue to improve water quality is to address the needs of the watershed as a whole, make all sources of pollution accountable for their loadings, and to fully fund the activities necessary to achieve our latest clean water goals.

As a further resource on POTWs and TMDLs, I invite you to contact AMSA's Washington office to get a copy of AMSA's TMDL "survival guide" for wastewater agencies, entitled: Evaluating TMDLs . . . Protecting the Rights of POTWs. On behalf of my municipal wastewater treatment colleagues, I thank you for the opportunity to speak before this subcommittee.

STATEMENT OF JOAN M. CLOONAN, PHD., J.D., VICE PRESIDENT, ENVIRONMENT & REGULATORY AFFAIRS, J.R. SIMPLOT COMPANY FOOD GROUP

Good morning, Mr. Chairman and members of the committee. I am Joan Cloonan, Vice President for Environment and Regulatory Affairs of the J.R. Simplot Company Food Group. The J.R. Simplot Company is a privately held agribusiness corporation based in Boise, Idaho. It employs more than 12,000 people in the United States, Canada, Mexico, Australia and China. Simplot is one of the world's largest processors of frozen potatoes, turning out more than 2 billion pounds of French fries and other potato products annually. It is one of the nation's largest producers of beef cattle and a major manufacturer of agricultural fertilizers with markets in the United States, Canada and Mexico.

I am speaking today on behalf of the Northwest Food Processors Association, a regional trade association representing the fruit, vegetable and specialty processing food industry in Idaho, Washington and Oregon. Food processing is the largest manufacturing employment sector in the State of Idaho and the second largest manufacturing employment sector in both Washington and Oregon. Food processors in the region operate 247 processing plants, employ over 50,000 individuals and realize over $6 billion in annual sales.

As part of my written testimony I have provided copies of the comments on the TMDL rule submitted by the Northwest Food Processors Association as well as

those submitted by FIEC, the Food Industry Environmental Council, a coalition of more than 50 food processors and food industry trade associations. I am not addressing all of the issues raised in those comments, but would be happy to answer questions regarding them.

Food processors fully support the goals of the Clean Water Act to restore and maintain the quality of the nations waters. We are supportive of the general concepts that we believe motivated the proposed regulations.

The proposed regulation states: "The Water Quality Management (WQM) process described in the Act and in this regulation provides the authority for a consistent national approach for maintaining, improving and protecting water quality while allowing States to implement the most effective individual programs." This is an admirable goal, but we believe that the proposal unreasonably limits the States' discretion in how they would achieve the overall goals of the program.

The Pacific Northwest States have assumed a strong leadership role in the establishing and funding programs to meet Clean Water Act requirements, including preparation and implementation of TMDL programs. All three States are committed to preparing TMDLs for all State water bodies listed as water quality impaired within timeframes dictated by litigated agreement. It is important to recognize that although some Federal funding has been provided to States for the TMDL programs, the current programs are primarily funded by State moneys.

We believe that the TMDL should be a State-managed program. State control fosters efficient management by recognizing that the States are best equipped to provide the day-to-day oversight and monitoring needed to identify and correct water quality problems. We are concerned that the proposed rules would significantly change the program from its current focus on State management by imposing strong new Federal oversight provisions that do not serve us well in achieving clean water goals.

In the State of Idaho program, stakeholder groups work with our Division of Environmental Quality to help them develop TMDLs. The stakeholder group is charged with development of the implementation plan within 18 months of approval of the TMDL. The implementation plan is not now subject to EPA approval. The proposed system would include the implementation plan as part of the TMDL and add significantly to the time for development of the TMDL. In addition, EPA can refuse to approve an implementation plan until it is satisfied that the State has sufficiently strong authority to achieve water quality standards. Under this proposal EPA expands its authorized authority over nonpoint sources by its ability to withhold TMDL approval, holding the State and point sources hostage to the TMDL process.

Under the proposed offset provision, listed water bodies cannot accept new or significantly increased discharges of the water quality limited constituent unless mandatory effluent trading or "offsets" occur. The offset requirement precedes and may even replace the preparation of a TMDL. Effluent trading may potentially place a disproportionate burden on point sources inconsistent with the equity considerations of the TMDL process. We support voluntary effluent trading and oppose any water clean-up program that mandates or coerces private parties into effluent trading.

The State of Idaho is in the forefront working with EPA on the development of a voluntary effluent trading program. The process has proven to be complicated but this voluntary pilot program could provide a model for the rest of the country. The first model trades will involve a point source and a nonpoint source. Key concepts are: local control, market-based pricing, appropriate ratios. This process will encourage and finance nonpoint source projects such as constructed wetlands, which otherwise might never happen. Quantification can be broad and based on the type of project, with a conservative reduction credit, or monitored, with liberal reduction credit. The trade ratios will be dependent on the relative locations of the trading partners. We believe this will provide a flexible and economic mechanism to meet environmental responsibilities.

We agree with the conclusion reflected in section 130.34 that daily loads are inappropriate for certain pollutants such as nutrients, sediment, and temperature.

We concur with the distinction between pollution and pollutant. It appropriately narrows the scope of TMDLs by recognizing the impracticability of dealing with pollution via the quantitative analysis of a TMDL. The background provided by EPA makes it clear that this change is specifically designed to exclude flow and habitat alteration from the scope of TMDL. Pollution should be addressed by a process or processes separate from TMDLs. Listing water bodies for pollution under this process, however, diverts States' resources from the task Congress clearly intended: listing of water bodies impaired by pollutants.

The prioritization requirements in section 130.28 are highly prescriptive and could result in a meaningless priority list, with most of the waterways of the State being designated high priority because of the presence of any of several listed spe-

cies. The section also requires a fairly substantial written justification for each decision to start a TMDL.

Should threatened water bodies be listed? The statute does not require the listing of threatened water bodies; it requires the listing of bodies where data show that certain effluent "are not stringent enough to implement any water quality standards applicable to such waters." The statute does not support the Agency's conclusion that water bodies should be listed because there is some possibility that standards will not be attained. The States would be required to predict which water bodies now meeting standards might not meet standards in the future, and then defend those uncertain predictions when they are challenged.

Instead of requiring the listing of threatened water bodies, EPA should encourage States to identify water bodies that they believe are threatened and to take appropriate actions to assure that they do not become impaired.

EPA should reconsider its attempt to expand its authority into traditional State regulatory areas. It is important to look to the entire Clean Water Act, with its balance of State and Federal authorities for achieving clean water goals, rather than to force the TMDL program to achieve these goals on its own in a complex and prescriptive program. We believe that the better course is to work cooperatively with the States and the regulated community affected by the rules and we look forward to working with both the State and EPA on these important goals. We look forward to the balance between the certainty of a consistent Federal program and the flexibility and efficiency of an effective State-managed program.

Thank you for the opportunity to address you today. I will be happy to answer any questions.

STATEMENT OF THOMAS THOMSON, NEW HAMPSHIRE TREE FARMER, CHAIR, POLICY COMMITTEE, AMERICAN TREE FARM SYSTEM

Good morning. My name is Tom Thomson. I'm a Tree Farmer from New Hampshire and chairman of the policy committee for the American Tree Farm System.

I'm grateful for the opportunity to be here today. Our properties, the Thomson Family Tree Farm, cover 2,600 acres of working, sustainable forests. They're managed by my family—including Sheila, my wife of 33 years, and my 22-year-old-son Stacey, whom I am honored to represent here today.

But I also want to speak today on behalf of 66,000 other family forestland owners who are members of the American Tree Farm System—founded in 1941 and now the nation's largest and oldest forest certification program for small, private landowners. Together, we Tree Farmers own nearly 25 million acres of diverse and growing forests.

That a lot of trees. But it's only a fraction of the 405 million acres of forests owned by 9.9 million individual citizens and families in the United States. It's those individuals and families not industry and not government—who are the true "majority owners" of America's forests.

And it's those individuals and families—and the forests they have tended—who stand at risk because of EPA's ill-considered policies on TMDL and their decision to regulate forestry activities as a point source of pollution.

Sitting right behind me today are four other Certified Tree Farmers from around the country—Anitra Webster from Virginia, Wilson Rivers of Florida, Bill Lawhon from Ohio, and Greg Daley of New Jersey.

They are joining me today because Tree Farmers all over this Nation are opposed to EPA's proposed rule. I know many of you have seen a list of 200 or so people who are opposed to S. 2041 and S. 2139—legislation that would prevent EPA from designating forestry as a point source. They call it a "special interest loophole."

They're wrong. The attached list contains the names of over 3,000 Certified Tree Farmers—people who own perhaps 80 or 100 acres of forest, who have invested and cared for the land. All of them took the time to contact EPA and urge Carol Browner to withdraw the rule. The Tree Farm leadership from almost every forested State in the Nation has written their Congressional delegation. In some ways, our interest *is* special; we believe in good stewardship and then work to do something about it. And we believe Congress was right all along: forestry simply shouldn't be considered a point source of pollution.

Three months ago, most of us didn't know exactly what a TMDL was. But each of us knew quite a bit about water quality and forestry.

Every Certified Tree Farmer—all 66,000 of us—has made a written pledge to grow the wood our Nation needs while protecting water quality, soil and wildlife habitat. Each of us has pledged to meet or exceed State best management practices. Many of us provide recreation opportunities for our neighbors—a place to hike,

watch the leaves change colors, fish or hunt. And our Tree Farms are inspected every 5 years by professional foresters to assure we meet the high standards of the American Tree Farm System.

I'm proud to say that Certified Tree Farms are among the most beautiful, best managed forests in the United States.

And we are enthusiastic about preaching what we practice. Many of us work with our State agencies and with our State Tree Farm Committees to help educate other landowners about the importance of following BMPs and practicing the best kind of sustainable forestry.

With this kind of aggressive, private and voluntary stewardship, it is no surprise that water quality issues related to forestry are small and getting smaller.

- Compliance rates now approach 90 percent in many of the States where BMPs are in place.
- Total river and stream miles impaired due to silviculture declined 20 percent between 1994 and 1996.
- The number of miles deemed to have "major impairment" from silviculture fell 83 percent.
- In 1996, EPA dropped silviculture from its list of 7 leading sources of river and stream impairment.
- That same year, silviculture contributed only 7 per cent of total stream impairment.

We are proud of this record, and anxious to work with our State agencies the people who know our land and water best—to do an even better job in the future.

But, from where we stand, EPA's proposal to designate forestry activities as a point source of pollution will make it harder, not easier to do that job. We see this as a clear case where "trying to fix it will break it."

Let me explain.

Owning and managing forestland is risky business. It is definitely not for the faint-hearted. Two years ago on January 8, a massive ice storm stunned four northeast States, and caused hundreds of millions of dollars of damage to forests. Two months before that storm, our own Tree Farm was recognized as the Outstanding Northeastern Tree Farm for 1997. Three days after the storm, 900 acres of prime forestland were devastated. Our legacy to our son Stacey lay on the ground, broken under the weight of tons of ice.

Today we are working tirelessly to repair the land. It will take a whole generation to restore our forests.

Every other Tree Farmer faces the same kind of challenge perhaps from fire, or insects, or drought and disease. But most of us are willing to make the best of it, or at least try.

What do we need to succeed?

First, the flexibility to conduct our timber operations when the time is right—and that time may be when we need money to pay for surgery or college tuition or retirement. Or it may be when market conditions are just right and we can get the kind of return we want on our investment. Or it may be, as it is for us, when we're racing against the clock to retrieve some value from our ice-damaged timber before it's lost to insects and rot.

Second, we need the opportunity to work with the State forestry agencies that know us . . . and the land . . . best. Landowners have worked with these agencies to establish BMPs. We work with these agencies to assure that compliance is where it should be. Where it isn't, we've worked to find ways to improve it—and I know we will continue to do so in the future. EPA already reviews and approves BMP programs. Why not continue down this road that's already taken us so far.

The alternative EPA proposes is—plain and simple—a Federal regulatory program that reaches far beyond "bad actors" to virtually every forest landowner, including the millions of people like me whose forest practices improve the environment, not hurt it.

What happens if we're faced with this radical departure in law and policy? Requiring us to get a permit will likely cost us money, even if it's simply to qualify under a general permit. It will almost certainly take time. And, if my friends are right about the inevitability of citizen suits gumming up the whole process, that time might stretch out to forever.

In other words, practicing sound sustainable forestry won't get easier; it will get harder. Especially today, when urban sprawl is sending the value of forestland into the stratosphere and developers call week after week with offers to buy up your Tree Farm, then pave it.

So far we've just said no. But others may not be able to—especially if they're faced with more red tape, higher costs and a Federal permitting system that could lead,

ultimately, to lawsuits from faraway places trying to stop the one timber harvest they might plan every decade.

I know that EPA officials claim they will only use permitting in extreme cases where damage to water quality is severe and State programs are not effective. But lawyers who have studied the issue claim that case law will make it very difficult for EPA ultimately to prevent the designation of all forestry operations as subject to point source discharge permits, once they have started down the road they propose.

Under these circumstances, many landowners might do what Thomas Dowd—a Certified Tree Farmer from Massachusetts—wrote on January 8 in a letter to his State's Congressional delegation: "Should the EPA, through increasing regulation, make Tree Farming uneconomical, the unintended consequence would be that I would most likely sell my 200 acres of forest for a housing subdivision."

This is no idle threat. In my own home State of New Hampshire, more and more forestland is falling under developers' bulldozers every year. In 1983, 87 percent of New Hampshire was covered by forests. In 1993, that number had dropped to 83 percent. By 2020, even the most optimistic survey by the Society for the Protection of New Hampshire Forests has that number falling to 80 percent.

That's a lot of trees, about twice as much forest cover as we had 100 years ago. But, best case, it still means we'll lose about 150,000 acres of forest in the next 20 years just in my little State—most of it developed, replaced by homes, shopping centers and parking lots.

No one would argue that this is good for water quality or the environment. It's not.

So what about Thomas Dowd, and me and countless other landowners who simply aren't inclined to sell? EPA and Congress can make it easier for us to say no—much easier—by getting rid of red tape, not adding to it. Don't impose a Federal permitting system.

You can make it easier for us to do even more for water quality by directing a larger share of Section 319 funds to forest landowners for improvement projects. Right now, only 2 percent of those funds are devoted to forestry. Help us expand our heritage of voluntary, private stewardship. Make it possible for EPA to invest public resources in the kind of citizen initiatives that have already worked for decades.

Over the past 60 years, our American Tree Farm System and the 66,000 landowners who've pledged to meet its standards, have made enormous strides in conserving our forests and water. It is a record we should celebrate, not regulate—and we invite you to join us.

PINE KNOB FARM,
Whitefield, NH, March 13, 2000.

Mr. TOM THOMSON,
Orford, NH.

DEAR TOM: Forwarded is a copy of the letter we sent to the EPA regarding the proposal to designate forestry operations as a point source for pollution. We were pleased to learn that you will be going to Washington to testify before the Fisheries, Wildlife and Water Subcommittee of the U.S. Senate's Public Works Committee regarding the proposed change. We hope the members of this committee appreciate what Tree Farmers and most woodland owners regardless of affiliations do to improve water quality not degrade it.

Please provide a copy of our letter of January 17, 2000, addressed to the EPA to the subcommittee and any other interested parties. We trust that reason will prevail and that a non-partisan intervention by the Senate and, hopefully, the House as well will insure that the EPA withdraws this proposal as one which will do more damage than good to our nation's forests.

Sincerely,

DAVID W. TELLMAN.

PINE KNOB FARM,
Whitefield, NH, January 17, 2000.

Comment Clerk for the TMDL Program Rule,
Environmental Protection Agency,
Washington, DC.

TO WHOM IT MAY CONCERN: Do not designate forestry operations as a point source for pollution. As Tree Farmers and as stewards of the land we have tried our best to maintain or improve water quality, wildlife and plant habitats as well as the quality of timber for eventual harvest by our grandchildren.

Most of our more than 800 acres of forest grows on hydric soils. We have limited timber harvests to frozen ground, but on occasion there is a thaw during the operation which may cause some temporary run off. Seldom has this affected any area beyond the immediate operation. Most people would never see a problem, but we have shut down logging operations until freezing temperatures return. We take other measures as well to protect water quality during and after logging operations. Most landowners and loggers, whether or not they are Tree Farmers, follow the same procedures. As landowners we must live with the results of what we do. We do not need more permits, analysis, fees or "outside experts" telling us how to manage our land.

We have, for many years, encouraged school groups, various organizations and individuals to visit our Tree Farm to see the way we manage the land, to hunt, to hike or to cross country ski. We have invited people to see logging operations in progress. No one has ever questioned our care of the land, but two hikers did question the cutting of "all those beautiful trees".

Regrettably we have a few people in our town and surrounding communities who do not believe a tree should ever be cut whether in our nearby White Mountain National Forest or on private land. These individuals will welcome your proposed rules, especially the opportunity to bring legal action against landowners for perceived violations. It would only take a couple of well publicized cases not only to curtail logging on private lands, but also to end good and active stewardship on such lands. More private land now open to the public will likely be posted against trespassing.

Encourage and assist private landowners to be good stewards of the land. Do not promulgate new regulations which will in the long term defeat what we all want to achieve—retention of open space, clean water, clean air, a habitat that will sustain diverse wildlife and plants alike and a place for people to enjoy. We are enclosing a copy of the information sheet we give visitors to our Tree Farm. We would welcome the opportunity to have one or more EPA folks visit and see for themselves some of what we have done.

Sincerely,

DAVID W. TELLMAN AND TANYA S. TELLMAN,
New Hampshire Tree Farm #2112.

STATEMENT OF THE CHEVRON COMPANIES

We appreciate the opportunity to present our views for the record to the Subcommittee on Fisheries, Wildlife, and Water of the Senate Committee on Environment and Public Works. Chevron is the ninth largest industrial corporation in the United States and the world's fifth largest energy enterprise. We are an integrated oil company involved in all aspects of the energy business: exploration, production, manufacturing, transportation, marketing, and research. Chevron is an environmentally responsible company and is often considered a leader in implementing advanced water pollution controls. We take our environmental responsibilities very seriously, and achieve high standards. Chevron does support part of the proposed rulemaking published August 23, 1999 on the Total Maximum Daily Load (TMDL) and permit programs under the Clean Water Act. We share EPA's goals for an open, scientifically sound program based on adequate data and run by the States. However, we do have concerns about sections of the proposed rule.

CURRENT ACTIVITY ON TMDL'S AND IMPACT ON CHEVRON

Prior to discussing the specific concerns about the rule, we would like to take the opportunity to discuss a growing issue of concern. We are becoming increasingly concerned that some of the EPA Regions are beginning to implement the rulemaking prior to finalization, and in some cases going beyond what would be provided in the regulations. Notably, EPA Region IX is aggressively (and prematurely, we feel) advancing the TMDL program in the San Francisco Bay when existing op-

erating permits at point source facilities, such as refineries, come up for renewal (roughly every 5 years). It appears for some metals, such as mercury, point sources will have to meet very stringent water quality objectives at the end of the discharge pipe without any dilution credit (even though point sources contribute less than 1 percent of the mercury load in the Bay). In this case, refineries have already installed costly controls, and to meet the new tighter limits will likely mean going to a zero discharge mode (total water recycle). No refinery does this currently and it may not even be technically feasible. It would involve using the treated wastewater in the cooling towers and then eventually evaporating the residual waste brines and hauling away many tons of salts and solid waste. For one of our refineries, we estimate the capital cost would be over $80 million with annual operating expense of tens of millions of dollars. There would be no added environmental benefit to the Bay as a result of this action. We believe that this Region, and perhaps others, are going beyond current rules as well as overtaking and interfering with the State's authority.

The TMDL program, as provided under current rules, should be allowed to run its course as Congress intended to allow States to set sound credible limits on sources, rather than EPA Region IX's arbitrary and unscientific actions to force dischargers to zero. It should be additionally noted that this is coming at a time when there are general concerns about the impact of stringent environmental rules on the oil industry, and how this translates into the additional costs of producing gasoline.

IF CONGRESS WERE TO TAKE ACTION

We share many of the same concerns that the States have also raised about the proposed rulemaking including workload, funding, and State authority over implementation of the program versus Federal control. The National Governors' Association (NGA) has put forward a policy which outlines and asks Congress to address many of these issues. We believe that the most helpful role for EPA is to use its vast resources to develop sound technical guidance that States can use for such tasks as developing TMDLs and load allocations.

If Congress were inclined to take some legislative action on the TMDL program, we would like to suggest the following:

A. Reduce the Huge Workload of 40,000 TMDLs. If the States are to submit 40,000 TMDLs, EPA Regional Offices will have to approve one TMDL every workday for the next 15 years. Such a fast pace would make it impossible for TMDLs to be grounded in sound scientific principles and relevant data. Congress needs to help the States out of this bind by sending a clear message that States can and should prioritize and re-issue their lists of impaired waters and TMDLs using sound methods. Further, Congress should ensure that EPA will not second guess State de-listing decisions for waters in which only outdated, insufficient, or poor quality data exist.

Even the environmental group NRDC said in their comments on the proposed TMDL rule that they "would rather see States develop fewer comprehensive TMDLs than advance hundreds of inferior load limits" (1/20/00 letter to EPA docket). Listings should be for significant and real impairments, not based on esoteric reasons such as "not enough grass on the stream bottom." Listings should be based on some objective basis that ties in a meaningful way to what ultimate "success" should look like. More stakeholders will support the program if they understand this ultimate goal and that the process is sound and objective.

B. All Parties That Contribute to Impaired Waters Should be Involved. There is a need to address fairly the role of all sources in moving forward to improve impaired waters. To this end, the focus of the TMDL program must shift from the point source dischargers to *all sources* of pollution to our nation's waters. All parties must participate in a timely and measurable way. It would not be equitable to force one group of sources to again bear the brunt of further allocation reductions while others are not held accountable for significant contributions to water quality impairment. The National Governor's Association appears to take a similar stance: "A water quality attainment plan should include an allocation for point and nonpoint source reductions required to meet water quality standards . . ." "States . . . may consider cost-effectiveness, technical feasibility, and . . . point and nonpoint sources will be held accountable for their respective allocated reductions" (Section 3.2.1 in Ref. 1).

According to EPA, of the 20,000 impaired water bodies nationwide:

- 43 percent are impaired by non-point sources solely,
- 10 percent by point sources solely, and
- 47 percent are impaired by a combination of point and non-point sources.

In our home State of California the numbers are even more striking—only 1 percent of water bodies are impaired solely by point sources. EPA's Assistant Administrator for Water, Chuck Fox, testified before Congress on October 28, 1999 that "pollution from factories has been dramatically reduced. But runoff from city streets, rural areas, and other sources continues to degrade the environment." It would be helpful to clarify by law or expressions of intent that other methods are needed when voluntary best practices (e.g., under CWA Section 319), in combination with appropriate and reasonable point source controls, are not sufficient to improve impaired waters.

A simple step (along the lines of NGA's position above) that would be extremely helpful would be to require full investigation and disclosure of all the sources' contributions to the impairment and a rough estimate of the cost-effectiveness of controls on those different sources. With such facts on the table, it is usually easier to reach consensus on an implementation plan. We have seen this approach work well in local air pollution programs.

C. Congress Shouldn't Have Courts Run the TMDL Program. EPA's proposed TMDL rule gives States 15 years to develop TMDLs. Even though many States say that time schedule would be very difficult given the massive workload, court actions are setting even tougher 5- and 7-year schedules. Whether or not EPA's rule is postponed or additional time is granted to States, Congress should seek every available opportunity to clarify its intent regarding the TMDL program. We need to establish a priority-based mechanism that maps out sound, equitable progress in TMDL development and implementation while barring unrealistic schedules that lead to poor results and more litigation. The authority must lie with the States, and the workload prioritized.

D. Provide More Funding. The cost to State agencies to develop the TMDLs has been estimated as high as $20 billion over 15 years. Yet, the Administration has estimated that the States' costs will only be $25 million per year. Interestingly enough, the Administration's proposed funding to States for the TMDL program is $45 million per year. Clearly these funds are woefully inadequate to accomplish the anticipated workload and the cost estimates in the regulation are unrealistic. At this point, no one really knows what the real costs will be, but we agree with the States that if the program is to be implemented as proposed, significantly more funds must be provided to State agencies. A study to look at what the actual costs will be, based upon prior experience, would be helpful to ensure that the correct level of funding is provided.

E. Allow More Time for Legacy Pollutants. In the Great Lakes Initiative, EPA authorized phased TMDLs, which allow additional time to reach attainment. Phased TMDLs are based on the gradual removal of legacy sources such as contaminated sediments. Since this problem is not unique to the Great Lakes but rather nationwide, Congress should clarify that for these situations fixed time schedules for attainment are not required in the implementation plans.

F. Allow Permit Renewals to Get Benefit of TMDLs. EPA's goal is to renew permits for point sources every 5 years or sooner. At permit renewal, our fear is that some EPA Regions may be tempted to drastically tighten permit limits before TMDLs have been developed and TMDL-based limits determined. Once such limits have been implemented, Clean Water Act "anti-backsliding" provisions [CWA Section 402(o)] may prevent subsequent implementation of less stringent requirements, even if a new TMDL would call for less stringent requirements. Congress should prevent EPA Regions from unjustified tightening of permit limits on a point source while a TMDL is being developed, since the TMDL may determine that these stringent requirements are unnecessary. We should first establish TMDLs, then set sound limits.

G. States Should Run the Program. We agree with suggestions made by NGA in their water policy paper regarding Federal versus State roles (Section 3.2.2 in Ref. 1),[1] such as having EPA approve the State's water program, but not the individual plans for each water body. Also, we like NGA's suggestion that if EPA rejects a State's program, the State should be given a reasonable amount of time to make modifications. A recent example where we feel EPA is getting too involved in what should be a State decision is Region IV's actions on the mercury TMDL for the Savannah River. EPA is replacing the State's water quality standard of 12 ppt with EPA's own target of 1 ppt. Of 115 point sources, EPA is requiring only two facilities to meet the 1 ppt since they just happen to have mercury limits in their existing permits. The other 113 sources, as well as air emissions and other sources are not

[1] NGA's Policy on Water Resource Management, Adopted Winter Meeting 2000; See www.nga.org

being considered. This is an example of where we believe that EPA's quick approach is neither technically sound nor equitable for the two targeted facilities.

EPA should develop comprehensive guidance and workshops on how to develop TMDLs, load allocations, and other details for the States. We feel that such communication among EPA Regions, States and EPA Headquarters often result in better solution ideas and improved cooperation.

We do have some additional concerns with EPA's proposed rule beyond the items discussed above, however we have tried to focus comments on our highest priority issues. We appreciate the opportunity to provide a statement for the record, and look forward to continuing to work with the subcommittee to address these issues.

JOE F. NIX, PH.D.,
Arkadelphia, AR, June 21, 2000.

CHAIRMAN,
Senate Committee on Environment and Public Works,
Washington, DC.

DEAR MR. CHAIRMAN: I wish to make a few comments regarding proposed EPA regulations which would require permitting of silviculture operations based on TMDL allocation of impaired streams. As a matter of background, I am a chemist and I have spent 30 years of my professional life studying streams and lakes of Arkansas. Although I fully understand the position of those who oppose the regulation based on economic impact, I think that there is a more fundamental issue which appears to have been overlooked.

The fact is that there is very little scientific evidence which indicates that silviculture activities are a major source of stream impairment in Arkansas. I think it is generally understood that the nature and magnitude of water quality impacts from silvicultural actives vary from region to region. What may be true on steep slopes of the Pacific Northwest may not be true or applicable to the timberlands of Arkansas or the southeastern U.S. EPA seems to have assumed that there is an impact then set out to develop regulations to control something that does not necessarily exist.

Others have suggested that the TMDL program provides a sound framework for the evaluation of the factors which impact streams. This is true but it should be recognized that the process has not progressed to the point where significant stream impairment from silviculture has been demonstrated in this part of the country.

Most of the data that I have seen indicates that the source of sediment in most of the streams throughout the timber producing areas of the southeast is roads and road cuts. Obviously there is some road construction associated with silviculture operations but I have yet to see a study that indicates that roads built for silvicultural purposes constitutes a majority of the sources.

I am also convinced that we do not understand the loading which occur from the natural environment An understanding of these processes is needed so that a comparison can be made to loading from anthropogenic sources. In some cases, the loading from anthropogenic sources may be lost in the background of natural processes. Additional studies are needed to make this type of comparison.

To summarize, I do not believe that the proposed EPA regulation has scientific merit at this point. EPA and other funding agencies should direct research funding in an effort to answer critical questions about sources of loading from the natural environment and only then consider the need for regulations. To be specific, it is wrong to regulate without cause then go out and see if the regulation is really needed. The reverse would be a more logical approach. EPA must learn to adhere to good science.

Sincerely,

JOE F. NIX, PH.D.

GREEN BAY PACKAGING INC.,
Morrilton, AR, June 21, 2000.

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

HONORABLE SIRS: My name is Allen Farley and I am the Landowner Assistance Forester with Green Bay Packaging Inc. in Morrilton, Arkansas. I would like to commend your committee for the thorough job you are doing with evaluating the purpose and need of additional Federal regulations concerning TMDL standards relating to forestry practices. As you are aware from the public meetings and panel

discussions, the State of Arkansas has multiple layers of leadership in place to monitor the water quality of our State and are very conscious of maintaining the environment in a professional manner.

It is my belief that any additional Federal regulations forced on the citizens of Arkansas to attempt to fix a problem that does not exist by the EPA would not only cost the tax payers many millions of dollars unnecessarily, but would hamper if not eliminate the private landowner from conducting needed silvicultural practices to improve their forests. A large part of my job is to educate and to assist private landowners in conducting wise and correct forest management practices. I have never come across any landowner that is not concerned with water quality, erosion, wildlife and planting trees for the future. Any regulations that may cause money to be taken out of the pockets of these landowners will adversely effect their decision to actively manage their property.

I trust your committee will be very cautious with any decisions concerning altering the way private landowners and industrial forest products companies management of their lands.

Sincerely,

ALLEN FARLEY,
Landowner Assistance Forester.

[From the New Hampshire Sunday News, February 1, 1998]

TREE FARMS TALLY ICE DAMAGE

A landscape littered with downed limbs and splintered trunks seems to make a mockery of the sign posted at the entrance to Tom and Sheila Thomson's 1,060-acre woodlot in Orford: "Thomson Family Tree Farm and Wildlife Habitat, A Working Sustainable Forest."

Weeks after one of the worst ice storms on record hit New England, New York and Quebec, the Thomsons and thousands of other private forest landowners are reeling from the disaster's impact on their woodlots. "I just can't believe it. It looks like a bomb struck out there," said Tom, who owns and manages 2,400 acres of forest along the New Hampshire-Vermont border.

Although recovery operations are under way, Thomson says the storm devastated 90 percent of his trees, the outlook for meaningful salvage efforts is bleak.

Preliminary estimates indicate that 20 percent of the region's 26 million acres of forests suffered moderate to severe damage. Most, like Thomson's, were privately owned woodlots ranging in size from 10 to 500 acres.

"Forest owners depend on the income from timber and firewood, or from maple syrup production," said Larry Wiseman, president of the American Forest Foundation. "It provides the cash they need to pay taxes, plant trees and keep their forests healthy."

With five million acres of forests damaged, it will be nearly impossible for landowners to receive ample compensation for their timber, or to replace the income they've lost. More than 70 percent of the forestland in the Northeast is privately owned.

"This isn't really about money," said Wiseman. "It's about the future of New England's forests, watersheds and wildlife." Conversion of forestland for development, he said, may be the biggest threat posed by the storm.

"All the landowners I know are passionate about good stewardship. But if I were looking at 20 years of income lying on the ground, I'd listen a lot more closely the next time a developer came calling."

Honored last November for his exemplary forest stewardship with the American Tree Farm System's Northeast Regional Tree Farmer of the Year Award, Thomson—a son of former Gov. Meldrim Thomson—bought his first 125 acres when he was 11 years old. Little by little he purchased more land, all the while managing its resources according to the principles of sound forestry.

Tree Farm System Director Robert Simpson says the Thomson operation was a study in how everyone benefits from good stewardship. "By conserving water and wildlife habitat and providing recreational opportunities for their neighbors, Tom and Sheila represent the very best in non-industrial private forestland ownership," he said. "The devastation they're facing will be felt far beyond the boundaries of their tree farm."

Moose, bear, coyote, deer, beaver and more than 90 identified species of birds live on and visit their farm. The Thomsons built hiking trails connected to the Appalachian Trail, and opened their land to cross-country skiers and other outdoor recreation

enthusiasts. In addition, dozens of area schools and civic groups have visited their woods to learn about the value of sustainable forestry.

"On an emotional level, the thing that hurts most is the loss of the legacy that Sheila and I worked so hard to leave for our son," Tom says.

Like his father, 20-year-old Stacey Thomson got an early start in forestry. He received a 12-acre woodlot as a birthday gift when he turned 12, and recently bought his first house with the profits from his own firewood business.

Two months ago Stacey started his own timber harvesting business, as well, and bought a skidder to remove timber from his tree farm. "My dad and I weren't planning to harvest our tree farm under these conditions," he said.

Tom is working with his forester in preparing a new forest management plan. "At a time like this, you look for the positive opportunities and make the most out of them," he said. "Our management plans have changed because of the storm, but our goal remains the same—to maintain a working, sustainable tree farm and share it by offering educational and recreation opportunities to others."

With its nearly 70,000 non-industrial, private forest landowners, the American Tree Farm System is the nation's oldest and largest certifier of sustainable forestry.

OVER 200 ORGANIZATIONS OPPOSE CLEAN WATER ACT SPECIAL INTEREST LOOPHOLES (H.R. 3609, S. 2041 AND S. 2139)

March 9, 2000.

DEAR SENATORS AND REPRESENTATIVES: We—the attached 207 organizations and 76 individual citizen clean water advocates—strongly oppose legislative proposals recently introduced in the House and Senate that would create a huge new special interest loophole in the Clean Water Act for forest industries that pollute our nation's rivers, streams, lakes and oceans.

Our organizations represent hundreds of thousands of members who use the nation's waters for recreational, commercial and subsistence purposes. These new bills, H.R. 3609, S. 2041 and S. 2139, would threaten the water quality that our members and the American public rely on for these important uses. We not only object to the substance of these bills, we are concerned by reports that they might emerge as a legislative rider on an appropriations bill—a particularly inappropriate backdoor strategy for attempting to overturn a longstanding provision of the Clean Water Act. We ask you to oppose this anti-environmental legislation, whether it is in the form of a stand-alone bill or a rider.

In sum, these bills would create an unprecedented statutory exemption from the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) for logging activities that cause point source discharges into waters of the United States. These bills have been spurred by an aggressive misinformation campaign about a recent rule change proposed by the Environmental Protection Agency (EPA) that would require certain point source discharges from silvicultural activities to obtain NPDES permits. The proposed rule would require that logging-related direct discharges get NPDES permits only under certain narrow circumstances, including when such discharges are causing significant pollution of waters that are already too polluted. Contrary to the rhetoric of those opposing this rule, EPA's proposal only addresses point sources—it does not purport to regulate non-point sources—and regulation of these point sources is not inconsistent with the Agency's authority under the Act.

The Clean Water Act contains no exemption from the definition of "point source" for silvicultural activities. Although EPA has not treated most silviculture activities as point sources in the past, the Agency has found that an automatic exemption in EPA's rules is no longer appropriate if we are to achieve the Clean Water Act's goal of fishable and swimmable waters. In those cases where a forestry-related practice meets the statutory definition of "point source" and the activity is a significant source of water pollution, EPA and the States must be able to regulate and control pollution from that activity. Any regulation of logging pollution would still be limited to those activities that already fall within the statutory definition of "point source."

Logging and logging roads degrade water quality in many parts of the country. Numerous scientific studies have documented the serious harm to water quality and aquatic ecosystems that can be caused by logging practices and logging roads. Roads and logging can significantly pollute and even destroy stream ecosystems by introducing high volumes of sediment and nutrients into streams, changing natural stream flow patterns, and damaging vital aquatic habitats. Eliminating the automatic exemption from point source regulation for silvicultural activities that have

point source discharges is necessary to address water quality problems in many States.

Regardless of your view of EPA's current rulemaking proposal, there is no legal or public policy justification for the environmentally destructive loophole in the Clean Water Act that H.R. 3609, S. 2041 and S. 2139 advance. These bills would weaken one of our nation's most successful environmental laws for the benefit of a few forestry companies at the expense of clean water. Please stand up for clean water and responsible forestry practices by opposing H.R. 3609, S. 2041, S. 2139 and any related anti-environmental rider that would exempt silviculture point source pollution from the Clean Water Act.

Sincerely,

Brad McLane, Alabama Rivers Alliance, Birmingham, AL; Beth K. Stewart, Cahaba River Society, Birmingham, AL; Kenneth Wills, Alabama Environmental Council, Birmingham, AL; Dan Murchison, Chilton Pride, Chilton County, AL; Gershon Cohen, Earth Island Institute, Haines, AK; Bob Shavelson, Cook Inlet Keeper, Homer, AK; Shawn Porter, Arkansas Watershed Alliance, AR; Bill Kopsky, Arkansas Public Policy Panel, Little Rock, AR; Nick Zunick, Senior Patrol Leader, Boy Scout Troop Fifteen, Hot Springs, AR; David Reagan, Ouachita Watch League, Hot Springs Nat'l. Pk., AR; Mariah Myers, Sierra Student Coalition, University of Arkansas, Fayetteville, AR; Robert Lippman, Glen Canyon Action Network, Flagstaff, AZ; Barbara Vlamis, Butte Environmental Council, Chico, CA; Michael McFarland, Fresno Audubon Society, Fresno, CA; Kyle Haines, Klamath Forest Alliance, Etna, CA; Patricia McCoy, Southwest Interpretive Association, Imperial Beach, CA; Mary Bull, Save the Redwoods/Boycott the Gap Campaign, Fort Bragg, CA; Craig Thomas, Center for Sierra Nevada Conservation, Georgetown, CA; Robin Mayer, Magic, Stanford, CA; Stephen Sayre, Lassen Forest Preservation Group, Chico, CA; Vivian Parker, Shasta Chapter, California Native Plant Society, Kelsey, CA; Tarren Collins, Santa Lucia Chapter/Sierra Club, Atascadero, CA; Kent Stromsmoe, Forestry Monitoring Project, Martinez, CA; Geoffrey Smith, Sierra Club, San Diego Chapter, San Diego, CA; Britt Bailey, Center for Ethics and Toxics, Gualala, CA; Steve Nicola, California Indian Basketweavers Association, Nevada City, CA; Wendy Blankenhiem, Community Action Network, Medocino, CA; Jonathan Kaplan, WaterKeepers Northern California, San Francisco, CA; Dr. Rob Schaeffer, SAFE: Save Our Ancient Forest Ecology, Modesto, CA; Jess Morton, Audubon-Palos Verdes/South Bay, San Pedro, CA; Ara Marderosian, Sequoia Forest Alliance, Weldon, CA; Christine Ambrose, Citizens For Better Forestry, Arcata, CA; Mary Ann Matthews, State Forestry Coordinator, California Native Plant Society, CA; Chris Maken, Concerned Citizens for Napa Hillsides, Napa, CA; Redwood Mary, Plight of The Redwoods Campaign, Ft. Bragg, CA; Tom Wodetzki, Alliance for Democracy, Mendocino Coast Chapter, Albion, CA; Jean Crist, Protect Our Watershed, Magalia, CA; Chris Poehlmann, Gualala River Improvement Network, Annapolis, CA; Patricia M. Puterbaugh, Lassen Forest Preservation Group, Chico, CA; Christopher M. Papouchis, Animal Protection Institute, Sacramento, CA; Irvin Lindsey, Outdoor Science Exploration, Santa Cruz, CA; Steve Sugarman, Social & Environmental Entrepreneurs, Malibu, CA; Alan Levine, Coast Action Group, Point Arena, CA; Holly Hannaway, LightHawk, Aspen, CO; Harlin Savage, American Lands Alliance, Boulder, CO; Jacob Smith, Wildlands Center for the Prevention of Roads, Boulder, CO; Jon Jensen, Center for Native Ecosystems, Boulder, CO; Sloan Shoemaker, Aspen Wilderness Workshop, Aspen, CO; Annie White, CU-Sinapu, Boulder, CO; Steve Glazer, High Country Citizens' Alliance, Crested Butte, CO; Jeffrey A. Berman, Colorado Wild, Boulder, CO; Margaret Miner, Rivers Alliance of Connecticut, Collinsville, CT; Sharon Buccino, Natural Resources Defense Council, Washington, DC; Steve Holmer, American Lands Alliance, Washington, DC; Ed Hopkins, Sierra Club, Washington, DC; Joan Mulhern, Earthjustice Legal Defense Fund, Washington, DC; Courtney Cuff, Friends of the Earth, Washington, DC; Brock Evans, Federation of Western Outdoor Clubs, Washington, DC; Catrina Ciccone, Lutheran Office for Governmental Affairs, Evangelical Lutheran Church in America; Washington, DC; Nick Brown, World Wildlife Fund, Washington, DC; Aaron Viles, U.S.

PIRG, Washington, DC; Mike Leahy, National Audubon Society, Washington, DC; Amy Lesser, Center for Environmental Citizenship, Washington, DC; Rebecca Wodder, American Rivers, Washington, DC; James S. Lyon, National Wildlife Federation, Washington, DC; Tim Eichenberg, Center for Marine Conservation, Washington, DC; Brock Evans, The Endangered Species Coalition, Washington, DC; Doug Sloane, Southeast Forest Project, Washington, DC; Mary Beth Beetham, Defenders of Wildlife, Washington, DC; Ted Morton, American Ocean Campaign, Washington, DC; Karsten A. Rist, Tropical Audubon Society, Miami, FL; Beth Frazer, Community Watershed Project, Athens, GA; Doug Haines, Georgia Legal Watch, Athens, GA; Ohana Foley, Student Peace Action Network, Haiku, HI; Linda Appelgate, Iowa Environmental Council, IA; Marti L. Bridges, Idaho Rivers United, Boise, ID; G.A. Bailey, Selkirk-Priest Basin Association, Priest River, ID; Liz Sedler, Alliance for the Wild Rockies, Sandpoint, ID; J. Dallas Gudgell, Idaho Conservation League, Boise, ID; Lee Halper, Land, Air & Water Society, Jerome, ID; Chuck Pezeshki, Clearwater Biodiversity Project, Moscow, ID; Lynne Stone, Boulder-White Clouds Council, Ketchum, ID; Katie Fite, Committee for Idaho's High Desert, Boise, ID; Albert Ettinger, Environmental Law and Policy Center of the Midwest, Chicago, IL; Frank Ambrose, Indiana Forest Alliance, Bloomington, IN; Tom Anderson, Save the Dunes Council, Michigan City, IN; Cliff Smedley, Stewards of the Land, Johnson, KS; Larry Zuckerman, Pure Water For Kansas, Program of the Kansas Wildlife Federation, Pretty Prairie, KS; Cheryl Bersaglia, Upper Cumberland Watershed Watch, McKee, KY; Liz Natter, Democracy Resource Center, Lexington, KY; Jan Jennemann, Mercer Water Watch, Salvisa, KY; Coleman Smith, Citizens Environmental Defense League, Bowling Green, KY; Judith D. Petersen, Kentucky Waterways Alliance, Munfordville, KY; Barbara Warner, Marion County Water Watch, Lebanon, KY; Jill Mastrototaro, Lake Pontchartrain Basin Foundation, Metairie, LA; Cyn Sarthou, Gulf Restoration Network, New Orleans, LA; Michael Kellett, RESTORE: The North Woods, Concord, MA; Pine DuBois, Jones River Watershed Association, Kingston, MA; Josh Kratka, National Environmental Law Center, Boston, MA; Ed Himlan, Tom Spiro, and Brandon Kibbe, The Massachusetts Watershed Coalition, MA; Kai Newkirk, E.A.R.T.H. (Ecologically Aware and Responsible Together at Hampshire), Amherst, MA; Laura Rose Day, Natural Resources Council of Maine, Augusta, ME; Ray Fenner, Superior Wilderness Action Network, St. Paul, MN; Nancy Clay Madden, MS Coast Audubon Society, Jackson, MS; Larry Smith, Pine Woods Audubon, Hattiesburg, MS; Judi Brawer, American Wildlands, Bozeman, MT; Joe Gutkoski, Montana River Action Network, Bozeman, MT; Jeff Juel, The Ecology Center, Inc., Missoula, MT; Robin Cunningham, Montana Fishing Outfitters Conservation Fund, Gallatin-Gateway, MT; Cold Mountain, Cold Rivers, Missoula, MT; Cesar Hernandez, Flathead Chapter of the Montana Wilderness Association, Kalispell, MT; Larry Campbell, Friends of the Bitterroot, Hamilton, MT; Elizabeth O'Nan, Protect All Children's Environment, Marion, NC; Dan Whittle, North Carolina Environmental Defense, Raleigh, NC; Cathie Berrey, Katuah Earth First!, Asheville, NC; Rick Dove, Neuse RIVERKEEPER, New Bern, NC; Marion Smith, Neuse River Foundation, New Bern, NC; Andrew George, Southern Appalachian, Biodiversity Project, Asheville, NC; Ginger Bush, Rockingham County Watershed Preservation Coalition, Inc., Colfax, NC; Hope C. Taylor, Clean Water Fund of NC, Asheville, NC; Meredith McLeod, Hickory Alliance, Chapter of the Blue Ridge Environmental Defense League, Greensboro, NC; Robert Perks, Pamlico-Tar River Foundation, Washington, NC; John Runkle, Conservation Council of NC, Raleigh, NC; Candice Carr, ASHE, Active Students for a Healthy Environment, Asheville, NC; Jean Spooner, NCSU Water Quality Group, North Carolina State University, Raleigh, NC; Chuck Rice, North Carolina Wildlife Federation, NC; Nancy L. Girard, New Hampshire Conservation Law Foundation, Concord, NH; Marie A. Curtis, New Jersey Environmental Lobby, Trenton, NJ; Harold E. Taylor, Pompeston Creek Watershed Association, Cinnaminson, NJ; Hugh Carola, The Fyke Nature Association, Ramsey, NJ; Julia M. Somers, Great Swamp Wa-

tershed Association, New Vernon, NJ; Karen R. Halliday, New Mexico Wilderness Alliance, Albuquerque, NM; Kerry Sullivan, Natural Resources Protective Association, Staten Island, NY; Day Star Chou, Flushing Greens, Green Party of NY, NY; Kathrn Martini and Tara Kehoe, HEART, Syracuse, NY; Gordon Douglas, Friends of the Great Swamp, Pawling, NY; Jennifer Nalbone, Great Lakes United, Buffalo, NY; Manna Jo Greene, Hudson Valley Sustainable Communities Network, Cottekill, NY; William Peltz, Capital District Labor-Religion Coalition Albany, NY; Erik Holland, Civilian Filibuster, Reno, NY; Jason Tockman, Buckeye Forest Council, Athens, OH; Margaret Ruff, Oklahoma Wildlife Federation, Oklahoma City, OK; Judy Guise-Noritake, Pacific Rivers Council, Eugene, OR; John Taylor, Sisklyou Audubon Society, Grants Pass, OR; Michael Donnelly, Friends of Breitenbush Cascades, Salem, OR; Dominick Dellasalla, World Wildlife Fund, Klamath-Siskiyou Region, Ashland, OR; Tom Burns, Concerned Friends of the Winema, Chiloquin, OR; John E. Barry, Range Ecology Group, La Grande, OR; P. Sydney Herbert, Oregon Shores Conservation Coalition, Portland, OR; George Hutchinson, Rogue Group and Oregon Chapter Sierra Club, OR; Nina Belk Northwest Environmental Advocates, Portland, OR; Claudia McCue, Corvallis Area Forest Issues Group, Monroe, OR; Donald Fontenot, Cascadia Forest Alliance, Portland, OR; Shannon Wilson, Many Rivers Group Sierra Club, Eugene, OR; Ric Bailey, Hells Canyon Preservation Council, La Grande, OR; Tom Dimitre, Headwaters, Ashland, OR; Jim Britell, Kalmiopsis Audubon Society, Port Orford, OR; Nathan Tublitz, Eugene Natural History Society, Eugene, OR; Susan Jane Brown, Northwest Environmental Defense Center, Portland, OR; Lovenia Warren, Salmon for All, Astoria, OR; Jay Letto, Central Cascades Alliance, Hood River, OR; Lisa P. Brenner, Oregon Clearinghouse for Pollution Reduction, Portland OR; Mary Ann Lucking, CORALations, Inc. Carolina, PR; Kathy McDeed, South Carolina Forest Watch, Westminster SC; Wendy Smith, World Wildlife Fund—Southeast Rivers, Nashville, TN; Donald B. Clark, United Church of Christ, Network for Environmental & Economic Responsibility, Pleasant Hill, TN; Rev. Walter Stark, Cumberland Countians for Peace & Justice, Pleasant Hill, TN; Louise Gorenflo, Obed Watershed Association, Crossville, TN; Edward C. Fritz, Texas Committee on Natural Resources, Dallas, TX; Live Oak Alliance, Austin, TX; Theodore C. Mertig, Environmental Action, EI Paso, TX; James Facette, Center for Social Justice and Global Awareness, San Antonio, TX; Denise Boggs, Utah Environmental Congress, Salt Lake City, UT; Steve Moyer, Trout Unlimited, Arlington, VA; Jack Dunavant, Southside Concerned Citizens, Halifax VA; David Bookbinder, American Canoe Association, Springfield, VA; Tim SanJule, Rivanna Conservation Society, Palmyra, VA; Shenandoah Ecosystems Defense Group, Charlottesville, VA; Dave Muhly, Virginia Forest Watch, Wytheville, VA; Detta Davis, The Clinch Coalition, Coeburn, VA; Jackie Hanrahan, Coalition for Jobs and the Environment, Abingdon, VA; Richard Flint, Committee for Improvement of Dickenson County Inc., Clintwood, VA; Rick Parrish, Southern Environmental Law Center, Charlottesville, VA; Dick Austin, Devil's Fork Trail Club, Dungannon, VA; Christopher M. Kilian, Conservation Law Foundation, Montpelier, VT; Job C. Heintz, Vermont Natural Resources Council, Montpelier, VT; Wally Elton, Ascutney Mountain Audubon Society, Springfield, VT; Stephen Crowley, Vermont Chapter of the Sierra Club, South Burlington, VT; Jim Northup, Forest Watch, Montpelier, VT; Brady Engvall' Friends Of Grays Harbor, Westport, WA; Greg Wingard, Waste Action Project, Seattle, WA; David Jennings, Gifford Pinchot Task Force, Olympia, WA; Helen Ross, Seattle Audubon Society, Seattle, WA; Joe Scott. Northwest Ecosystem Alliance, Bellingham, WA; Dr. Herbert Curl, Jr, Seattle Audubon Society, Seattle WA; Susan Crampton, Methow Forest Watch, Twisp, WA; Timothy J. Coleman, Kettle Range Conservation Group, Republic, WA; Bill Hallstrom, Green-Rock Audubon Society, Beloit, WI; David J. Zaber Wisconsin's Environmental Decade, Madison, WI; Eric Uram, Sierra Club Midwest Office, Madison, WI; David J. Zaber. Western Lakes Wildlife Center, Monona, WI; Dr. Margaret Janes, Potomac Headwaters Resource Alliance, Mathias, WV; Mr. Francis D.

Slider, Mountaineer Chapter of Trout Unlimited, Buckhannon, WV; Jim Summers, West Virginia B.A.S.S. Federation, Worthington, WV; Dianne Bady, Ohio Valley Environmental Coalition, Huntington, WV; Dan Heilig, Wyoming Outdoor Council, Lander, WY; Jonathan B. Ratner, Sublette Riders Association, Pinedale, WY; Danna Smith and Douglas Sloane, Dogwood Alliance, Southeastern United States.

INDIVIDUAL CLEAN WATER ADVOCATES

Wanda B. Stephens, Fayetteville, AR
Holly Ferguson, Fayetteville, AR
Moira Johnston Block and Alvin Lee Block, M.D., CA
Cory Chew, Los Angeles, CA
Cralan Deutsch, CA
Kirk Mobert, Point Arena, CA
Heidi Marshall, Point Arena, CA
Thomas Davis, Napa, CA
Lucy Kenyon, Santa Rosa, CA
Holly Mitten, Moss Beach, CA
Mary Knight, Willits, CA
Anthony Morris, Willits, CA
Talia Eisen, Los Angeles, CA
Kathie Lech, Willits, CA
Fred and Phyllis Mervine, Ukiah, CA
Elise Kelley, Davis, CA
Rainer Hoenicke, Napa, CA
David H. Walworth, MD, Soqiel, CA
James Woods, Penn Valley, CA
Diane Solomon, C.P.A., San Jose, CA
Meade Fischer, Corralitos, CA
Eric Sunswheat, Potter Valley, CA
Douglas F. Wallace, Ft. Collins, CO
Tom Dickinson, Boulder, CO
Estelle Gahn, Fort Collins, CO
Daniel Mandelbaum, Washington, DC
Benna Kolinsky, Washington, DC
Marc Goncher, Atlanta, GA
Jason Barringer, Atlanta, GA
Ernest L. Horton, Marietta, GA
Renuka Dhungana, Marietta, GA
Marion B. Hilliard, Orange Park, FL
Chris Norden, Moscow ID
Monte D. Wilson, Potlatch, ID
Leslie A. Manskey, Bloomington, IL
Robert E. Rutkowski, Esq., Topeka, KS
Tina Montgomery, Louisville, KY
Carrie DeJaco, Louisville, KY
Melanie Hurst, Louisville, KY
Owen Muise, Plymouth, MA
Cynthia S. Brown, PhD., Saint Paul, MN
J.F.Puckett, MD, Hattiesburg, MS
Tom Mattison, Jacksonville, NC
James L. Conner II, Durham, NC
Peter and Margaret Schubert, Durham, NC
John Colvin, Albuquerque, NM
Karen McCue, Albuquerque, NM
Colin Sillerud, Albuquerque, NM
Dorothy D. Meyerink, Henrietta, NY
Joel Clark Mason, Chappaqua, NY
Mr. Bobbie D. Flowers, New York, NY
Carol Witbeck, Clackamas, OR
Peter M. Lavigne, Portland, OR
Megan Kemple, Eugene, OR
John Thornton, Grants Pass, OR
Ann Easterly, Oregon City, OR
Connie Earnshaw, Portland, OR
Catherine Thomasson, MD, Portland, OR
Kay Ryan Biondo, Waldport, OR
Shirley L. Brown, Sublimity, OR
Richard Katz Do, East Stroudsburg, PA
Kim Danley, Salt Lake City, UT
Marilyn Dinger, Kaysville, UT
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Peter H. Richardson, Norwich, VT
Dave Robinson, Curlew, WA
Marva E. Schuelke, Everett, WA
Liz Marshall, Mount Vernon, WA
Carol Melton, Seattle, WA
Jerry Burke, Petersburg, WV
Lou Schmidt, Bristol, WV
Vince Dudley, Charleston, WV
Charles "Larry" Harris, Morgantown, WV

STATEMENT OF AMERICAN TREE FARM SYSTEM

[Robert Simpson and Ralph Posner]

MEMBERS OF NATION'S LARGEST FOREST OWNER NETWORK CONVINCED EXISTING SYSTEM PROTECTS WATER QUALITY, FEAR NEW RULES MIGHT ADD TO SPRAWL

WASHINGTON, DC.—Members of the 66,000-strong American Tree Farm System today appeared before a hearing of the U.S. Senate Committee on Environment and Public Works to voice opposition to an EPA proposal that would greatly affect forest management. If enacted, the proposal would regulate forestry activities as a "point source" of pollution, equating forestry with sewage disposal and reversing nearly three decades of policy under the Clean Water Act. Furthermore, the proposal would shift regulation to the Federal level despite years of success and cooperation at the State level.

On behalf of Tree Farm's 66,000 family forest owners, Tom Thomson, a New Hampshire Tree Farmer, testified, "The EPA proposal will place an undue burden

on small landowners. The result will not lead to added environmental protection, but may encourage family tree farmers among the best nation's forest stewards—to sell off their land to developers."

Under EPA's proposed rule changes, landowners may be required to obtain a Federal permit for almost all forest management activities. The proposed permitting process could lead to significant and unnecessary administrative delays, making it harder for small family forest owners to practice sustainable forestry.

EPA studies indicate that forestry presently contributes only a negligible fraction of pollution to streams and rivers. This tiny percentage is growing even smaller—under existing programs—as a result of responsible forest owners who follow State best management practices aimed at protecting watersheds and water quality. Forestry is not included in EPA's list of leading sources of impairment to lakes, reservoirs, estuaries or shoreline waters.

"Water quality is improving because forest landowners, foresters and logging professionals are serious about best management practices," said Thomson. In fact, 47 States have adopted best management practices for forestry. On average, individual compliance for these practices is almost 90 percent.

"What's remarkable is that the current system we have now is working," said Bob Simpson, national director of the American Tree Farm System. "There's no reason to add another layer of regulation. Responsible forest owners know how to protect water quality, and they're doing it."

SOCIETY OF AMERICAN FORESTERS

FOREST SCIENTISTS VOICE OPPOSITION TO EPA'S WATER QUALITY REGULATIONS

(By Michael Goergen)

WASHINGTON, DC—At a press briefing today, the Society of American Foresters (SAF) once again voiced its strong opposition toward an EPA proposal that would categorize forestry activities on private forest lands as a "point source" of pollution. The hotly contested EPA proposal, which would in essence equate forestry with sewage disposal, is being examined by the U.S. Congress during a series of hearings on Capitol Hill.

"Professional foresters have been working to improve water quality from forests for over 100 years. SAF supports efforts aimed at reducing nonpoint source pollution from forestry operations," according to Dr. George Ice, a research hydrologist representing SAF. "However, SAF is opposed to the regulatory changes proposed for forestry because the science EPA used to draft the proposal is inadequate, the current programs in place are successful, and the costs of EPA's proposal would be astronomical."

EPA's proposed rule fails to acknowledge that managed forests can benefit water quality. For example, officials in New York State recently decided that the best way to protect the water supply of New York City was by managing forests in the Catskill Mountains. Clearly, the EPA cannot make an informed decision about the impact of forestry activities on water quality without understanding that properly managed forests preserve water quality.

"SAF recognizes that if forest management is conducted improperly it can be a problem for water quality, which is why we are working to ensure that every forest management operation has involvement by forestry professionals," says Dr. Ice. "Water quality in forests would be better served by fully supporting existing nonpoint source control programs. We should be rewarding landowners for high quality forest management, not burdening them with excessive regulations, red tape, and high costs."

FORESTRY AND WATER QUALITY

- Forests cover one-third of this nation's land, are the source for 80 percent of our freshwater, and contribute to a mere 7 percent of impaired waterbodies.
- Best Management Practices (BMPs) are designed to minimize pollution impacts from various forestry activities. Landowners comply with BMP's 85 to 90 percent of the time. Repeated assessments show improving compliance.
- Every State with significant commercial forestry operations has a forest nonpoint source control program, some of these are voluntary and others are regulatory.
- In 1996, EPA dropped silviculture from its list of the seven leading sources of river and stream impairment.

- The largest source of pollution in estuaries came from industrial discharges (56 percent of the total), followed by urban runoff, municipal point sources, upstream sources, and agriculture. Forestry is a very minor source compared to other pollution sources.
- The largest source of pollution to ocean shorelines was urban runoff (55 percent), followed by septic systems, municipal sewer discharge, industrial pollution, and land disposal of wastes. Again, forestry is a minor problem.
- Officials in New York State recently decided that the best way to protect the water supply of New York City was by managing forests in the Catskill Mountains.
- It has cost an estimated $5 million to conduct a TMDL assessment on just one river South of Portland, Oregon. The assessment recognized phosphorus as a problem in the watershed, and set limits to reduce phosphorus levels. However, those levels are not achievable because the basic geology of the area causes the problem, not land management.
- A 1998 Washington Department of Ecology (DOE) report (DOE 1998) estimated that it would cost $6.7 million annually for 15 years to conduct the 666 TMDLs for waterbodies listed as water quality limited in 1996. This will result in reduced efforts in other environmental programs including:
  - reduced nonpoint source technical assistance to landowners and policy development
  - reduced statewide and regional watershed reports and coordination
  - reduced timber practice watershed analyses and policy development
  - reduced water quality assessments and coordination with tribes
  - reduced technical assistance on lake protection and restoration
  - reduced technical assistance on groundwater protection
  - reduced aquatic pesticide management

March 21, 2000.

Hon. ROD GRAMS,
U.S. Senate,
Washington, DC.

DEAR SENATOR GRAMS: The Minnesota Forestry Association (MFA) is one of the oldest conservation organizations in Minnesota and the only organization dedicated exclusively to the stewardship of all forest resources in the State. Our membership is made up almost entirely of non-industrial private forest landowners that endorse a broad spectrum of forest management objectives. Non-industrial private forest landowners own over 40 percent of the forestland in Minnesota.

I am writing on behalf of our members (nearly 1000 individuals) to request that you do not support the Environmental Protection Agency's attempt to declare silvicultural practices as "point sources" of pollution and regulate forest management activities under the National Pollution Discharge Elimination System (NPDES).

While MFA certainly supports and promotes responsible forest management to protect and improve water quality, we do not agree there is a need for this additional burden of unnecessary Federal regulation and expense on Minnesota's non-industrial private forest landowners. Studies show that forest management activities in Minnesota contribute very little to the pollution of our water resources. More importantly, Minnesota has very effective *voluntary* programs in place to protect water quality. These include extraordinarily high voluntary compliance with water quality and wetland best management practices, the development and implementation of new timber harvesting and forest management guidelines that also address water quality, and many continuing education opportunities for both landowners and resource managers.

Thank you for considering our request. We are counting on your support to prevent this unnecessary and expensive new Federal regulation.

Sincerely,

TERRANCE J. WEBER,
Executive Director.

KENTUCKY FOREST INDUSTRIES ASSOCIATION,
March 21, 2000.

Hon. JIM BUNNING,
U.S. Senate,
Washington, DC.

DEAR SENATOR BUNNING: As Chairman of the State Tree Farm Committee our organization represents 937 tree farmers which manage over 242,000 acres. All of these forest landowners practice sustainable forestry and are certified by professional foresters as members of the American Tree Farm System. These forest landowners are exemplary stewards of the forest and practice responsible forest management as members of the most successful voluntary forest conservation program in the United States.

On behalf of the Tree Farmers in Kentucky I would like to make you aware of our opposition to EPA changing the definition of silviculture from a nonpoint source to a point source of pollution. This would require permits for forests activities and has the potential to stop forest management and destroy our grooving wood industry in Kentucky State studies have shown that less than 3 percent of non-point source pollution originates from logging and forest management activities. In addition this small amount of pollution has been addressed by the State with the passage of the Forest Conservation Act in 1998 which makes silviculture best management practices for water quality mandatory starting in July of 2000.

Current regulations more than address potential pollution problems related to silviculture. It would make much better sense to allow State regulations to address problems and increase EPA 319 grant finding for voluntary programs to educate and inform private forest landowners. I appreciate the opportunity to comment on this important issue and would be glad to supply any additional information on this subject.

Sincerely,

STEVE ROGIER,
Kentucky Tree Farm Chairman.

MONTANA FOREST OWNERS ASSOCIATION,
MONTANA TREE FARM COMMITTEE,
Evaro, MT, March 22, 2000.

Hon. MAX BAUCUS,
U.S. Senate,
Washington, DC.

Subject: Proposed Revisions to the Water Quality Planning and Management Regulation

DEAR SENATOR BAUCUS: I am current chair of the Montana Tree Farm Committee and president of the Montana Forest Owners Association. Together, our organizations directly represent 400 nonindustrial private forest landowners in Montana who practice sustainable forestry; indirectly, we speak for thousands more who are concerned with good forest stewardship on their forest lands.

We are committed to clean water goals identified in Section 303(d) of the Clean Water Act. We support our State's Total Maximum Daily Load process, which successfully addresses many of the issues identified in EPA's proposed rules. We also support Montana's Best Management Practices program and Streamside Management Zone rules, both of which evaluate and ensure the effectiveness of silvicultural practices in addressing key water quality issues.

However, we do not support the proposed EPA changes, which seek to define forest management activities as point source discharges. But we do support improving water quality through increased flooding of Section 319, so that voluntary programs may be developed to educate and inform nonindustrial private forest landowners.

While all the nuances of the proposed rule changes are unclear, the stark implication is that, for the first time, all forest management activities undertaken by Montana landowners are subject to Federal regulations imposed by the EPA. This EPA ruling could eventually require that landowners obtain point source discharge permits for all silvicultural practices—including activities ranging from timber harvest, to thinning, to pruning, to slash disposal, to cutting the annual family Christmas tree.

Not only does this rule legitimize a high level of Federal intrusion into private forest land management, required permits would add significant expense and delay to implementing forest management plans while inhibiting many smaller landowners from even trying to manage their forests. Further, if Federal permits are

required prior to conducting such forestry activities, individual citizens and environmental groups will be able to challenge (either seriously or frivolously) the issuance of these permits in Federal court. Additionally, permitting may require Federal examination of private lands to ensure that no possible threatened species or their habitats exist on that land.

The EPA suggests that this rule will be implemented only on a case-by-case basis. However, historic enlargement and imposition of Federal regulations and the wide spread use of the court system by political interest groups suggests otherwise. Regardless of how the rule is interpreted now, it constitutes a very large foot of Federal control in the very small, vulnerable, and increasingly marginalized door of private property roots.

In the final analysis, the unintended consequences of such rulemaking are poorly understood by environmental and land management agencies. If the ultimate result of such heavy-handed regulations is to dissuade nonindustrial private forest landowners from even trying to manage their forests, then we can say good-bye to sustainable forestry on hundreds and thousands of significant forest acreages in Montana and millions of acres across the country. The implications of "nonmanagement" are not pretty. Private lands will face increased wildfire potential (together with increased potential for loss of human life in the wildland-urban interface) and insect and disease infestations; further, landowners will be provided with yet another incentive to subdivide and develop increasingly scarce open spaces and forest land.

We believe that EPA's proposed rules, defining all silvicultural activities as point source discharges, are ill-advised and counterproductive. The regulatory bureaucracy mill be enlarged and sustainable forestry practiced, especially on small forest acreages, will be harmed.

Thank you for this opportunity to comment on this important issue.

Sincerely,

THOM LIECHTY,
Chair, Montana State Tree Farm Committee;
President, Montana Forest Owners Association.

FREEMAN FARM,
Knox, PA, March 21, 2000.

Hon. RICK SANTORUM,
U.S. Senate,
Washington, DC.

RE: EPA's Proposed Federal Water Regulation

DEAR REPRESENTATIVE PETERSON: You received a copy of my letter of January 12, 2000 directed to Ms. Carol Browner, Administrator in opposition to the EPA's proposed Federal water regulations under section 303(d) of the Clean Water Act. Thanks for your reply of February 9, 2000. We have been advised that of the nearly 30,000 comments sent to EPA regarding their proposed ruling, roughly 70 percent related to the forestry issue The Tree Farm community represented approximately 14 percent of the total.

Joan and I are one of the 1378 Pennsylvania's Tree Farmers and 65,000 National Tree Farm forest landowners whose practices are certified as sustainable by professional foresters. Along with other Tree Farmers in the State we support clean water. These forest landowners are exemplary stewards upholding nearly 60 years of responsible forest management and members of the most successful voluntary conservation program in the history of United States.

We ask that you say "NO" to the EPA's proposed rule charge and permitting forestry activities on private lands. Please say, "YES" to improving water quality through increased finding of Section 319, so that voluntary programs (like the successful American Tree Farm System) may educate and inform private forest landowners.

Sincerely,

GEORGE W. FREEMAN,
1990, 1997 Pennsylvania Tree Farmer of the Year
1998 National Tree Farmer of the Year.

Hon. WAYNE ALLARD,
U.S. Senate,
Washington, DC.

DEAR SENATOR ALLARD: I am the chairman of the Colorado State Tree Farm Committee. We represent over 300 forest landowners who actively practice sustainable forestry under the guidance of the Colorado State Forest Service and other professional foresters. We support the use of the Best Management Practices for the Protection of Water Quality developed by the Colorado State Forest Service.

Our members advocate the education of private forest landowners in the use of responsible forest management practices. We are affiliated with the American Tree Farm System, which has a sixty-year history of responsible forest management throughout the United States. Tree Farmers have established the most successful voluntary forest conservation program in the history of this country.

I am writing today to ask for your help in preventing the Environmental Protection Agency from making a big mistake. The EPA is proposing revisions to the Total Maximum Daily Load (TMDL) and National Pollutant Discharge Elimination System (NPDES) permit programs. We believe that these changes will shift regulation of forest management activities from State-level to Federal supervision.

These revisions will require Colorado to submit costly implementation plans for every TMDL. Worse still, they may alienate many forest landowners who, through our efforts and those of the Colorado State Forest Service, have voluntarily chosen to practice responsible forest management on their property.

I urge you to review and reject EPA's proposed revisions and then support improving water quality through increased funding of Section 319, so that voluntary programs (like those of the American Tree Farm System and the Colorado State Forest Service) may educate and inform private forest landowners.

Thank you for considering our suggestion.

COLORADO STATE TREE FARM COMMITTEE:
Wes Rutt, *Chair,*
Michael Hughes, *Secretary,*
Wayne Baasch,
Ray Ramos,
Gary Hiner,
Ray Mehaffey, *Vice Chair,*
Joel Stewart, *Treasurer,*
Raul Bustamante,
John Smethurst,
Jan Hackett.

CHARLANE PLANTATION,
March 20, 2000.

Senator MICHAEL CRAPO,
U.S. Senate,
Washington, DC.

DEAR SENATOR CRAPO: As the current National Outstanding Tree Farmers as named by the American Forest Foundation and the American Tree Farm System, we represent some 65,000 Tree Farmers across our country managing over 25,000,000 forested acres. We are writing you about our concern for one of the most important issues ever to face us. I'm sure that you are aware of the issue of Total Maximum Daily Loads, or TMDL's, as they pertain to forestry. Mainly, that forestry activities have in the past been considered a non-point source of TMDL's, and that the EPA is now seeking to make forest activities a point-source. It is certainly no secret that all of the American Tree Farmers in our country have always supported clean water, air, and sustainable forestry practices, and therefore stand as shining examples of good stewards of the land. As you may be aware, by it's own admission the EPA has determined that forestry has contributed less that 7 percent of the levels of TMDL's. In 1996, EPA dropped forestry from it's list of leading sources of river and stream impairment. It is therefore absolutely shocking and staggering to all of us in the forestry community that the EPA would seek to change the current status of forestry activities. This change amounts to punishing all of the private landowners that supply our country with the all-important resource of wood for the good stewardship practices that we have been following for nearly 60 years. The American Tree Farmers stand as one of the finest group of practicing environmentalists in the world. As private landowners, we are and always have been concerned with sound environmental practices, and to be subjected to this outrageous

regulation is more than a slap in the face for us. Please say NO to this unreasonable rule change that would cause permitting of forestry activities on our private lands. Please say YES to improving water quality through voluntary programs like the successful American Tree Farm System, that educate and inform private forest landowners. Thank you for your kind attention to this matter.

Sincerely,

CHUCK AND ROSE LANE LEAVELL,
National Outstanding Tree Farmers, 1999–2000.

STATEMENT OF SHARON BUCCINO, SENIOR ATTORNEY, NATURAL RESOURCES DEFENSE COUNCIL

Mr. Chairman and members of the committee: Thank you for the opportunity to talk with you today about critical steps needed to address the more than 20,000 water bodies across the country that still do not meet water quality standards. My name is Sharon Buccino. I am a Senior Attorney in the public lands program of the Natural Resources Defense Council (NRDC). NRDC is a non-profit organization with over 400,000 members across the country. NRDC's members depend on clean water to enhance their quality of life and protect their health.

NRDC supports EPA's efforts to revive the Clean Water Act's (CWA) Total Maximum Daily Load (TMDL) program. We also support EPA's proposal to eliminate the current regulatory exemption for silviculture from the CWA's National Pollutant Discharge Elimination System (NPDES) permit requirements. I will make four main points in my testimony today. First, I want to clarify that EPA's silviculture proposal applies only to point sources. Second, I will provide some examples demonstrating the need for the EPA's new regulations—where silviculture point sources are causing significant water pollution and therefore an NPDES permit is appropriate. Third, I will explain EPA's legal authority for eliminating the silviculture exemption. Fourth, I will explain why non-point sources should be included in the TMDL process.

In 1972, Congress recognized that technology-based controls alone would not deliver clean water to the American public. Congress established the TMDL program to identify those water bodies which did not meet water quality standards and to develop a plan to restore the water quality of these impaired waters. Until recently, the TMDL program was largely ignored. Citizens across the country had to bring suit to force EPA and States to begin to address their obligations under the program. Yet, despite this effort, almost 40 percent of the Nation's waters assessed by States still do not meet water quality standards. These polluted waters include approximately 300,000 miles of river and shoreline and 5 million acres of lakes.

More needs to be done by EPA and the States if the TMDL program is to succeed in cleaning up our nation's waters. EPA has proposed changes to the TMDL regulations, as well as a few changes to the regulations for point source discharge permits under the NPDES program that it believes will improve the implementation of the program. NRDC supports some aspects of the proposed rule and opposes others, but we strongly support effective implementation of the TMDL program, most of which is already in the existing statute and regulations, to clean up impaired waters.

One important piece of EPA's proposed rule changes is the proposal to eliminate the current exemption that silvicultural point sources enjoy from NPDES permit requirements. Logging and logging roads degrade water quality in many parts of the country. Numerous scientific studies document the harm to water quality and aquatic ecosystems caused by logging and logging roads. Current State practices fail to address adequately water pollution from logging activities. Where a silviculture activity meets the statutory definition of point source and it is causing significant water pollution, there is no excuse for not requiring a discharge permit. Timber companies should not be exempt from CWA requirements that other industries must comply with. EPA has appropriately decide to eliminate the special carve-out from CWA requirements that timber companies now enjoy.

The American public has already waited almost 30 years for effective implementation of the TMDL program. NRDC has urged EPA to move forward expeditiously with new regulations that will make the TMDL program more efficient and effective. We hope Congress will not interfere with this progress. In particular, we urge Congress not to adopt the legislation proposed by Senators Lincoln and Hutchinson. I have with me today a letter signed by over 250 organizations and citizens across the country opposing the exemptions for timber companies from CWA requirements contained in S. 2041 and S. 2139. I have attached this letter as Attachment 1 to my testimony and ask that it be entered into the record.

I. EPA'S SILVICULTURE PROPOSAL DOES NOT AFFECT NON-POINT SOURCES.

Significant misunderstanding exists about the scope of EPA's silviculture proposal. It does not affect non-point sources. The proposed EPA regulations seek to facilitate better implementation of the TMDL program by amending existing regulatory exemptions for certain silvicultural point sources to require, on a case-by-case basis, the issuance of NPDES permits by EPA or delegated States where necessary to implement wasteload allocations identified in the TMDL process. The Clean Water Act only requires NPDES permits from point sources. EPA's proposal does nothing to require permits from non-point silvicultural activities. The proposal simply eliminates the blanket exemption from the definition of point source that most silvicultural activities have enjoyed pursuant to regulation.

The only silvicultural activities potentially affected by EPA's proposal are those that fall within the statutory definition of point source. The Clean Water Act defines "point source" to mean:

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.[1]

Activities that do not involve a confined and discrete conveyance are completely outside the scope of EPA's silviculture proposal.

EPA's silviculture proposal does not even appear to cover all point sources. After having identified the set of activities that would be considered "point sources" under the Clean Water Act, EPA only proposes to consider requiring an NPDES permit where: (1) those activities affect an impaired water body, that is a stream, lake or estuary that fails to meet water quality standards; (2) EPA has written a TMDL, presumably as a result of a State failure to do so; and (3) a specific finding has been made that the activity contributes to a violation of water quality or is a significant contributor of pollutants to waters of the United States. Where such conditions exist, it is entirely logical and appropriate to use the NPDES system as the mechanism to ensure that appropriate pollution controls are adopted by those sources.

EPA's proposal will not affect those silviculture operations that are taking appropriate steps to prevent water pollution. If a timber company is following all the best management practices (BMPs) adopted by a State and those BMPs are effective in preventing water pollution, EPA's proposal will not apply. In this case, either the affected water body will not be in violation of water quality standards or, if the water body is impaired, other sources are the problem. Both the preamble and the regulatory text of EPA's proposal clearly State that the Agency will only consider requiring an NPDES permit from a silviculture activity not previously regulated if the activity is a significant source of a water pollution problem.

Unfortunately, there are many places where silviculture operators are not taking the steps necessary to prevent water pollution. It is these operations that are the subject of EPA's proposal. This is why EPA's silviculture proposal is an important step toward delivering clean water to the American public.

II. SILVICULTURAL ACTIVITIES CONTRIBUTE SIGNIFICANTLY TO WATER POLLUTION IN MANY PARTS OF THE COUNTRY

Numerous States have identified various silvicultural activities as sources contributing to the water quality impairment of water bodies listed under Section 303(d) of the Clean Water Act. In the 32 States that report source information to EPA as part of their 303(d) lists, approximately 350 are impaired as a result of silvicultural activities including harvesting and logging road construction/maintenance. See, EPA Access97 TMDL/303(d) Data base, summary table attached as Attachment 2. In Montana alone, 193 of the listed water bodies are impaired as a result of "silviculture." *Id*. An additional 33 water bodies are affected by logging roads and maintenance. *Id*. Still another 30 water bodies are listed because of harvesting. *Id*.

Of the remaining States that do not report source information in their 303(d) lists, significant logging occurs in several. These States include Idaho, Washington, Oregon, Colorado, Kentucky, and Vermont. Information gathered from the Idaho Department of Environmental Quality indicates that of 731 water quality limited stream segments on the State's 1998 303(d) list, 573 are listed for sediment. Of these, at least 220 are listed primarily because of silvicultural practices on public land. Senator Crapo, I have brought a map of Idaho that vividly demonstrates the extent of the problem in your State. The map is attached as Attachment 3.

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[1] 33 U.S.C. § 1362(14).

Furthermore, in many cases, logging activities have a detrimental impact on water quality even though the effect may not result in the violation of a water quality standard. State 303(d) lists only include those water bodies where violations of water quality standards have occurred. The list of streams and other waters harmed by logging activities is much longer than the list of affected 303(d) water bodies.

Numerous scientific studies document the harm to water quality and aquatic ecosystems caused by logging and roads. Roads and logging can significantly degrade stream ecosystems by introducing high volumes of sediment into streams, changing natural streamflow patterns, and altering stream channel morphology. NRDC has recently published an annotated bibliography that provides an overview of primary research, almost all from peer-reviewed journals, documenting the adverse environmental impacts of roads and logging. NRDC, *End of the Road: The Adverse Ecological Impacts of Roads and Logging, A Compilation of Independently Reviewed Research* (December 1999). A few of the many studies summarized in the NRDC bibliography are discussed in more detail below. The chapter relevant to water quality is attached as Attachment 4.

In one study, scientists found that logging activities in steep and high-rainfall forests of Oregon, Washington, British Columbia and Alaska accelerated erosion rates thus increasing sedimentation rates of streams. Chamberlin, T.W., R.D. Harr and F.H. Everest. 1991. Timber harvesting, silviculture, and watershed processes. American Fisheries Society Special Publication 19: 181–205. Sedimentation and altered stream structure reduced available fish cover and food supplies. *Id*. In another, scientists found the volume of fine sediment present in streams increased in direct proportion to logging in the watershed and stream crossings by roads. Eaglin, G.S. and W.A. Hubert. 1993. Effects of logging and roads on substrate and trout in streams of the Medicine Bow National Forest, Wyoming. North American Journal of Fisheries Management 13: 844–846. Still another study found that 30 years after clearcut logging occurred, average and peak stream flows in the watershed studied were still higher than pre-logging flows. Troendel, C.A. and R.M. King. 1985. The effect of timber harvest on the Fool Creek Watershed, 30 years later. Water Resources Research 21: 1915–1922. Another study found that forest road erosion was a source of fine sediment in stormflow runoff, even after mitigation measures. Swift Jr., L.W. 1984. Soil losses from roadbeds and cut and fill slopes in the Southern Appalachian Mountains. Southern Journal of Applied Forestry 8: 209–216. In still another study, scientists found that forest roads extended the natural channel network, initiated new channels, and increased the susceptibility of steep slopes to landsliding. Montgomery, D.R. 1994. Road surface drainage, channel initiation, and slope instability. Water Resources Research 30: 1925–1932. This study specifically found that road cuts intercepted subsurface flow and diverted it to roadside ditches. *Id*.

III. CURRENT STATE PRACTICES FAIL TO ADDRESS ADEQUATELY WATER POLLUTION FROM SILVICULTURAL ACTIVITIES

State forest practices have not adequately addressed water pollution from logging, road construction and other silvicultural activities. Logging on State and private lands is generally governed by State forest practices. The quality of State forest practices varies widely across the country. While many States have developed some kind of best management practices (BMPs) for logging, the rigor of these operational guidelines varies from State to State. In most States, compliance with BMPs is merely voluntary. Even in States where BMPs are enforceable, State agencies lack the resources to monitor adequately compliance with the BMPs or their effectiveness in protecting water quality. Furthermore, few States require logging operators to provide prior notice either to the State or to the public of timber harvesting. Consequently, States have little or no opportunity to limit the environmental damage before it occurs.

In Tennessee, for example, non-compliance with the State's voluntary BMPs has led to significant environmental damage. At one highly visible cut along U.S. Interstate 40, State inspectors responding to numerous citizen complaints found that logging operations only complied with 9 percent of the BMPs. Large volumes of sediment have washed into numerous small streams from the site's steep, denuded hillsides, eventually ending in the Tennessee River and the Buffalo River. Dogwood Alliance, *Report on the Humphreys County, Mid-South Cut* (January 2000). According to the Dogwood Alliance, a non-profit citizen organization, over 98 percent of all soil erosion on forested lands in Tennessee can be traced to roads, skid trails, and log landings. *Id*.

I have brought a couple of photos with me that illustrate quite vividly the damage logging practices can cause. One is a photograph of a skid trail at the Humphreys

County, Mid-South cut. The second is a photograph of the stream below the skid trail. It is this kind of activity and damage that make EPA's silviculture proposal necessary. When logging occurs in a way that does not cause these kinds of results, EPA's proposal does not apply. When logging occurs in way that does cause these results, a permit is entirely appropriate to prevent the harm. I think few would disagree that the skid trail pictured here is a "discernible, confined and discrete conveyance . . . from which pollutants are discharged" into a stream. Since the skid trail falls within the CWA's definition of point source, the Act requires the timber operator to obtain an NPDES permit before discharging any sediment or debris into the stream below. These photographs are attached as Attachment 5.

In West Virginia, water pollution from logging activities goes unregulated and timber companies are fighting to stay free from environmental controls. See, Ward, K., "Timber, farming fight to remain unregulated," *Charleston Gazette* (August 27, 1999). Compliance with the State's BMPs is effectively voluntary. As a result, the BMPs are frequently not followed and logging and road construction has led to significant degradation of water quality. "Timber has few regulations," *Charleston Gazette* (November 25, 1996). Even where the BMPs are followed, significant environmental damage can result. At one timber cut in Monongalia County, for example, the logger mulched the road as required by the State BMPs, but the road still washed away resulting in sediment buildup in the nearby stream. *Id*.

Virginia's logging guidelines are also voluntary. While the Virginia Department of Forestry has the authority to fine loggers if they pollute a stream or river, the agency has rarely done so. The Department's director, Jim Garner, describes the Department of Forestry's philosophy as a "soft approach" to making sure loggers do not pollute the State's rivers and streams. See, Nixon, R. and M. Hudson, "Foresters Take Low-Key Approach," *Roanoke Times* (November 23, 1998). In fact, evidence shows widespread noncompliance. An annual audit of logging sites by the Department found more than 90 percent failed to meet all the agency anti-erosion guidelines. *Id.* One forest warden has described the impact of unregulated forest practices on water quality as follows: "I've seen streams completely destroyed. Afterwards, you don't know where the stream channel was. It's all a big muck." *Id.*

Significant damage to water quality from logging occurs even in States with arguably the best forest practices, like California and Oregon. In California, over 30 water bodies are listed as impaired because of logging or logging roads. A recent report by an independent scientific review panel concluded that California's forest practice rules fail to protect beneficial uses of the waters—fisheries. *Report of the Scientific Review Panel on California Forest Practice Rules and Salmonid Habitat,* prepared for The Resources Agency of California and the National Marine Fisheries Service (June 1999). In particular, the report documents the failure of California's forest practice rules to protect anadromous salmonid populations. Id. at i. Sedimentation and turbidity from roads and logging have interfered with salmon spawning. Id. at 12. In reviewing California's Coastal Nonpoint Pollution Control Programs, the National Oceanic and Atmospheric Administration and EPA explicitly found that "additional [forestry] management measures are necessary in order to attain and maintain water quality standards." EPA/NOAA, *Coastal Zone Act Reauthorization Amendments (CZARA) Findings (July 1998),* notice of availability published in 63 Fed. Reg. 37094 (July 9, 1998).

Although revised in 1994, the Oregon Forest Practices Act and its implementing regulations fail to ensure attainment of water quality criteria, meet antidegradation requirements or fully protect aquatic species, including imperiled salmon and trout. In data collected pursuant to Section 305(b) of the CWA, Oregon's Department of Environmental Quality conservatively estimates that over 25 percent of all stream miles now listed for temperature impairment are on private forestlands. This is true despite general compliance with current standards and guidelines. The current policies do not restrict riparian harvest adequately to ensure full protection of salmonid and other aquatic life from habitat degradation related to sediment, altered temperature regimes (due to shade reduction and management-related stream morphology changes) and depletion of instream large wood. See e.g., National Marine Fisheries Service, "A Draft Proposal Concerning Oregon Forest Practices." (submitted to the Oregon Board of Forestry Memorandum of Agreement Advisory Committee and the Office of the Governor February 17, 1998).

Oregon's official State science team concluded that "current rules for riparian protection, large wood management, sedimentation, and fish passage are not adequate to reserve depressed stocks of wild salmonids." The scientists recommended greater vegetation retention in riparian areas and landslide paths, protection of floodplains, better control of road-related sedimentation and other measures. Independent Multidisciplinary Science Team. 1999. Recovery of Wild Salmonids in Western Oregon Forests: Oregon Forest Practices Act Rules and the Measures in the Oregon Plan

for Salmon and Watersheds. Technical Report 1999–1 to the Oregon Plan for Salmon and Watersheds, Governor's Natural Resources Office, Salem, Oregon.

The current Oregon program is particularly weak in its protection for small streams, where little or no vegetation retention is required. NMFS, "A Draft Proposal Concerning Oregon Forest Practices." Monitoring data shows significant post-harvest temperature increases for portions of smaller streams lacking riparian protections (Oregon Department of Forestry, *Riparian Functions Issue Paper*, 1999), as well as increased fine sediment. Thom, B.A., K.K. Jones, and R.L. Flitcroft. 1999. Stream Habitat Conditions in Western Oregon. Monitoring Program Report 1999–1 to the Oregon Plan for Salmon and Watersheds, Governor's Natural Resources Office, Salem, Oregon.

IV. FEDERAL LOGGING GUIDELINES ALSO FAIL TO ADDRESS ADEQUATELY WATER POLLUTION FROM SILVICULTURAL ACTIVITIES.

In addition to logging on State and private lands, significant logging occurs on lands managed by Federal agencies, primarily the U.S. Forest Service (USFS) and the Bureau of Land Management (BLM). The National Forest Management Act provides for standards and guidelines for logging in the national forests. 16 U.S.C. § 1600 et seq. BLM manages its land under the Federal Land Policy and Management Act. 43 U.S.C. § 1701 et seq. Forest management plans incorporate best management practices to address water quality impacts from logging and logging roads. For the most part, these standards are more rigorous than State guidelines. See, e.g., GAO, *Public Timber: Federal and State Programs Differ Significantly in Pacific Northwest*, GAO/RCED–96–108 (May 1996), at 4–6.

Even Federal BMPs, however, fail to protect water quality adequately. Logging continues to add large loads of sediments to streams, destroying fish habitat, modifying stream flows, changing stream temperatures, and altering stream channels. Logging on Federal lands has also led to massive landslides, damaging property and costing lives, as well as ravaging ecosystems. "Siuslaw Study Ties Landslides to Roads, Clear-cuts," *The Oregonian* (May 23, 1997). In some instances, sedimentation has been so severe that it has shut down drinking water supplies. GAO, *Oregon Watersheds: Many Activities Contribute to Increased Turbidity During Large Storms*, GAO/RCED–98–220 (July 1998), at 4, 6 (describing contribution of human activities, including timber harvesting, to the shut down of the water treatment system in Salem, Oregon, in February, 1996).

In Alaska's Tongass National Forest, the USFS has documented the failure of BMPs to protect water quality adequately. In its 1995 report to Congress, *Anadromous Fish Habitat Assessment*, the USFS stated:

> Current practices on the Tongass do not meet either the goal of the Tongass Land Management Plan to "preserve the biological productivity of every fish stream on the Tongass," or the long-term goal of avoiding the possible need for listing of salmon and steelhead stocks under the Endangered Species Act. . . . [T]imber harvest practices on the Tongass observed as part of this study were found to increase risk over natural risk levels to both habitat productivity and to individual stocks of salmon and steelhead.

USFS, *Anadromous Fish Habitat Assessment* (AFHA) (1995), at 7. The USFS stated further, "even completely implementing current procedures would not be fully effective in protecting anadromous fish habitat productivity and salmon and steelhead stocks over the long term." *Id.*

Among other things, the AFHA report specifically addressed the detrimental environmental impacts associated with the location and lack of maintenance of roads constructed to facilitate clearcutting on Tongass National Forest lands. The USFS found:

> [p]roblems were noted associated with design, construction, maintenance, mitigation, and closure of roads, especially on steep, unstable slopes. Stream crossings are sometimes designed for less than critical flow, and ditch relief culverts are sometimes not sufficient to maintain the hydrology of steep slopes, hollows, and wetlands Culvert crossings of roads on steep mountain-slope channels was another concern These culverts have a tendency to fail and plug with bedload, becoming persistent maintenance problems.

AFHA, Appendix C, at 37.

More recently, in its 1998 *Annual Monitoring and Evaluation Report*, the USFS discusses the failure of current Fish and Riparian Standards and Guidelines to effectively maintain and improve fish habitat. According to the study and analysis of the Petersburg Ranger District, 455 miles of road have been surveyed. Of the 107 crossings on Class I streams, the Forest Service assumes that 50 percent of these

culverts do not allow for the successful passage of fish. The statistics are even worse for the 257 Class II streams that were surveyed: about 85 percent of these culverts are not adequate to pass fish. USFS, *Annual Monitoring and Evaluation Report for Fiscal Year 1998*, at 22 ("10 percent may not be adequate"; "75 percent are assumed inadequate to pass fish at all design flows").

The problem with culverts is not limited to the Petersburg district. A recent effectiveness monitoring study in Hoonah, Alaska, revealed that from a total of 13 Class I stream culvert crossings identified "all of these . . . were judged to have characteristics that impede upstream migration by adult and/or juvenile anadramous fish." See Riley & Paustian, *Fish Passage at Selected Culverts Crossings on the Hoonah District Road System* (March 23, 1999), at 1–2. In addition, 17 of the 19 Class II culvert crossings surveyed were "judged to be partial or complete upstream migration barriers for resident fish species." *Id.*

It is worth repeating that where timber companies and States and getting the job done to protect water quality, EPA's silviculture proposal will not apply. EPA's proposal is necessary because unfortunately the job is not getting done in many places.

V. THE CLEAN WATER ACT SUPPORTS EPA'S ACTION

Contrary to the claims of some, the CWA supports, even arguably requires, EPA's action. The CWA itself contains no exemption for silvicultural activities from the definition of "point source." The only explicit statutory exclusion from the definition of point source is for agricultural stormwater discharges and return flows from irrigated agriculture.[2]

Courts have consistently found that the list provided in the CWA's definition of point source is not exhaustive. See, e.g., *Kennecott Copper Corp.* V. *EPA*, 612 F.2d 1232, 1243 (10th Cir. 1979) (Congress defined "point source" broadly so that it would be applicable to thousands of contemplated point sources, not all of which would possibly be enumerated); *U.S.* v. *Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) (Congress defined point source broadly to include "any identifiable conveyance from which pollutants might enter the waters of the United States").

Courts have also held that the definition of point source should be interpreted broadly to further the purposes of the CWA. *Earth Sciences*, 599 F.2d at 373 ("We believe it contravenes the intent of FWPCA and the structure of the statute to exempt from regulation any activity that emits pollution from an identifiable point."); *Quivira Mining Co.* v. *EPA*, 765 F.2d 126, 129–30 (10th Cir. 1985), cert. denied, 474 U.S. 1055 (1986)("it was the clear intent of Congress to regulate waters of the United States to the fullest extent possible"); *Community Ass'n for Restoration of the Environment* v. *Sid Koopman Dairy*, 54 F.Supp.2d 976, 981 (E.D.Wash. 1999) (manure spreading operations considered point source to further clear intent of Congress in the CWA to insure that animal wastes do not pollute the water of the United States); *Washington Wilderness Coalition* v. *Hecla Mining Co.*, 870 F.Supp. 983, 988 (E.D. Wash. 1994) ("'point source' must be interpreted broadly to effectuate the remedial purposes of the CWA"). The CWA's purpose is to restore and maintain the quality of the nation's waters.[3] Regulating silvicultural activities that meet the statutory definition of point source and which convey pollutants, such as sediment, into impaired streams furthers this purpose.

In the absence of clear statutory language excluding silvicultural activities from the definition of point source, EPA has the authority to include them. In *NRDC* v. *Costle*, the U.S. Court of Appeals for the D.C. Circuit explicitly held that "the power to define point and nonpoint sources is vested in EPA." 568 F.2d 1369, 1382 (D.C.Cir. 1977). This is consistent with the deference courts have given to agency interpretations of broad statutory language. See, e.g., *Chevron U.S.A. Inc.* V. *NRDC*, 467 U.S. 837, 842–45 (1984) (if the statute is silent or ambiguous with respect to a specific issue, the question for the court is whether the agency's answer is reasonable).

Since the only basis for the current categorical exemption of most silvicultural activities from the definition of point source is an EPA regulation, EPA has the authority to change this regulation as long is such change has a rational basis. *Chevron*, 467 U.S. at 863–64 ("An initial agency interpretation is not instantly carved in stone. . . . [T]he agency . . . must consider the wisdom of its policy on a continuing basis."); *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983) (recognizing that "[r]egulatory agencies do not establish rules of conduct to last forever" and must be given "ample latitude" to adapt their rules and policies); *Center for Science* v. *Department of Treasury*, 797 F.2d 995, 998–1000

[2] 33 U.S.C. § 1362(14).
[3] 33 U.S.C. 1251(a).

(D.C.Cir. 1986) (noting that an agency may change its course with or without a change in circumstances as long as it provides a reasoned analysis).

As explained above, eliminating the point source exemption for most silvicultural activities is necessary to address water quality problems in many areas of the country. Logging and logging roads have introduced high volumes of sediment into streams and changed natural streamflow patterns. Silvicultural activities have contributed to the impairment of numerous water bodies. In order to meet their obligations under the CWA to restore and maintain the quality of the nation's waters, EPA and the States must be able to limit silvicultural discharges.

While some silvicultural activities may fall outside the statutory definition of point source, others do not. Courts have characterized point sources as those activities that can be isolated as the source of pollution. *Earth Sciences*, 599 F.2d at 371; *Avoyelles Sportmen's League, Inc.* V. *Marsh*, 715 F.2d 897, 922–25 (5th Cir. 1983) (vehicles, such as bulldozers, involved in land clearing activities are point sources); *Beartooth Alliance* v. *Crown Butte Mines*, 904 F.Supp. 1168, 1173 (D.Mont. 1995) (nonpoint sources are limited to uncollected runoff which is difficult to ascribe to a single polluter).

In some cases, it is certainly possible to identify silvicultural activities as point sources that cause water impairment. Sediment from logging and logging roads may be conveyed into streams and other waters during storm events through channels or ditches. The Tennessee skid trail is a good example of the kind of silviculture activity that falls within the statutory definition of point source. In these cases, it is entirely appropriate, and in fact legally required by the CWA, to require an NPDES permit.

Eliminating the silviculture exemption as proposed does not unlawfully preempt State authority. While Section 319 of the CWA gives States primary responsibility for the development non-point source controls, EPA's proposal only addresses point sources. EPA proposes to change the regulatory definition of "silvicultural point source" to eliminate the categorical exclusion of most silvicultural activities. Any regulation of silvicultural activities would still be limited to those activities that fall within the statutory definition of point source.[4]

No previous case law bars EPA's action. Given the existing regulatory silviculture exemption from the definition of point sources, courts have not had to address the issue of whether a particular silvicultural activity falls within the statutory definition of point source. Courts have deferred to EPA's previous decision to exclude silvicultural activities from point source controls. Likewise, courts will defer to EPA's decision now to include silvicultural activities as long as a rational basis exists for doing so.

Where Congress intended to exclude silvicultural activities from CWA requirements it explicitly did so. For example, in Section 404 of the CWA regulating the discharge of dredged or fill material, Congress listed "silviculture," in addition to and separate from "farming."[5] Also in Section 404, Congress listed "forest roads," in addition to and separate from "farm roads."[6] In contrast, the exception from the statutory definition of "point source" is limited to "agricultural stormwater discharges and return flows from irrigated agriculture."[7] Congress did not include silviculture in the exemption. Consequently, it should not be read into the exemption. See *Indep. Bankers Ass'n of Am.* V. *Farm Credit Admin.*, 164 F.3d 661, 667 (D.C.Cir. 1999) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

VI. NON-POINT SOURCES SHOULD BE INCLUDED IN THE TMDL PROCESS

As explained above, EPA's silviculture proposal does not require permits from non-point sources. In fact, nothing in EPA's proposed changes to the TMDL and NPDES rules requires permits from non-point sources. EPA has acknowledged that States have the primary responsibility to regulate non-point sources. The TMDL process is a critical mechanism for ensuring that controlling pollution from non-point sources is efficient and effective. The TMDL process will accomplish little if it does not consider pollution from non-point sources.

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[4] See 33 U.S.C. 1362(14).
[5] 33 U.S.C. 1344(f)(A).
[6] 33 U.S.C. 1344(f)(E).
[7] 33 U.S.C. 1362(14).

Excluding non-point sources from a program designed to address aggregate pollution rather than discrete sources would make virtually no sense. The purpose of the TMDL program is to address situations where point source controls have not done the job in meeting water quality standards. Section 303(d) requires each State to identify waters where technology-based controls (i.e., the effluent limitations applicable to point sources under Section 301) are inadequate to attain water quality standards. Unfortunately, in many circumstances, control of point sources alone is insufficient to meet water quality standards.[8] Approximately 90 percent of the waters listed by States as impaired fail to meet water quality standards at least in part as a result of polluted runoff from diffuse or non-point sources. Approximately half of all impaired water bodies violate water quality standards as a result of non-point sources alone. Excluding these waters from the TMDL program would simply ignore the problem rather than provide an effective means of restoring water quality.

Moreover, excluding non-point sources from the TMDL process would unfairly continue to force point sources to bear the lion's share of the water pollution control price tag despite clear evidence that non-point sources contribute substantially, and in many watersheds exclusively, to water body impairment. For this reason, several industries strongly support inclusion of non-point sources in the TMDL program. The Association for Metropolitan Sewerage Agencies (AMSA), for example, has urged Congress to support EPA's plan to expand the regulation of non-point sources through the TMDL program. In a January 20, 2000, letter to this committee, AMSA described inclusion of non-point sources in the TMDL program as "critical to the success of the Clean Water Act."

Finally, the protracted schedule for listing and completion of TMDLs in the proposed regulations would be entirely unnecessary, and in fact would constitute unreasonable and unlawful delay of an already-overdue program, if it were limited to the comparatively easy task of identifying and quantifying point source wasteload allocations. The proposed regulations provide States 15 years, 2 years beyond the current 13-year schedule, to establish TMDLs for waterbodies listed as impaired. If the TMDL process only involved point sources, there would be little reason for such a long time period to develop TMDLs.

From a legal perspective, EPA is well within its authority, if not subject to a legal duty, to include non-point sources in this program. Section 303(d)(1)(A) requires States to identify all waters for which technology-based pollution controls are not sufficient to implement any applicable water quality standard. Section 303(d)(1)(C), in turn, requires the development of TMDLs for all of the waters identified under (d)(1)(A). The only waters explicitly excluded from TMDL process are those that have attained water quality standards. All other waters must be addressed and for them to be addressed effectively non-point sources must be included in the mix of regulatory and non-regulatory controls.

While the legislative history of Section 303(d) is sparse, it clearly reflects that Congress understood that non-point sources contribute substantially to the pollution of many watersheds and should be taken into account in the TMDL process.[9] As Oliver Houck, a Professor of Law at Tulane Law School, has written:

> The only logical interpretation of [the] legislative history behind section 303(d) is that nonpoint sources were a big fact of life in achieving water quality standards, and they would have to be included in the assessments of polluted waters and their TMDL allocations. Were they not included, a process to ensure that municipal and industrial limits were "consistent with water quality standards" would make no sense; it, literally, could not be done.[10]

The argument that the TMDL program is intended solely to identify additional point source controls is inconsistent with the CWA. Such interpretation undermines the CWA's purpose to restore and maintain the quality of the nation's waters.[11] A program that ignores 90 percent of the problem cannot be said to be consistent with restoring the quality of the nation's waters. Courts avoid interpreting a statute in a way that would produce an illogical or unreasonable result. See, e.g., *In re Pacific-Atlantic Trading Co.*, 64 F.3d 1292, 1303 (9th Cir. 1995). If Congress had intended to limit the TMDL program to point sources, it would have explicitly done so. Congress used the term "point sources" repeatedly throughout the CWA and could have limited Section 303(d)'s application to point sources if it so chose, but it did not.

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[8] 33 U.S.C. 1313(d)(1)(A).
[9] H.R. Rep. No. 92–911, at 105 (1972).
[10] Houck, Oliver A., *TMDLs: The Resurrection of Water Quality Standards-Based Regulation Under the Clean Water Act*, 27 Envtl. L. Rep. 10329, 10337 n. 100 (1997).
[11] 33 U.S.C. 1251(a).

Contrary to critics of EPA's proposal, the Agency makes no attempt to regulate non-point sources. A critical distinction exists between the identification of non-point sources in a TMDL and regulation of non-point sources. A TMDL provides a "pollution budget," i.e., the amount of a particular pollutant that a water body can bear and still meet water quality standards. Identifying all the sources, both point and non-point, of a pollutant is essential to completing the pollution budget. A TMDL is also designed to allocate the budget, or maximum load, among the various sources affecting the water body. A State's decision to allocate load reductions to non-point sources does not bring that operator into a permit or regulatory program. Under EPA's proposal, a State may choose a broad range of controls, including voluntary or incentive-based actions, to ensure that the allocations for non-point sources are met.

VII. CONCLUSION

In my testimony, I have tried to explain the limited impact of EPA's silviculture proposal—that it only applies to activities which meet the statutory definition of a point source and are known to contribute to water quality impairment. EPA's proposal would not apply to timber companies and States that are getting the job done to maintain and restore water quality. However, in many places the job unfortunately is not getting done. It is these places where water quality is impaired as a result of logging or logging roads that make EPA's proposal necessary. I have also tried to explain the importance of including non-point sources in the TMDL program. I hope that Congress will recognize the need for EPA's proposal and support the Agency's efforts to ensure clean water for all Americans.

Thank you for the opportunity to testify. I would be happy to answer any questions that you may have.

ATTACHMENT 1

Over 200 Organizations Oppose Clean Water Act Special Interest Loopholes (H.R. 3609, S. 2041 and S. 2139)

March 9, 2000.

DEAR SENATORS AND REPRESENTATIVES: We—the attached 207 organizations and 76 individual citizen clean water advocates—strongly oppose legislative proposals recently introduced in the House and Senate that would create a huge new special interest loophole in the Clean Water Act for forest industries that pollute our nation's rivers, streams, lakes and oceans.

Our organizations represent hundreds of thousands of members who use the nation's waters for recreational, commercial and subsistence purposes. These new bills, H.R. 3609, S. 2041 and S. 2139, would threaten the water quality that our members and the American public rely on for these important uses. We not only object to the substance of these bills, we are concerned by reports that they might emerge as a legislative rider on an appropriations bill—a particularly inappropriate backdoor strategy for attempting to overturn a longstanding provision of the Clean Water Act. We ask you to oppose this anti-environmental legislation, whether it is in the form of a stand-alone bill or a rider.

In sum, these bills would create an unprecedented statutory exemption from the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) for logging activities that cause point source discharges into waters of the United States. These bills have been spurred by an aggressive misinformation campaign about a recent rule change proposed by the Environmental Protection Agency (EPA) that would require certain point source discharges from silvicultural activities to obtain NPDES permits. The proposed rule would require that logging-related direct discharges get NPDES permits only under certain narrow circumstances, including when such discharges are causing significant pollution of waters that are already too polluted. Contrary to the rhetoric of those opposing this rule, EPA's proposal only addresses point sources—it does not purport to regulate non-point sources—and regulation of these point sources is not inconsistent with the Agency's authority under the Act.

The Clean Water Act contains no exemption from the definition of "point source" for silvicultural activities. Although EPA has not treated most silviculture activities as point sources in the past, the Agency has found that an automatic exemption in EPA's rules is no longer appropriate if we are to achieve the Clean Water Act's goal of fishable and swimmable waters. In those cases where a forestry-related practice meets the statutory definition of "point source" and the activity is a significant source of water pollution, EPA and the States must be able to regulate and control pollution from that activity. Any regulation of logging pollution would still be limited to those activities that already fall within the statutory definition of "point source." Logging and logging roads degrade water quality in many parts of the country. Numerous scientific studies have documented the serious harm to water quality and aquatic ecosystems that can be caused by logging practices and logging roads. Roads and logging can significantly pollute and even destroy stream ecosystems by introducing high volumes of sediment and nutrients into streams, changing natural stream flow patterns, and damaging vital aquatic habitats. Eliminating the automatic exemption from point source regulation for silvicultural activities that have point source discharges is necessary to address water quality problems in many States.

Regardless of your view of EPA's current rulemaking proposal, there is no legal or public policy justification for the environmentally destructive loophole in the Clean Water Act that H.R. 3609, S. 2041 and S. 2139 advance. These bills would weaken one of our nation's most successful environmental laws for the benefit of a few forestry companies at the expense of clean water. Please stand up for clean water and responsible forestry practices by opposing H.R. 3609, S. 2041, S. 2139 and any related anti-environmental rider that would exempt silviculture point source pollution from the Clean Water Act.

Sincerely,

Brad McLane, Alabama Rivers Alliance, Birmingham, AL; Beth K. Stewart, Cahaba River Society, Birmingham, AL; Kenneth Wills, Alabama Environmental Council, Birmingham, AL; Dan Murchison, Chilton Pride, Chilton County, AL; Gershon Cohen, Earth Island Institute, Haines, AK; Bob Shavelson, Cook Inlet Keeper, Homer, AK; Shawn Porter, Arkansas Watershed Alliance, AR; Bill Kopsky, Arkansas

Public Policy Panel, Little Rock, AR; Nick Zunick, Senior Patrol Leader, Boy Scout Troop Fifteen, Hot Springs, AR; David Reagan, Ouachita Watch League, Hot Springs Nat'l. Pk., AR; Mariah Myers, Sierra Student Coalition, University of Arkansas, Fayetteville, AR; Robert Lippman, Glen Canyon Action Network, Flagstaff, AZ; Barbara Vlamis, Butte Environmental Council, Chico, CA; Michael McFarland, Fresno Audubon Society, Fresno, CA; Kyle Haines, Klamath Forest Alliance, Etna, CA; Patricia McCoy, Southwest Interpretive Association, Imperial Beach, CA; Mary Bull, Save the Redwoods/ Boycott the Gap Campaign, Fort Bragg, CA; Craig Thomas, Center for Sierra Nevada Conservation, Georgetown, CA; Robin Mayer, Magic, Stanford, CA; Stephen Sayre, Lassen Forest Preservation Group, Chico, CA; Vivian Parker, Shasta Chapter, California Native Plant Society, Kelsey, CA; Tarren Collins, Santa Lucia Chapter/Sierra Club, Atascadero, CA; Kent Stromsmoe, Forestry Monitoring Project, Martinez, CA; Geoffrey Smith, Sierra Club, San Diego Chapter, San Diego, CA; Britt Bailey, Center for Ethics and Toxics, Gualala, CA; Steve Nicola, California Indian Basketweavers Association, Nevada City, CA; Wendy Blankenhiem, Community Action Network, Medocino, CA; Jonathan Kaplan, WaterKeepers Northern California, San Francisco, CA; Dr. Rob Schaeffer, SAFE: Save Our Ancient Forest Ecology, Modesto, CA; Jess Morton, Audubon-Palos Verdes/South Bay, San Pedro, CA; Ara Marderosian, Sequoia Forest Alliance, Weldon, CA; Christine Ambrose, Citizens For Better Forestry, Arcata, CA; Mary Ann Matthews, State Forestry Coordinator, California Native Plant Society, CA; Chris Maken, Concerned Citizens for Napa Hillsides, Napa, CA; Redwood Mary, Plight of The Redwoods Campaign, Ft. Bragg, CA; Tom Wodetzki, Alliance for Democracy, Mendocino Coast Chapter, Albion, CA; Jean Crist, Protect Our Watershed, Magalia, CA; Chris Poehlmann, Gualala River Improvement Network, Annapolis, CA; Patricia M. Puterbaugh, Lassen Forest Preservation Group, Chico, CA; Christopher M. Papouchis, Animal Protection Institute, Sacramento, CA; Irvin Lindsey, Outdoor Science Exploration, Santa Cruz, CA; Steve Sugarman, Social & Environmental Entrepreneurs, Malibu, CA; Alan Levine, Coast Action Group, Point Arena, CA; Holly Hannaway, LightHawk, Aspen, CO; Harlin Savage, American Lands Alliance, Boulder, CO; Jacob Smith, Wildlands Center for the Prevention of Roads, Boulder, CO; Jon Jensen, Center for Native Ecosystems, Boulder, CO; Sloan Shoemaker, Aspen Wilderness Workshop, Aspen, CO; Annie White, CU-Sinapu, Boulder, CO; Steve Glazer, High Country Citizens' Alliance, Crested Butte, CO; Jeffrey A. Berman, Colorado Wild, Boulder, CO; Margaret Miner, Rivers Alliance of Connecticut, Collinsville, CT; Sharon Buccino, Natural Resources Defense Council, Washington, DC; Steve Holmer, American Lands Alliance, Washington, DC; Ed Hopkins, Sierra Club, Washington, DC; Joan Mulhern, Earthjustice Legal Defense Fund, Washington, DC; Courtney Cuff, Friends of the Earth, Washington, DC; Brock Evans, Federation of Western Outdoor Clubs, Washington, DC; Catrina Ciccone, Lutheran Office for Governmental Affairs, Evangelical Lutheran Church in America; Washington, DC; Nick Brown, World Wildlife Fund, Washington, DC; Aaron Viles, U.S. PIRG, Washington, DC; Mike Leahy, National Audubon Society, Washington, DC; Amy Lesser, Center for Environmental Citizenship, Washington, DC; Rebecca Wodder, American Rivers, Washington, DC; James S. Lyon, National Wildlife Federation, Washington, DC; Tim Eichenberg, Center for Marine Conservation, Washington, DC; Brock Evans, The Endangered Species Coalition, Washington, DC; Doug Sloane, Southeast Forest Project, Washington, DC; Mary Beth Beetham, Defenders of Wildlife, Washington, DC; Ted Morton, American Ocean Campaign, Washington, DC; Karsten A. Rist, Tropical Audubon Society, Miami, FL; Beth Frazer, Community Watershed Project, Athens, GA; Doug Haines, Georgia Legal Watch, Athens, GA; Ohana Foley, Student Peace Action Network, Haiku, HI; Linda Appelgate, Iowa Environmental Council, IA; Marti L.Bridges, Idaho Rivers United, Boise, ID; G.A. Bailey, Selkirk-Priest Basin Association, Priest River, ID; Liz Sedler, Alliance for the Wild Rockies, Sandpoint, ID; J. Dallas Gudgell, Idaho Conservation League, Boise, ID; Lee Halper, Land, Air & Water Society, Jerome, ID; Chuck

Pezeshki, Clearwater Biodiversity Project, Moscow, ID; Lynne Stone, Boulder-White Clouds Council, Ketchum, ID; Katie Fite, Committee for Idaho's High Desert, Boise, ID; Albert Ettinger, Environmental Law and Policy Center of the Midwest, Chicago, IL; Frank Ambrose, Indiana Forest Alliance, Bloomington, IN; Tom Anderson, Save the Dunes Council, Michigan City, IN; Cliff Smedley, Stewards of the Land, Johnson, KS; Larry Zuckerman, Pure Water For Kansas, Program of the Kansas Wildlife Federation, Pretty Prairie, KS; Cheryl Bersaglia, Upper Cumberland Watershed Watch, McKee, KY; Liz Natter, Democracy Resource Center, Lexington, KY; Jan Jennemann, Mercer Water Watch, Salvisa, KY; Coleman Smith, Citizens Environmental Defense League, Bowling Green, KY; Judith D. Petersen, Kentucky Waterways Alliance, Munfordville, KY; Barbara Warner, Marion County Water Watch, Lebanon, KY; Jill Mastrototaro, Lake Pontchartrain Basin Foundation, Metairie, LA; Cyn Sarthou, Gulf Restoration Network, New Orleans, LA; Michael Kellett, RESTORE: The North Woods, Concord, MA; Pine DuBois, Jones River Watershed Association, Kingston, MA; Josh Kratka, National Environmental Law Center, Boston, MA; Ed Himlan, Tom Spiro, and Brandon Kibbe, The Massachusetts Watershed Coalition, MA; Kai Newkirk, E.A.R.T.H. (Ecologically Aware and Responsible Together at Hampshire), Amherst, MA; Laura Rose Day, Natural Resources Council of Maine, Augusta, ME; Ray Fenner, Superior Wilderness Action Network, St. Paul, MN; Nancy Clay Madden, MS Coast Audubon Society, Jackson, MS; Larry Smith, Pine Woods Audubon, Hattiesburg, MS; Judi Brawer, American Wildlands, Bozeman, MT; Joe Gutkoski, Montana River Action Network, Bozeman, MT; Jeff Juel, The Ecology Center, Inc., Missoula, MT; Robin Cunningham, Montana Fishing Outfitters Conservation Fund, Gallatin-Gateway, MT; Cold Mountain, Cold Rivers, Missoula, MT; Cesar Hernandez, Flathead Chapter of the Montana Wilderness Association, Kalispell, MT; Larry Campbell, Friends of the Bitterroot, Hamilton, MT; Elizabeth O'Nan, Protect All Children's Environment, Marion, NC; Dan Whittle, North Carolina Environmental Defense, Raleigh, NC; Cathie Berrey, Katuah Earth First!, Asheville, NC; Rick Dove, Neuse RIVERKEEPER, New Bern, NC; Marion Smith, Neuse River Foundation, New Bern, NC; Andrew George, Southern Appalachian, Biodiversity Project, Asheville, NC; Ginger Bush, Rockingham County Watershed Preservation Coalition, Inc., Colfax, NC; Hope C. Taylor, Clean Water Fund of NC, Asheville, NC; Meredith McLeod, Hickory Alliance, Chapter of the Blue Ridge Environmental Defense League, Greensboro, NC; Robert Perks, Pamlico-Tar River Foundation, Washington, NC; John Runkle, Conservation Council of NC, Raleigh, NC; Candice Carr, ASHE, Active Students for a Healthy Environment, Asheville, NC; Jean Spooner, NCSU Water Quality Group, North Carolina State University, Raleigh, NC; Chuck Rice, North Carolina Wildlife Federation, NC; Nancy L. Girard, New Hampshire Conservation Law Foundation, Concord, NH; Marie A. Curtis, New Jersey Environmental Lobby, Trenton, NJ; Harold E. Taylor, Pompeston Creek Watershed Association, Cinnaminson, NJ; Hugh Carola, The Fyke Nature Association, Ramsey, NJ; Julia M. Somers, Great Swamp Watershed Association, New Vernon, NJ; Karen R. Halliday, New Mexico Wilderness Alliance, Albuquerque, NM; Kerry Sullivan, Natural Resources Protective Association, Staten Island, NY; Day Star Chou, Flushing Greens, Green Party of NY, NY; Kathrn Martini and Tara Kehoe, HEART, Syracuse, NY; Gordon Douglas, Friends of the Great Swamp, Pawling, NY; Jennifer Nalbone, Great Lakes United, Buffalo, NY; Manna Jo Greene, Hudson Valley Sustainable Communities Network, Cottekill, NY; William Peltz, Capital District Labor-Religion Coalition Albany, NY; Erik Holland, Civilian Filibuster, Reno, NY; Jason Tockman, Buckeye Forest Council, Athens, OH; Margaret Ruff, Oklahoma Wildlife Federation, Oklahoma City, OK; Judy Guise-Noritake, Pacific Rivers Council, Eugene, OR; John Taylor, Sisklyou Audubon Society, Grants Pass, OR; Michael Donnelly, Friends of Breitenbush Cascades, Salem, OR; Dominick Dellasalla, World Wildlife Fund, Klamath-Siskiyou Region, Ashland, OR; Tom Burns, Concerned Friends of the Winema, Chiloquin, OR; John E. Barry, Range Ecology Group, La Grande, OR; P. Sydney Herbert, Or-

egon Shores Conservation Coalition, Portland, OR; George Hutchinson, Rogue Group and Oregon Chapter Sierra Club, OR; Nina Belk Northwest Environmental Advocates, Portland, OR; Claudia McCue, Corvallis Area Forest Issues Group, Monroe, OR; Donald Fontenot, Cascadia Forest Alliance, Portland, OR; Shannon Wilson, Many Rivers Group Sierra Club, Eugene, OR; Ric Bailey, Hells Canyon Preservation Council, La Grande, OR; Tom Dimitre, Headwaters, Ashland, OR; Jim Britell, Kalmiopsis Audubon Society, Port Orford, OR; Nathan Tublitz, Eugene Natural History Society, Eugene, OR; Susan Jane Brown, Northwest Environmental Defense Center, Portland, OR; Lovenia Warren, Salmon for All, Astoria, OR; Jay Letto, Central Cascades Alliance, Hood River, OR; Lisa P. Brenner, Oregon Clearinghouse for Pollution Reduction, Portland OR; Mary Ann Lucking, CORALations, Inc. Carolina, PR; Kathy McDeed, South Carolina Forest Watch, Westminster SC; Wendy Smith, World Wildlife Fund—Southeast Rivers, Nashville, TN; Donald B. Clark, United Church of Christ, Network for Environmental & Economic Responsibility, Pleasant Hill, TN; Rev. Walter Stark, Cumberland Countians for Peace & Justice, Pleasant Hill, TN; Louise Gorenflo, Obed Watershed Association, Crossville, TN; Edward C. Fritz, Texas Committee on Natural Resources, Dallas, TX; Live Oak Alliance, Austin, TX; Theodore C. Mertig, Environmental Action, EI Paso, TX; James Facette, Center for Social Justice and Global Awareness, San Antonio, TX; Denise Boggs, Utah Environmental Congress, Salt Lake City, UT; Steve Moyer, Trout Unlimited, Arlington, VA; Jack Dunavant, Southside Concerned Citizens, Halifax VA; David Bookbinder, American Canoe Association, Springfield, VA; Tim SanJule, Rivanna Conservation Society, Palmyra, VA; Shenandoah Ecosystems Defense Group, Charlottesville, VA; Dave Muhly, Virginia Forest Watch, Wytheville, VA; Detta Davis, The Clinch Coalition, Coeburn, VA; Jackie Hanrahan, Coalition for Jobs and the Environment, Abingdon, VA; Richard Flint, Committee for Improvement of Dickenson County Inc., Clintwood, VA; Rick Parrish, Southern Environmental Law Center, Charlottesville, VA; Dick Austin, Devil's Fork Trail Club, Dungannon, VA; Christopher M. Kilian, Conservation Law Foundation, Montpelier, VT; Job C. Heintz, Vermont Natural Resources Council, Montpelier, VT; Wally Elton, Ascutney Mountain Audubon Society, Springfield, VT; Stephen Crowley, Vermont Chapter of the Sierra Club, South Burlington, VT; Jim Northup, Forest Watch, Montpelier, VT; Brady Engvall' Friends Of Grays Harbor, Westport, WA; Greg Wingard, Waste Action Project, Seattle, WA; David Jennings, Gifford Pinchot Task Force, Olympia, WA; Helen Ross, Seattle Audubon Society, Seattle, WA; Joe Scott. Northwest Ecosystem Alliance, Bellingham, WA; Dr. Herbert Curl, Jr, Seattle Audubon Society, Seattle WA; Susan Crampton, Methow Forest Watch, Twisp, WA; Timothy J. Coleman, Kettle Range Conservation Group, Republic, WA; Bill Hallstrom, Green-Rock Audubon Society, Beloit, WI; David J. Zaber Wisconsin's Environmental Decade, Madison, WI; Eric Uram, Sierra Club Midwest Office, Madison, WI; David J. Zaber. Western Lakes Wildlife Center, Monona, WI; Dr. Margaret Janes, Potomac Headwaters Resource Alliance, Mathias, WV; Mr. Francis D. Slider, Mountaineer Chapter of Trout Unlimited, Buckhannon, WV; Jim Summers, West Virginia B.A.S.S. Federation, Worthington, WV; Dianne Bady, Ohio Valley Environmental Coalition, Huntington, WV; Dan Heilig, Wyoming Outdoor Council, Lander, WY; Jonathan B. Ratner, Sublette Riders Association, Pinedale, WY; Danna Smith and Douglas Sloane, Dogwood Alliance, Southeastern United States.

INDIVIDUAL CLEAN WATER ADVOCATES

Wanda B. Stephens, Fayetteville, AR
Holly Ferguson, Fayetteville, AR
Moira Johnston Block and Alvin Lee Block, M.D., CA
Cory Chew, Los Angeles, CA
Cralan Deutsch, CA
Kirk Mobert, Point Arena, CA
Heidi Marshall, Point Arena, CA
Thomas Davis, Napa, CA
Lucy Kenyon, Santa Rosa, CA
Holly Mitten, Moss Beach, CA
Mary Knight, Willits, CA

Anthony Morris, Willits, CA
Talia Eisen, Los Angeles, CA
Kathie Lech, Willits, CA
Fred and Phyllis Mervine, Ukiah, CA
Elise Kelley, Davis, CA
Rainer Hoenicke, Napa, CA
David H. Walworth, MD, Soqiel, CA
James Woods, Penn Valley, CA
Diane Solomon, C.P.A., San Jose, CA
Meade Fischer, Corralitos, CA
Eric Sunswheat, Potter Valley, CA
Douglas F. Wallace, Ft. Collins, CO
Tom Dickinson, Boulder, CO
Estelle Gahn, Fort Collins, CO
Daniel Mandelbaum, Washington, DC
Benna Kolinsky, Washington, DC
Marc Goncher, Atlanta, GA
Jason Barringer, Atlanta, GA
Ernest L. Horton, Marietta, GA
Renuka Dhungana, Marietta, GA
Marion B. Hilliard, Orange Park, FL
Chris Norden, Moscow ID
Monte D. Wilson, Potlatch, ID
Leslie A. Manskey, Bloomington, IL
Robert E. Rutkowski, Esq., Topeka, KS
Tina Montgomery, Louisville, KY
Carrie DeJaco' Louisville, KY
Melanie Hurst, Louisville, KY
Owen Muise, Plymouth, MA
Cynthia S. Brown, PhD., Saint Paul, MN
J.F.Puckett, MD, Hattiesburg, MS
Tom Mattison, Jacksonville, NC
James L. Conner II, Durham, NC
Peter and Margaret Schubert, Durham, NC
John Colvin, Albuquerque, NM
Karen McCue, Albuquerque, NM
Colin Sillerud, Albuquerque, NM
Dorothy D. Meyerink, Henrietta, NY
Joel Clark Mason, Chappaqua, NY
Mr. Bobbie D. Flowers, New York, NY
Carol Witbeck, Clackamas, OR
Peter M. Lavigne, Portland, OR
Megan Kemple, Eugene, OR
John Thornton, Grants Pass, OR
Ann Easterly, Oregon City, OR
Connie Earnshaw, Portland, OR
Catherine Thomasson, MD, Portland, OR
Kay Ryan Biondo, Waldport, OR
Shirley L. Brown, Sublimity, OR
Richard Katz Do, East Stroudsburg, PA
Kim Danley, Salt Lake City, UT
Marilyn Dinger, Kaysville, UT
Judy Strang, Monroe, VA
Peter H. Richardson, Norwich, VT
Dave Robinson, Curlew, WA
Marva E. Schuelke, Everett, WA
Liz Marshall, Mount Vernon, WA
Carol Melton, Seattle, WA
Jerry Burke, Petersburg, WV
Lou Schmidt, Bristol, WV
Vince Dudley, Charleston, WV
Charles "Larry" Harris, Morgantown, WV

NOTE: other attachments are kept in committee files.

STATEMENT OF ROB OLSZEWSKI, DIRECTOR, ENVIRONMENTAL AFFAIRS, THE TIMBER COMPANY, ON BEHALF OF AMERICAN FOREST & PAPER ASSOCIATION

INTRODUCTION

Mr. Chairman, members of the committee, my name is Rob Olszewski and I am Director of Environmental Affairs for The Timber Company, which represents the timberland assets of Georgia-Pacific Corporation. I appreciate the opportunity to present my testimony today on behalf of the American Forest & Paper Association on the Environmental Protection Agency's (EPA) August 23 proposed regulations to revise the Total Maximum Daily Load (TMDL) program under Section 303(d) and modifications to the National Pollutant Discharge Elimination System (NPDES) permit program under Section 402 of the Clean Water Act. You will hear that these proposed rules are a radical departure from the existing Federal statute and case law. Mr. Chairman, as a member of the TMDL Federal Advisory Committee Act (FACA) group that met to develop guidance for the EPA on these water quality issues, I am struggling to see how the August proposal resembles much of the nonpoint source discussions held over one and one-half years. The August proposal is as monumental as reauthorization of the Clean Water Act—in fact we believe it is a reauthorization of the statute without your concurrence. The forestry community hopes your committee will view it that way given the enormous economic and administrative burdens that will be imposed on landowners, manufacturers and State agencies.

AF&PA is the national trade association of the pulp, paper and forest products industry. We represent approximately 84 percent of paper production, 50 percent of wood production and 90 percent of industrial forestland in the United States. Nationwide, there are approximately 8 million non-industrial private landowners who own 59 percent or approximately 288 million acres of the total productive timberland. After the forest products industry, the farming community owns the largest fraction of private timberlands in the country. The Timber Company owns land throughout the country including Arkansas, Virginia, Florida, West Virginia, South Carolina, Georgia, Louisiana, Oregon, North Carolina, California and Mississippi.

As stated, AF&PA represents the manufacturers of the country's paper supply who also have serious concerns with the proposals. While I will confine most of my remarks to the forestry components of the rule, I do want to highlight issues of concern to the manufacturing segment of our industry. The forestry community shares many of those concerns.

First, EPA needs to ensure that TMDL listings and TMDL development are based only on high quality data. While the proposal's requirement that States develop a listing methodology is an excellent start, it does not go far enough. Second, EPA should provide a clear procedure to take waters that meet certain criteria off the impaired waters list between State listing cycles, especially if EPA extends the listing cycle to 4 or 5 years. In light of the harsh regulatory consequences that result from listing, such as offset requirements and other interim restrictions before TMDLs are developed, the proposals should ensure that only waters truly in need of TMDL development remain on the list. Finally, an issue I will discuss in more detail from the forestry perspective is that of implementation plans. EPA's criteria for TMDL approval will result in the Agency rejecting more State-developed TMDLs, with EPA issuing Federal implementation plans (and Federal permits) in their place. I will defer to the other witnesses testifying today to discuss these issue in more detail from the manufacturing perspective.

The proposed rules are a top-down Federal approach being imposed on States and private industrial and non-industrial forest landowners throughout the country. Some important stakeholders in the issue including the National Association of State Foresters, the U.S. Forest Service; the Society of American Foresters; and the agriculture and ranching community have serious concerns with the proposed rulemaking. In fact, I am unaware of any comments submitted by a State or Governor that supports the removal of forestry as a nonpoint source activity.

TWO ISSUES: FORESTRY REDESIGNATED AND TMDLS

Today I will discuss two particular issues contained in the August 23 proposals. The first issue deals with EPA's decision to abandon almost 30 years of statutory interpretation of the Clean Water Act and case law by eliminating the designation of forestry activities as a "nonpoint source" activity. The second describes how EPA selectively used the FACA group to impose indirect Federal oversight on activities conducted by millions of landowners throughout the country. Finally, I will address briefly how we believe the Federal EPA can assist States and communities in getting on-the-ground results to protect and maintain water quality nationwide.

Let me first explain the background of the existing regulation defining these forestry activities as nonpoint sources. In the original Clean Water Act (CWA) regulations, EPA chose to exclude certain activities, including all silvicultural activities, from the NPDES program, without regard to whether they were point sources. When environmental groups challenged this, the Federal courts ruled against EPA and ordered the agency to identify those activities that are point sources. EPA responded with rules in 1976 that identified four discrete activities associated with forestry operations as point sources. They concluded that everything else associated with forestry is a nonpoint source. By way of explanation, EPA stated in the proposed rulemaking that "the [Clean Water Act] and its legislative history make clear that it was the intent of Congress that most water pollution from silvicultural activities be considered nonpoint in nature" and be addressed under section 208 of the statute. 41 Fed. Reg. 6233, 6234 (February 12, 1976).

EPA has proposed to eliminate the following activities from categorization as a nonpoint source: nursery operations; site preparation; reforestation; cultural treatment; thinning; prescribed burning; pest and fire control; harvesting operations; surface drainage and; road construction and maintenance. Instead, EPA proposes to redefine them as point sources. The proposed rule would give EPA or NPDES-authorized States the authority to designate silvicultural activities as point sources requiring NPDES permits. The designation would be triggered when the State or EPA determines that the silvicultural activity "contributes to a violation of water quality standard or is a significant contributor of pollutants to waters of the United States." EPA states that it will only exert this authority in impaired waterbodies on a case-by-case basis where a State fails to develop a reasonable assurances program that BMPs can achieve load reductions in an impaired waterbody and the activities are not enforceable. In fact, EPA attempts to reassure the affected landowners by stating that it will only take 2 hours to prepare a notice of intent to file for a Federal permit. If the national forest system timber sales program is used as a guide, actually obtaining the Federal approval to conduct a harvesting operation is the real time question. Moreover, although EPA claims they will use this authority sparingly, this limitation does not apply to designations by States.

There are a tremendous number of administrative and legal issues consequences involved in developing and imposing permit requirements on forest landowners. For example, EPA lists some criteria for determining what constitutes a reasonable assurance program but withhold saying which programs are approvable. Other issues include how a permit would even be administered and the "miniscule" issue of an EPA permit program that triggers consultation under the Endangered Species Act. Further, AF&PA has a far different interpretation of the EPA's statutory authority under the Section 402(p) provisions we would like to include as part of the public record. Mr. Chairman, we are going down an abyss that will lead to staggering economic consequences.

LEGAL AUTHORITY

Not only does the forestry community disagree with the time required to obtain a permit, the reasonable assurance test and how it would work; the logic for requiring one is flawed. EPA provides two reasons for its change of interpretation. First, that the 1987 CWA amendments did not categorically exempt silvicultural activities from the stormwater program similar to the agricultural exclusion provision. Therefore, they assert the authority to "close the regulatory gap" and label all silvicultural activities as point sources. Second, Congress never explicitly stated that silviculture was a nonpoint source.

We believe these farming and forestry activities are "nonpoint" sources and there is no legal or statutory authority for EPA to revise the regulations by eliminating the nationwide recognition of forestry as a nonpoint source activity merely to address some unidentified last resort situations on an individual basis. AF&PA believes that the 1972 Act and its 1977 and 1987 amendments clearly intended not to regulate water pollution from most silvicultural activities through the Section 402 or 404 permit programs. In fact, the 1987 Amendments enacted the Section 319 provisions to specifically address nonpoint source runoff, including silvicultural activities, through a State-based best management practices program. The Section 319 1987 Amendments revised the Section 208 program that required States to develop "a process to . . . identify silviculturally related nonpoint sources of pollution" and set forth procedures and methods to control to the extent feasible such sources. In November 1990 EPA promulgated stormwater regulations 3 years after the 1987 Amendments were enacted. At that time, EPA declared that silvicultural point sources do not include the very same activities they claim today are point sources. In addition, an EPA Phase II stormwater report presented to Congress in 1995 did not identify silviculture activities as appropriate for regulation under the stormwater program. Similarly, EPA should not reverse its earlier positions in this proposed rulemaking, if they only took the time to review the forest water quality facts obtained from their own publications and contained in my statement.

Even more confounding, in 1977, Congress enacted the Section 404 discharge of dredged and fill provisions which specifically exempted the identical silviculture activities from the requirement to obtain permits. In the legislative report language of the 1977 statute, Congress stated: "construction of farm and forest roads is exempted from section 404 permits. The committee feels that permit issuances for such activities would delay and interfere with timely construction of access for cultivation and harvesting of crops and trees with no countervailing environmental benefit." In another passage of the same report, the committee states "no permits are required" for activities listed in Section 208(b)(2)(F) through (I) "for which there are approved best management practice programs." How can the same exact silviculture activities that are specifically exempt under one point source program be subject to Section 402 permits under another program? Mr. Chairman and members of the committee, the American people always thought it was the responsibility of the Congress of the U.S. to reauthorize statutes and enact laws, not the executive branch of government.

TOTAL MAXIMUM DAILY LOADS

The second issue was the only focus of the FACA. States identify impaired waters (those waters not meeting water quality standards) and establish priority rankings and develop total maximum daily loads (TMDLs) under Section 303(d) of the Clean Water Act. Heretofore, a TMDL has been a numeric calculation of the amount of pollutants a waterbody can receive from point source discharges, nonpoint source runoff, natural background; with a margin of safety. Setting aside the scientific difficulty of actually calculating a "daily" load from nonpoint source activities, the proposed rule requires States to submit an "implementation plan" under Section 303(d). The plan would contain not only the numeric calculation but also eight required elements including control actions and measures that must be implemented before

EPA would approve the TMDL. The big issue, and one that was unresolved in the FACA group report, is whether the implementation plan should be submitted for approval by EPA under Section 303(d) or submitted under 303(e). We do not believe that Section 303(d) provides EPA with the authority to require implementation plans, nor does it provide, as EPA contends in the proposal, that implementation plans can be approved, disapproved, or taken over by EPA. This is not a minor legal issue but one that has enormous consequence for private landowners.

For example, lets examine the situation where EPA rejects an implementation plan because the Agency does not believe the forest stream side zone (SMZ) management width requirement established by a multi-stakeholder State best management practices group is sufficient to protect water quality. The Agency, having given themselves the authority to take over the State program, is now free to re-write the implementation plan, change the State's SMZ requirement and then impose an NPDES permit requirement because the State allegedly does not have sufficient enforcement authority. This is not theoretical, but exactly the type of authority the Agency is proposing to grant to itself. Moreover, the Agency is exposing itself to countless citizen provisions if it does not exercise this authority to the satisfaction of environmental activists.

According to EPA's August 1997 Memorandum published in the Federal Register, "implementation of a TMDL depends on other programs and activities; a TMDL alone does not create any new or additional implementation authorities." The numeric TMDL itself must be approved by the EPA but no reading of the statute or its legislative history calls for the preparation and submission of an implementation plan under 303(d). We believe the continuing planning process described in the Clean Water Act's Section 303(e) provision is the implementation phase for the 303(d) listed stream segments.

ECONOMIC IMPLICATIONS

These rules will impose serious constraints on economic growth and opportunity in our rural communities. EPA's economic analysis accompanying these proposed rules claims that between 600 and 1200 landowners per year will be affected and total administrative costs to sources and EPA/States would fall between $3.72 and $13.22 million. Mr. Chairman, there is no way that the economic burden on landowners, loggers, State agencies and the Federal Government would be so limited. There are literally thousands of silvicultural "events" in each State every year. According to AF&PA's assessment, supported by the work of five independent forest economists at well-respected academic institutions around the country, the incremental economic burden to landowners, operators, communities and government agencies could easily exceed $1 billion annually, nationwide. The administrative costs alone of an NPDES program for silviculture, even in the unlikely event that it would be invoked sparingly, would exceed EPA's estimates by several folds. Because the economic impact will far exceed $100 million annually, EPA must comply with the Unfunded Mandates Reform, Executive Order 12866, and the Regulatory Flexibility Act by conducting a more detailed and comprehensive benefit-cost economic analysis of the proposed rule.

PROGRESS IMPROVING WATER QUALITY

EPA contends that because silviculture activities are a cause of water quality impairment this gives them discretionary license to label such activities as point sources. While the forestry community recognizes that we are not perfect and we can improve our performance, the fact that silviculture can cause water quality impairment provides no justification to reverse 30 years of congressional writings. The EPA citation of silviculture's impact on water quality is selective and in some cases directly contradicts reports accompanying the proposed regulations. Every State with significant forest management activities has developed forestry best management practices or rules and submitted them to the Agency as part of the Section 319 nonpoint source program. The most recent publicly available data from EPA's website, the 1996 national TMDL tracking data base, indicates that only 11 States listed silviculture as the cause of impairment on their Section 303(d) list of impaired waterbodies where total maximum daily loads would actually have to be performed. These are the only waterbodies where the Agency purports the rule will apply. Further, almost two-thirds of the stream segments listed were from one State. Placing these numbers into perspective and upon closer examination of the Federal and State reports, the following information clearly reveals that forestry is a relatively minor cause of water quality impairment across the country:

- Silviculture accounts for approximately 7 percent of the total impaired river miles nationwide;

• The relative amount of total river and stream impairment due to silviculture dropped from 9 percent in 1988 to 7 percent in 1996;
• The number of river and stream miles classed as "major impairment" due to silviculture dropped 83 percent between 1988 and 1996;
• The length of river and stream miles impaired from natural causes is about twice the length of impairment due to silviculture;
• Silviculture represents one-tenth of 1 percent of the impaired coastal waters;
• Silviculture represents less than 1 percent of lake impairment;
• EPA's 1996 National Water Quality Inventory report dropped silviculture from the chart as one of the seven leading sources of impairment to rivers and streams; and
• Compliance with State forestry best management practices is reaching 90 percent or more.

To underscore the AF&PA record, I would like to share with you some of our accomplishments. Through the Sustainable Forestry Initiative (SFI) program, in which all members participate as a condition of membership, many members are not simply striving to achieve full compliance with Best Management Practices (BMPs) to protect water resources during forestry operations—they are providing a framework for going beyond conformance with voluntary guidelines. Equally important, member companies are committed to fostering the practice of sustainable forestry through landowner education efforts on all forestlands.

In 1997, AF&PA member companies began reporting on the number of acres and miles of streams that are enrolled in wildlife and fisheries agreements with conservation groups and public agencies that specify on-the-ground management practices. Almost 11 million acres, representing 20 percent of the total acres in the SFI program, and 4,286 miles of stream have been enrolled in these agreements. The SFI program has established State Implementation Committees in 32 States that receive more than $3.1 million from AF&PA members and allies to foster their responsibilities to promote SFI principles. While industrial forestland constitutes approximately 15 percent of the nation's forested acreage base, AF&PA members are also committed to expanding and promoting sustainable forestry into the broader forestry community.

A BETTER WAY

It is plainly evident from the reaction by the majority of State agencies, State water quality agencies, Governors and others that the proposed rules were formulated without the advice and input from those stakeholder groups who will be ultimately responsible for implementing the regulations. Mr. Chairman and members of the committee, there is a better way. It requires additional funding of the Section 319 program, greater cooperation among multiple State agencies engaged in nonpoint activities, more partnerships with private landowners and stakeholders and better dialog between EPA Regional Offices and the States to make improvements to water quality happen. However, the Federalization of nonpoint source activities as proposed under these circumstances will create dissension and not accomplish the mutual goals shared by everyone. Once again Mr. Chairman, these proposed rules would interrupt the progress in improving water quality. Every State with existing Memorandums of Understanding among State agencies and Federal agencies in some circumstances, including your own, will need to be rewritten and negotiated all over again. Is this what we want to do?

For industrial facilities and wood lot owners, this proposal will cause significant administrative delays. It will discourage the practice of sustainable forest management, create disincentives to expand forest cover in the U.S., stifle economic opportunity and prosperity in communities desperate to be part of the economic revival in this country and make it more difficult for people to make a living off their land.

This concludes my remarks, Mr. Chairman, and I would welcome any questions you or members of the committee may have.

STATEMENT OF DINA J. MOORE, RANCHER, KNEELAND, CA, ON BEHALF OF THE NATIONAL CATTLEMEN'S BEEF ASSOCIATION

Good morning Mr. Chairman and members of the subcommittee. I am honored to be here today to address this subcommittee on behalf of the National Cattlemen's Beef Association. The National Cattlemen's Beef Association (NCBA) is the marketing and trade organization for America's one million cattle farmers and ranchers, representing the largest segment of the nation's food and fiber industry.

While my full-time job is as a partner with my husband and family in a commercial cattle ranch and non-industrial timber business in Northern California, I am

proud to actively participate in our local watershed efforts. I have done extensive work with the Environmental Protection Agency (EPA) on Total Maximum Daily Loads (TMDL), conducting Historical Narrative interviews, assisting in public outreach and education and working collaboratively with the EPA in building a consensus on the development of TMDL's. I also founded and am the current president of our local watershed working group—the Yager/Van Duzen Environmental Stewards, or YES. The Mission Statement of YES most clearly States one of my personal goals: "[t]o ensure the Environmental Integrity of our watershed while maintaining our heritage and the economic sustainability of our endeavors."

EPA has, through the Section 319 program, empowered the States to take the responsibility for developing their own nonpoint source pollution management plans. By establishing the Proposed Regulatory Provisions, will EPA be promoting a duplicative effort to that of the States by taking over the authority of developing implementation plans? States understand the need for clean waters just as landowners of a working landscape understand the need for clean waters. Each State knows how best to achieve workable, realistic water quality goals for that State. In turn, the States can promote the implementation of Best Management Practices to the landowners. The more we can empower those who are responsible for managing the working landscape, the higher the degree of success. The best approach needs to get all the way down to the grass roots level. We need to enable those responsible for managing a working landscape to work from the grass roots level up to design and implement Best Management Practices in their own watershed. The most successful way of attaining clean water must come from the watersheds up, not the Federal Government down.

The driving force is the fear of litigation from the more radical sector of the environmental community. Just as EPA is considering more stringent regulations, so is the National Marine Fisheries Service (NMFS) considering expanding their listings to now include Steelhead as threatened. Because of the threat of litigation and the fact that NMFS and the State of California Division of Forestry and Fire Protection are not in concurrence as to how to best protect Steelhead, NMFS is threatening listing the species as threatened. The more sensitive species of Coho and Chinook salmon have already been listed as endangered. Unfortunately, the landowner is caught in the crossfire between a State and Federal Agency. As is the case in our watershed, we as landowners and managers have just worked with EPA on the development of the TMDL. Now, we are faced with working with the State on the Implementation Plan and NMFS on their listings. Our watershed was declared as impaired because the level of sedimentation affected the cold water fisheries, in particular the documented decline of salmon and steelhead. So which Federal Agency is in charge? As non-industrial landowners we are dealing with multiple State and Federal agencies who are not working together collaboratively to resolve the problem. Those agencies have the same objectives, the same driving force of concern over litigation, but different agendas and timelines.

The entire process and building of trust and collaboration begins anew each time another agency is brought into the process. The 319 program could be the mechanism for integrated State and Federal efforts. The Federal Government should not place more constraints on the State by taking on more authority thus creating more fragmentation. They should be using their powers to encourage States to implement a "one stop shop" where landowners can deal with all the agencies at one time and place. The resource, government and landowner would best served if government could address resource issues in a clear and consistent manner, with a single unified voice. There is no safe harbor for landowners that have worked collaboratively with a single agency.

The private sector will clearly incur costs from more stringent regulation. That is evident in the Forests of California. Non-industrial landowners are faced with having to cut more timber to cover the cost of greater regulation than they would like to from a stewardship or sustainable perspective. As more regulation is being mandated from multiple national and State agencies, the same land base and the same landowner is responsible for meeting the requirements that are set forth by those agencies. With this EPA proposed Regulatory Revision Federal Program being expanded, ultimately a cost will trickle down to the landowner and his only way of covering that cost is with heavier extraction from the land based resource that he manages. There is no compensation, reimbursement or incentive to the landowner for the time and knowledge that it takes to comply with regulation. As the landowners deal with more stringent regulation they will either hire help to work their land resource in their absence; or will they hire a professional consultant to help them weave their way through meeting the regulatory requirements of the different and multiple governmental agencies. Both are an out-of-pocket expense to the landowner, and the cost can be staggering. The monetary return that comes from a cat-

tle ranching enterprise alone is minimal. The cattle and the range that they live on provide enough of an economic return to pay for their direct costs, overhead costs as well as provide families with a below poverty level of income—even when the cattle market is in an upswing. This enterprise alone cannot not cover the previously mentioned hidden costs. Other resources will need to be developed and extracted.

While the argument is often made that there is grant money available, that too can be a cumbersome and unwieldy process. As landowners in a watershed that has been declared as impaired, we from the grass roots level are undertaking the burden of doing assessments and inventories. There are grants available to help, but many programs require matching funds, not taking into account the costs that we have incurred by writing grants or the time and energy spent hiring professional contractors to do the work and assessments for us. Although EPA does have the 319 and 205 grants available, the turn around time on getting those moneys is 18 months from the time of submittal of an application to an actual grant being awarded. That timeframe is simply put, outrageous.

Delisting and listing of watersheds needs to be clarified. The Proposed Regulatory Provision does help ensure that listing methodologies are more specific and subject to public review. Again, I refer to our watershed and my own experience in the Yager Creek and Van Duzen River Watershed. None of the multigenerational landowners knew that it had been listed as impaired. Pacific Lumber Company is a neighboring landowner in the lower part of the basin. The concern has been expressed that this is more a political process than a scientific process. When EPA did the TMDL, it broke the watershed into three distinct areas: the lower basin, middle basin, and upper basin. Those areas were characterized by different geologic types, channel types, distribution of anadromous fish, vegetation types and land management/ownership patterns. The results of a Sediment Source Assessment commissioned by EPA stated that natural erosion accounted for 84 percent of the erosion in the middle part of the basin. This portion of the watershed is comprised of ranches, and land ownership is comprised of multigenerational families. Concurrently, on our ranch we participated in an ongoing study by University California Cooperative Extension on the affects of cattle grazing in a riparian area. After an on-ground assessment using 3 different Federal field assessment tools—EPA's habitat field assessment data sheet, NRCS Stream visual assessment protocol and Bureau of Land Management's (BLM) proper Functioning Worksheet—our stream with the EPA assessment rated 18.40 out of 20 (20 being the highest mark), NRCS rated 9.4 out of 10 and BLM's rated properly functioning. Given all of the above information, I question whether our portion of the watershed should have been listed as impaired. If this information had been available before listing, and if the small non-industrial landowners that manage the middle portion of the watershed had been involved in the public review process, it could have been a different outcome. Not only does the listing process need to be methodical and scientifically sound, there also needs to be a clear process, which can be undertaken to ensure that waterbodies can be delisted. There is no clear-cut avenue to take in a delisting process.

It all gets back to the single working landscape, the individual land owner and his need to manage the resource in a sustainable manner that meets the needs of the resource and provides his family with a living. We, as multigenerational managers of a working landscape, know that we cannot mine the resource without long-term negative affects. We have been given the resource to hold in trust for future generations. Often times we feel that we are meeting the needs of government to the detriment of the environment we are managing. My counterparts in the mainstream environmental community recognize the cost to the environment of greater regulation and are speaking the same language that we are; let's provide greater incentives and less costly regulation. Let's look at tax incentives and cash incentives for encouraging stewardship. Let's hold out a carrot rather than wield a stick.

My perspective and view is one of working together collaboratively on resolving resource issues on the working landscape. I firmly believe that those who have a longtime multigenerational commitment to taking care of the working landscape will protect it. Other options that become a reality when we are no longer economically sustainable are selling to larger industrial landowners or breaking large landscapes into subdivisions and ranchettes, which clearly cause a degradation to the environment. I recognize the important role and need that regulation has served in protecting the environment. Nevertheless, I firmly believe that further regulation will swing the pendulum in a direction that will not serve in the best interest of the resource, government or non-industrial landowner.

Thank you, for the opportunity to participate in this important decision. I look forward to a day when we all are working collaboratively on resolving the issues of managing a natural working landscape.

PROPOSED RULE CHANGES TO THE TMDL AND NPDES PERMIT PROGRAMS

SATURDAY, MAY 6, 2000

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Whitefield, NH.

The committee met, pursuant to notice, at 1 p.m. at White Mountains Regional High School, Whitefield, NH, Hon. Robert C. Smith (chairman of the committee) presiding.

IMPACT OF PROPOSES RULES ON FORESTRY PRACTICES

Present: Senator Smith.

OPENING STATEMENT OF HON. BOB SMITH, U.S. SENATOR FROM THE STATE OF NEW HAMPSHIRE

Senator SMITH. The Environment and Public Works Committee of the U.S. Senate will please come to order; and let me, first of all, express my sincere gratitude to White Mountains Regional High School for their courtesy.

We're delighted to be here, and I want to also extend my appreciation to the EPA Administrator, Chuck Fox, who came all the way up from Washington to be here. You got to see some nice country, though, Mr. Fox?

Mr. FOX. Yes.

Senator SMITH. Also, sitting here with me, of course, to my right is your distinguished State Senator, Fred King. I've invited him to be up here to take all the tough questions. John Pemberton from the Environment and Public Works staff and Ann Klee from the Environment and Public Works Committee and Will Wrobleski of Congressman Sununu's staff are here.

Also from the Congressman Bass' office, Bill Williams is here. Bill, if you would like to make a statement—I was going to make a brief opening statement, but, if you'd like to make a comment or two, your statement will be submitted for the record. Then I'm going to turn it over to Mr. Fox.

Let me just say that it's very appropriate that we're here in the beautiful White Mountains of New Hampshire to discuss the environment. There are 780,000 acres of White Mountains and the extensive private forests that are home to hundreds of miles of pristine waters and beautiful forests. In fact, water in New Hampshire covers 115,000 acres; everything from the small ponds to Lake Winnipesaukee. Each year, over a million summer visitors come up here, more summer probably then in winter, to enjoy our moun-

tains and lakes and seashore. These forests—spruce and pine—are famous as the King's Woods for mast wood for ships in the early days of our history. They also add beauty to our landscape and wealth to the land.

Much of this area has great historical significance. The Connecticut River, where the "white-water men" risked their lives to bring the loggers the logs from the northern regions to the manufacturing centers. The 2,100-plus mile-long Appalachian Trail is right near us. It stretches along the mountain from Georgia to Maine; or from Maine to Georgia would be better put, probably. It winds through the heart of the White Mountains and traverses many of New Hampshire's greatest mountains.

And as the Senator from New Hampshire, and now the chairman of the Environment and Public Works Committee, I view it a privilege and an honor to protect these resources, not only for us here today, but for many generations to come. Our children and grandchildren will follow us into these beautiful, scenic mountain and forests, and we must protect the resources for them.

I think the residents here have a lot to be proud of what our timber companies, tree farmers, and farmers are doing today to preserve the land, as well as the natural resources. I've been up here many times in the past 16 years, as all of you know, and I know that you are good stewards. You have a lot to be proud of and I'm proud of you for being good stewards. I could go on forever talking about that.

The purpose of the hearing today is to examine the Environmental Protection Agency's proposed rule on Total Maximum Daily Loads, which we will probably call TMDLs throughout the hearing.

Since the EPA released this proposed rule last August, we've spent a lot of time talking with New Hampshire folks, Senators, and our colleagues, and State and local officials across the country. Mr. Fox came in and had a private discussion with me about this proposal, as well. There's been a lot of communication and many of you may have attended the recent University of New Hampshire's symposium that we held in Bedford a couple of weeks ago. We talked there about the impacts of this rule if it were finalized.

I'm usually asked, "Why is the EPA pushing this very controversial rule through quickly?" I think that Mr. Fox will respond to that. I don't have the answer, because it is hard to explain the urgency of the rule, but we'll hear from Mr. Fox shortly on that.

EPA's desire to rush this is especially frustrating because Administrator Browner has admitted that EPA failed in the drafting of a clear rule. It's not a clear rule. Even Mr. Fox had suggested substantial changes to the rule will be necessary. He indicated as much in a letter to me. Almost every industry has expressed strong concerns about this rule. But we're still looking at a deadline of June 30 on the finalization of this rule.

It's clear to me that it would be appropriate to slow that process down. Perhaps, EPA should look at a reissue of the proposed rule that provides all stakeholders an opportunity, not just the Washington folks or lobbyists in Washington, DC, but folks like you, to leave their views heard. We are probably going to have another one in the south in the next 4 to 5 weeks, as well, so that we can listen

to what's on your mind and, perhaps, take a time out on the rule before we implement it.

While I may not have a full knowledge of the thought process that went into the proposed rule at EPA, I do know that the silviculture industry in this State should be commended for its stewardship and work to protect the environment. Mr. Manfredonia of Region I at EPA stated that "silviculture and forestry operations are not, to the best of his knowledge and data, an issue for water quality." That's what he said. Yet today, we're faced with a rule, the proposed rule that could take effect as early as June 30; and I believe that could have a dramatic impact on the people who depend on this land and this water for their livelihoods in more ways than one. Because if it's not, this scenic beauty is not here, people won't come here and spend money as tourists; and also, if you have a woodlot, you could be in a position where you would not be able to earn your livelihood.

This proposed rule, if it is implemented, would regulate you for the first time under a Federal permit, under the Clean Water Act. This could have a dramatic impact on the forestry industry, but it also could have a dramatic impact on small family forestry and agriculture operations—small farmers, and small loggers, woodlot owners where margins are thin, and the survival of these businesses themselves could very well be in jeopardy.

I saw Tom Thomson here earlier. Tom's been down to Washington and testified on this issue. He's a tree farmer from Orford. He's fought through a lot of adversity, as you all have. He represents many of you in terms of what you went through with the Ice Storm here, where we helped to get some Federal funds to help you through that. But we should be proud of that stewardship and that conservation of open space.

I think Federal permitting of forestry activities makes an assumption that you're not good stewards. That's my problem with it. I would rather be more in line with saying, "Well, if there are problems here and we're not doing something right, then what are they? What's the science? Let's talk about it, and let's work together." Instead, let's look upstream a little bit and decide what we have to do to keep the water problem from having a negative impact on agriculture or forestry. What have people like Tom Thomson's done that would lead EPA to believe they need to impose a permit have him to cut down a tree? That's the bottom line.

The EPA says the States will be implementing this program. But in New Hampshire, it's very important to note here, we do not have delegated authority to issue permits. So, we fall into the category the EPA calls a "rare" situation, but that's small comfort for those of us—those of you who are on this land, because the EPA under this "rare" situation would be responsible for issuing the permits in New Hampshire and not DES.

Hopefully, Mr. Fox will be able to address that point, as well, as to whether or not there's some responsibility on that.

In order to address the many concerns and I've heard on the implementation of the regulations and the concerns with the rule, Senator Mike Crapo of Idaho and I have introduced, with 16 other co-sponsors, S. 2417, the "Water Pollution Program Enhancement Act of 2000." This is not a hearing on that bill. This is a hearing

on the issue of the proposed rule. I want to make this very clear, but I did want to note that the purpose of this legislation is to take care of three concerns that I think have been outlined in the hearings we've held over the past 2 months and, as well as, comments that I've heard from the New Hampshire environmental symposium a couple of weeks ago.

First, the States are in great need of increased funding to implement nonpoint source programs, conduct monitoring to develop scientifically based water quality programs, and to issue permits, and list waters under existing requirements. So, we provide an additional several million dollars for States to do just that.

Second, there are a lot of unanswered questions about the costs and scientific basis underlying TMDLs and their implementation, as well as, a host of alternative programs or mechanisms that exist at the State level that may be more effective to accomplish the same goals.

In other words, is there any other way that we could accomplish the goal of maintaining clean water here in the North Country on our forest lands and on our agricultural lands, other than the implementation of a Total Maximum Daily Load rule?

I don't think we've answered that question satisfactorily, and it should be answered, in my view, before we mandate more regulations or requirements on the private sector and the States.

Also, our legislation directs the National Academy of Sciences to try and answer some of these questions prior to any implementation of any new rule.

Third, to use a professional sports analogy, we need a time out. This came upon us awfully quickly. People now who make a living off the land are now hearing for the first time that suddenly they're going to need a permit to chop a tree down or to farm their land. We need a time out to analyze whatever battle we have to look at it carefully, and so that's why we're here today.

And this is a great State and it's a great country, but I think we need sound science. It is important, as well, and I think we need to look at it very carefully.

Let me just say that we will have as witnesses Mr. Fox first and then three other panels of very distinguished witnesses. At the end, if there are people here who would like to make a statement, 1 or 2 minutes, please, because we won't be able to do everybody; or ask a quick question of anyone, myself, or the staff, or Mr. Fox, we'd be glad to allow enough time for that. We'll see, if time permits, if we might be able to get a question or two directed to any others on the panels. We do have a limited amount of time.

So, let me thank you again for being here, Mr. Williams.

STATEMENT OF BILL WILLIAMS, STAFF MEMBER OF REPRESENTATIVE CHARLES F. BASS

Mr. WILLIAMS. Thank you, Senator, this will be fine. I just need to go on record. I will read the last two lines of Congressman Bass' 2-page testimony; and the final two lines are:

> In closing, I want to again thank Chairman Smith and the committee for holding this extremely important hearing. I hope that the testimony presented today by myself and others will convince the EPA to reconsider this proposed rule.
>
> Thank you very much.

Senator SMITH. Thank you very much, Mr. Williams, and the entire statement will and—and/or letter from Congressman Bass will be made a part of the committee's record.

[The prepared statement of Representative Bass follows:]

STATEMENT OF HON. CHARLES F. BASS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW HAMPSHIRE

Chairman Smith and members of the committee, I would like to express my gratitude to you for holding this hearing today on the Environmental Protection Agency's (EPA) proposed rules regarding Total Maximum Daily Loads (TMDLs) from silviculture operations and for affording me the opportunity to submit my statement for the record. I have serious concerns about the EPA's proposal to reclassify silviculture from a "non-point source" activity to a "point source" activity under the Clean Water Act (CWA).

The EPA's proposal would mandate regulation of all silviculture activities as point sources of pollution under the National Pollutant Discharge Elimination System (NPDES), opening up all private landowners to NPDES permit regulations. Specifically, this regulation would include previously exempt categories, such as nursery operations runoff, site preparation, reforestation activities, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, and road building and maintenance.

I am concerned that removing the exemption on these activities may unnecessarily impose heavy-handed Federal regulation on forestry activities. The silviculture industry has a long history of seeking common-sense solutions to achieve effective, sustainable land management. In a 1996 EPA report to Congress, forestry activities were identified as the smallest source of nonpoint source pollution, contributing approximately 3 percent to 9 percent of nonpoint source pollution to our nation's waters. Due to the relatively small impact of this industry, I believe that landowners should be encouraged to work directly with States and local governments to find answers to pollution problems. New Hampshire's forest landowners, through the use of Best Management Practices, the New Hampshire Professional Logger Program, the Sustainable Forestry Initiative, and Tree Farm Program, have contributed considerable resources and effort to protection of water quality.

Furthermore, in the original rulemaking process following enactment of the CWA, the EPA recognized that Congress's original intent was to designate forestry activities as a nonpoint source of pollution. Therefore, this proposed rule would represent a departure from 30 years of regulatory practice. This change would subject landowners to citizen suits for permitted activities, not to mention potential fines, and necessitate Federal permits for most forest management activities, which would be subject to unnecessary and potentially costly delays. The burden of these rules could force landowners to forfeit their stewardship of the land in favor of giving into the ever-present pressures of development, which we can all agree is not in the best interest of the environment.

Although we all share the common goals of categorically improving the quality of our nation's streams and rivers, we must not impose an excessive Federal regulatory burden that could cripple the silviculture industry. Instead, I would encourage continued cooperation between the Federal Government and the States to provide the necessary incentives to landowners to maintain healthy forests.

In closing, I want to again thank Chairman Smith and the committee for holding this extremely important hearing. I hope that the testimony presented today by myself and others will convince the EPA to reconsider this proposed rule.

Senator SMITH. Mr. Fox has indicated that after his opening statement, he will be available for questions. This is a field hearing so we don't have to follow all the formalities that we do in Washington. That's what we're here for, to hear your views on these proposed rule changes.

Mr. Fox, welcome. I appreciate your coming up here and taking the time out of a busy schedule to be here and to hear from our constituents.

STATEMENT OF J. CHARLES FOX, ASSISTANT ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, WASHINGTON, DC

Mr. FOX. Thank you, Mr. Chairman, and Senator, it is a real pleasure to be here. It's rare that we get a chance to come outside of the Beltway for field hearings. We spent some time out in the forest this morning with Tom Thomson, and I couldn't agree with you more that there is some outstanding examples of stewardship in New Hampshire. They've been doing an admirable job of protecting water quality.

Enacting the Clean Water Act of 1972 has dramatically improved the health of rivers, lakes, and coastal waters throughout the country. It has stopped billions of pounds of pollution from being dumped in the water and doubled the number of waterways that are safe today for fishing and swimming. Many waters today are thriving centers of health communities.

But despite this tremendous progress in reducing water pollution, almost 40 percent of the Nation's waters as tested by the States still do not meet water quality goals. My earlier testimony to this committee in February described over 20,000 water bodies identified by the State as polluted in 1998. It also described our effort, begun almost 3 years ago, to work with a diverse Federal Advisory Committee to review the TMDL Program and identify needed improvements in existing regulations.

I would like to take this opportunity to reiterate that this is not a new rule. It is, in fact, a revision to the existing regulations, much as which were promulgated in 1985 during the Reagan administration.

This afternoon, I would like to work—focus on the work we have done since my February testimony with a range of interested parties to address the important issues raised in the proposed regulations.

Mr. Chairman, I would also like to describe the Administration's strong opposition to the legislation you recently introduced with Senator Crapo calling for a delay of several years in finalizing revisions to the TMDL program regulations.

Earlier this week, EPA and USDA released a joint statement describing areas of agreement on the TMDL rule. Mr. Chairman, I'd ask that a copy of the joint statement be included in the record.

Senator SMITH. It will be made part of the record.

Mr. FOX. The key elements of the joint statement describe changes the EPA expects to include in the final TMDL rule on topics of interest to the USDA. For example, the joint statement outlines how EPA and USDA propose to address the job of restoring polluted waters that are impaired as a result of forestry operations. Our joint forestry proposal is discussed in much more detail in my written testimony.

In April, I sent you a letter outlining the expected changes to the proposed rule in response to many comments we received. These changes emphasized that States will have to identify and clean up polluted waters through the TMDL program. The changes will give States more time, allowing them to tailor TMDLs to local conditions, and endorse voluntary programs by giving them full credit for the development of TMDL pollution budgets. The changes

would also streamline the regulatory framework considerably. My written testimony provides more details on these changes.

I briefly would like to turn to the legislation you introduced with Senator Crapo. The bill includes some important provisions expanding authorizations for State clean water grants. But the Administration must strongly oppose the bill because it would delay the final TMDL regulations by up to 3 years and, perhaps, longer. It calls for a study of the scientific basis for the TMDL program.

While we agree that there are technical issues associated with the development of TMDLs, the essential scientific bases for developing TMDLs and restoring polluted waters are well established. We respectfully suggest that there is no major scientific dispute related to the development of TMDLs that requires the attention of the National Academy.

Section 6 of S. 2147 would prevent the finalization of the TMDL regulations until the completion of the study by the National Academy.

An enactment of this proposal could result in the effective shutdown of the TMDL program in many States, as they and other parties defer work on TMDLs until the comprehensive studies mandated by Congress are completed. Sadly, Congress would be telling thousands of communities across this country that are eager to get to work to stand down, to pack up their clean water plans, and put them into the deep-freeze for the foreseeable future while a panel of scientists meets in Washington behind closed doors for almost 2 years to write a report.

Mr. Chairman, yesterday, I received copies of letters from two New England States that also oppose this provision of your bill and indicated the support for EPA's changes to the proposed, and I ask also that these letters be included in the record.

Senator SMITH. They will be made part of the record.

Mr. FOX. Finally, Mr. Chairman, in closing, I consistently hear from critics of the TMDL program that it is more of the old, top-down, command-and-control, one-size-fits-all approach to environmental protection. I've also heard many mischaracterizations and falsehoods that are simply irresponsible attempts to generate opposition to the rule. In fact, the TMDL program offers a vision of a dramatically new approach to clean water programs. This new approach focuses attention on pollution sources in proven problem areas, rather than all sources. It is managed by the States, rather than the EPA. It is designed to attain the water quality goals that the States set and to use measures that are tailored to fit each specific water body. This approach has proven to be effective in places like the Great Lakes, Chesapeake Bay, and Long Island Sound. It is an approach that will form the foundation of achieving clean water goals throughout the country.

Thank you very much.

Senator SMITH. Thank you very much, Mr. Fox.

Senator Fred King has indicated he didn't have an opening comment but wishes to speak.

Senator.

STATEMENT OF HON. FRED KING, SENATOR FROM THE STATE OF NEW HAMPSHIRE

Senator KING. Thank you, Senator Smith. I just wanted to say thank you for bringing this hearing to New Hampshire. It's certainly an extraordinary thing to have that happen, to have a field hearing on a bill that's as important as this. I do have a letter that I will submit into the record. I won't read it, because I know a lot of people are ready with comments that they'd like to make.

Several weeks ago, I wrote to the congressional delegation relative to this rule. I received very positive comments back from our other Senator and two Congressmen. So, I believe that the New Hampshire delegation is well aware of the situation and how it will potentially impact our economy. From what I've just heard, the State will have an opportunity to participate in the implementation of this rule. I will tell you that I sit as the vice chair of the committee in Concord known as the Administrative Rules Committee. All the rules that are adopted by State agencies have to come to that committee for a review. So, if this follows what would appear to be the historical pattern where Congress passed a law, or the Clean Water Act, EPA implemented rules and allowed States to implement those rules, the Legislature then passes the law, and what happens ultimately in Concord, our Department of Environmental Services will also be writing rules. So, we'll be watching the rulemaking process very carefully.

I think that the only comment I would make is that if anyone believes that you can conduct timber operations the way we historically do in northern New Hampshire by first getting a permit from the Federal Government, and dealing with the red tape, and still allow the timber operations to operate at a profit, it just isn't going to happen. If we're going to continue to harvest trees, we have to do it with sound techniques. To impose a Federal regulation is going to prohibit the cutting of trees. I will say that it is my personal belief that that isn't the role of Washington, anyway. I think cutting the trees is becoming a bad thing in the eyes of some people. I hope this isn't the case. Thank you.

Senator SMITH. Thank you, Senator King. Your letter addressed to the committee will be made part of the record.

It's approximately 1:40 p.m. now; and at no later than 2:15, I will move to the second panel. I'll just start with a couple of questions; and if anyone wishes to move up to the microphone, I'll try to recognize you at that time.

One of the pieces of information that I came up with, Mr. Fox, was that on the GAO study, and please comment whether it's accurate or not, that, apparently, there are only six States, that were able to manage water quality under these rules, and only three of them had the majority necessary to develop the TMDLs for nonpoint sources. The State said that shortages in staff and resources are why there is such a lack of data.

How do we comply with these additional requirements under this proposal, along with what Senator King just said about red tape. If you don't have the resources and the staff to do it, how do you propose to do that in the short period of time once the rule is implemented on June 30?

Mr. FOX. You are correct. The General Accounting Office report did raise questions about the adequacy of our water quality data in this country; and I can't disagree with many of the conclusions that are included in that report. We do need to do a better job of making an investment in this country in providing high-quality data; but, I would respectfully suggest that there is ample data in the vast majority of the cases that we could take action today. That's what we did in the Great Lakes in 1978; that's what we did in Chesapeake Bay in 1985.

The GAO Report, I think, importantly found that the more data we get, the more water quality problems we find. And it's very, very unlikely that there will ever be a situation where we are, in fact, doing TMDLs on the water that simply doesn't need it and it usually goes the other way around.

Senator SMITH. As I indicated in my opening statement, New Hampshire does not have the delegating authority to issue the Clean Water Act permit for point source. So, my assumption is that the EPA would have to implement that.

Let's use a hypothetical that says the State develops a TMDL for a water body that is impaired by both non-both nonpoint source and point source activities; so, if that happened, would it be—it would be EPA's job to issue the permit in that scenario, I assume?

Mr. FOX. The way the program is structured in New Hampshire, the State does have the lead in defining a list of waters that do not meet their standards. The State would have a lead in developing the TMDL itself. That TMDL would allocate a pollution budget for that water body, and then EPA would have the responsibility for the permits that are as part of that TMDL operation of those permits. However, many TMDLs will have nonpoint source and voluntary programs in them; and, of course, the State would implement those, and EPA would give them full credit in the pollution budget for those State voluntary programs.

Senator SMITH. How would the nonpoint source portion be implemented under that?

Mr. FOX. I don't know New Hampshire as well as I need to, but many States have an agricultural cost-share program, for example, where you can estimate how many acres of land will be enrolled in conservation practices; there might be a buffer strip program as part of the State Forest Program. There are ways that we could start finding the kinds of pollution reductions that would come from a voluntary program; and based on that analysis, those credits would then be given to the TMDL program.

Senator SMITH. Just one followup, and then we'll take this gentleman's question.

Using New Hampshire as an example now, who would make the decision whether a forestry or an agriculture operation is either a point source or a nonpoint source? Who would actually make that decision?

Mr. FOX. I'm glad you raised the forestry question. It's the subject of a good deal of attention I've been hearing in this community. I would like to just say, unequivocally, that EPA's not going to be issuing permits for every time you cut down a tree. That's just not what we propose.

Our initial proposal is simply focused at what we call bad actors. Operators that are, in fact, causing a significant water quality problem; States who need to make a scientific determination that they are, in fact, causing that problem; and it is only after the determination gets made, there can be any authority given to the State or the Federal Government to step in and require that Best Management Practices be used.

Based on the comments that we've received from State foresters, we modified that proposal, because the State foresters were afraid that our initiative would upset a State forestry program, and my understanding is that New Hampshire has a very good one.

And so the proposal, as it now stands, says that if you have a State forestry program that is achieving water quality goals, then there will be no permitting authority conveyed to either the State or EPA. Our goal is to really support the State forestry programs and achieve our shared goals in water quality.

But in terms of your specific question: Who makes that determination? That would be made by the regulatory agency, whether it is the State or EPA; and in this State, being a nondelegated State, most of those decisions would be made by the EPA.

Senator SMITH. I would just say if you would state your name clearly for the clerk; and if it's not Smith or easy to spell, spell it, if you would?

Mr. DEMOS. OK. My name is John Demos and I'm with the American Lands Alliance, which is a national environmental organization. I represent them in the Northeast up here. First of all, I would like to go on record as supporting the rule change.

As you stated earlier, 40 percent of our riverways and water bodies are great in this country, and I believe, according to the EPA, about 215 million Americans, the vast majority of Americans, live within 10 miles of a polluted body of water.

We'd also like to go on record as opposing your bill, Senator; although, we're very happy with what you're doing on the national wildlife refuge and your position on environmental riders.

Mr. FOX. We are, too.

Mr. DEMOS. Yes. I think this may be a tempest in a teapot for New Hampshire. If you look at statistics, it shows that—official Government statistics—water quality degradation into silviculture in the State is like zero percent. It's very low for agricultural, too. So, unless, you know, more studies are done to determine that silviculture is causing the water quality problem here, any rule change is probably going to have very little effect.

I was also talking to a logger here earlier who was very concerned, and I think there needs to be some clarification about this rule change, that this rule would affect all timber operations in the State, regardless; as the Senator has said, you'll have to get a permit to cut down a tree.

And to go over it again, and you were touching on it a few minutes ago, my understanding is if—you would have to determine if it's a greater body of water, first of all; you would have to determine if silviculture was the major source of pollution, second; and then under the TMDL programs, it would only affect point source pollution; and the point source would mean a culvert, a pipe. That's the statutory definition, that's correct?

Mr. FOX. Yes.

Mr. DEMOS. Now, the fellow I talked to earlier, I believe there's a lot of misinformation out there. He is afraid that any timber operation would be treated as a point source. And I hoped that you could clarify that?

Mr. FOX. You are a very well-informed individual. You said it precisely, and I'm not sure I could do better than that; and I would just sum it up and say that the silviculture provisions that we have proposed will have virtually no impact on the State of New Hampshire based on the current status of the silviculture in New Hampshire.

What people don't always appreciate is I was confirmed by Mr. Smith's committee who represent water quality interests in the Nation. There are silvicultural problems in other parts of the country, but I think you've summed it up very well. It would have virtually no impact, in fact, all of New England. Our current statistics show there's only two very small segments in Vermont out of all of New England that would be affected by this.

Mr. DEMOS. Thank you.

Senator SMITH. Thank you, Mr. Demos.

Let me just say that since people are beginning to come to the mike, I do have my self-imposed 2:15 rule for this panel. Again, if you could ask your question, there will be a comment period at the end for anybody who wishes to make anything for the record. So, if you could try to make the question brief so that Mr. Fox, I, or whoever you ask it to can respond.

Mr. THOMSON. Thank you. I'll be as brief as I can. My name is Tom Thomson, a tree farmer from Orford. I have a statement and I've got a question addressed to Mr. Fox; but, first, I'd like to thank Mr. Fox for coming up from Washington. I've spent some time earlier in the woods with you and hope you come back in the future. And I will suggest that all hearings in Washington, DC be held outside of the Beltway.

Senator SMITH. Good suggestion.

Mr. THOMSON. The statement is: I would like to suggest that EPA increase the funding through Section 313, which would go to the State to expand Best Management Practices, as well as, education. But do it on a voluntary basis, not regulatory basis. I encourage you to use New Hampshire as an example for other States to follow.

And I would like to ask you this question, Mr. Fox. Which is more environmentally damaging to our society, the tree farm or forest that we manage and work as a sustainable forest, protecting water quality, or the farm and forest being replaced by housing developments, shopping malls, and asphalt pavement, which we know today is urban sprawl?

Thank you.

Mr. FOX. Mr. Thomson, the more I spend time with you, the more I do realize there's a lot we agree on. I think it is important to state for the record that the forestry operations in effect can have tremendously beneficial impacts on water quality, and the comparison that you made is hands-down. The benefit for water quality would be the forest cover as opposed to a suburban land-

scape. Good forestry practices are an essential part of achieving our clean water goals, and I would agree with you.

I would also add that we have proposed very sizable increases in voluntary section 319, funding for nonpoint sources. This was a program which was at $100 million nationwide 2 years ago. This year's budget, the President has proposed $250 million. So, it's a sizable increase. We are now working with Congress to try to get that increased, so it comes out to people like you and States like New Hampshire.

Senator SMITH. I'll just move to this side for this gentleman.

Mr. SPALDING. I have a question for Mr. Fox. My name is Donald Spalding and I'm from Whitefield.

In "Through the Looking Glass," Humpty-Dumpty declares that words "will mean what I choose them to mean." What I'm referring to here is that phrase navigable waters of the United States regulated by the 1972 Clean Water Act, but now that's come to mean that swampy hollow in my back woods or the mud puddle big enough to attract the rats and the passing ducks.

And so my question is: What, if any, guarantees are there in these proposed rules that the language will not be subject to the same kind of abusive, excessive, and over-reaching interpretations eventually?

Mr. FOX. It is a fair question. We all draft these rules with the greatest intent in our democracy; and these rules have been interpreted by others.

I would say that the Clean Water Act, as initially envisioned in 1972, not only defined waters of the United States in a very broad way, but the 1972 Act actually also defined a TMDL program which we're now trying to implement.

We believe, and I don't just make this stuff up, I go through my attorneys, the Department of Justice, in developing our interpretation. We have a very thorough inter-agency process, and I'm assuming that future Administrations will do the same, and we're doing our best to implement the letter and the intent of the law, as well as, the regulations.

Mr. SPALDING. Thank you very much.

Senator SMITH. Yes, sir?

Mr. EDWARDS. My name is Tim Edwards, and I'm from the southeastern part of the State; and it took me 2½ hours to come here today, because it's pretty important to us down there, too.

I represent two different organizations, two different groups relative to sportsmen, but I also represent one of the largest landowners in the southern part of the State, and my question is for Mr. Fox.

With any regulation or any rule, typically, there are specific reasons for putting that rule in place, but there are, very imminent threats for the need of that rule. Could you just take a minute to explain in New Hampshire, specifically, just one example of why this rule is necessary? Then please take a minute to explain within New England why this rule is necessary, specifically, for the silviculture issues? I think that would kind of help me a little bit to understand why the EPA feels that it's necessary to consider silviculture itself as a point source solution.

Mr. FOX. That's a fair question. I should start with saying that I testified earlier that the silviculture provision of this rule will not have a very significant affect on New England. I would argue that it is the body of the TMDL proposal that would have the biggest significance and the biggest importance for New England.

We've spent a lot of time talking about forestry; but, in the practical sense, it's a very small piece of this overall proposal.

The urgency for this proposal, and why it is out there today, is there has been a whole lot of litigation over the past decade. The States throughout the country are beginning to implement the TMDL program like they've never implemented it before, and we've received a lot of interest from the States to craft a national framework for how this program is going to be used over the next decades. And we convened a diverse Federal advisory committee to help us develop recommendations and hear recommendations on the basis of those proposals. This has been basically 3½ years in the making, and it's been in response to a lot of concerns by States and litigation around the country.

Mr. EDWARDS. [Off-microphone] And [inaudible] to that, but what—give me a specific example in New Hampshire?

[Senator Smith instructs the Court Reporter to just take testimony only from people speaking at the microphone.]

Mr. FOX. Well, in New Hampshire, I know the next witness will give us the details, but there are some, at least, dozens, if not a few hundred, of waters identified in the State as polluted and not meeting water quality standards.

I know the Merrimack River is on the list. As we were coming up here, we crossed it a couple of times.

Mr. EDWARDS. Specifically related to the silviculture?

Mr. FOX. That's what I said. The silviculture proposal will not have as much of an impact here in New England; but, I'll tell you, it will have an impact out in the Pacific Northwest.

Mr. EDWARDS. [Speaking from audience.] Well, why would the rules——

[The Court Reporter interrupted the proceedings and asked Mr. Edwards to come back to the microphone to speak.]

Mr. EDWARDS. I apologize. I thought I could get a specific answer, and I obviously didn't.

I'll ask the specific question again: With any rule or any regulation, there is typically a need or an imminent threat to cause the necessity for the rule. Within New Hampshire, I'm looking for just one very specific example of why this rule change is necessary within this State related to the silviculture industry? And it's a very simple question.

You've come to New Hampshire and we appreciate that, and I would expect that you would have one specific example related to the silviculture industry. I'm very aware, as a sportsman, of the issues surrounding the Merrimack River, the Androscoggin River, and the Ammonoosuc, and many other rivers here, and, I'm actually, a strong proponent of the Clean Water Act. It's a good law. But I am also looking at groups, like myself, who are very good stewards of the land and we don't make a lot of money off of the land. We make, perhaps, just enough each 7 years from the logging to pay the taxes to leave it in open space. And down in the south-

eastern part of the State, and Senator Smith will, perhaps, confirm this, we've got a major problem with development. And one of the issues right now is in the last 2 years, we've seen hundreds and hundreds of acres put up for development purposes, primarily, because it's getting tougher and tougher to make money by keeping it in open space and be able to continue to pay the taxes, even with the current use statutes in the State. And this is just one more burden that looking at my piece of property, which is one of the largest pieces of property in the southern part of the State and very valuable, if I were to sell it and have it developed.

I'm just trying to understand how am I going to continue to keep that in open space while having to be concerned that I may get, and I use this term loosely, but it's a couple of environmentalists that come up and decide that we are doing something wrong, they petition the State House that something has to be done, and then, before I know it, I'm into a full regulatory issue with EPA and I'm having to deal with things on a point source solution, and I might get to the point where I don't have the money to pay the taxes on it any more.

And I guess this goes back to the other question that Mr. Thomson had: What is more important to the EPA? And, you know, is it open space or is it developing it?

And I really am looking for one very specific example in New Hampshire that shows the need for this rule. I don't want to hear that it would affect us, because it will affect us. As soon as a rule is in place, there are always small factions, and I deal with this both as a sportsman, as well as, a landowner and, as well as, an ordinary citizen; there are always small factions that once a rule is put in place, those small factions focus on that rule and they use that rule to the extreme.

So, this is one more rule; and, we, in New Hampshire, are very careful, especially, with our House of Representatives and our Senate, that we do not put rules in place, unless there is a necessity for that rule, because rules can be abused.

Mr. FOX. Well, I honestly don't have the answer that you want to hear; but I will very distinctly say that there are provisions of this rule that don't affect some States. There's a provision here dealing with concentrated animal feeding operations. This doesn't affect the State of New Hampshire much, either. This is a national rule, a national scope, and that's how we've developed it; and I can also tell you, and we won't do it now, but there's a whole lot of protection in here to prevent people like you from being subject to citizens' suits, and I don't think, frankly, that's a realistic end point, either.

Senator SMITH. Let me ask it a different way, Mr. Fox. Regarding the impact on say, a woodlot owner, how if the rule passes, if he wants to do some activity on his woodlot, cutting trees, for example—how is he going to know whether he has a point source? How's he going to know whether the water is impaired? How's he going to know whether he needs a permit before he cuts his trees? How will he know this? Or does he have to petition somebody at the EPA to go out and log?

Mr. FOX. It's actually going to be, I think, fairly straightforward. First and foremost, the State has an opportunity to have a state-

wide forestry program that is protective of water quality. The State will have 5 years to do that. If the State's program—and by all attempts that occurs, the State will probably meet that certification; if that program's adequate, there's no permitting authority.

Second issue, say, that the State does not have an adequate program in time, which we find it inadequate, we are now in a different position.

First off, there is no authority whatsoever for us to issue permits, unless that water is defined as impaired by silviculture. The citizens can get that information from the State. We publish it on the Internet. It's widely known of whether it's polluted water; and if there is polluted water, again, the permit is only going to be required when the regulatory agency makes a specific finding of the land that is causing the problem.

Senator SMITH. All right, but let me go one step further; and then I'll take some questions.

Let's just say that somebody on their woodlot decides to conduct some activity, and a citizens' group sues EPA, because they claim you're not enforcing the Clean Water Act as prescribed under the rule. What happens? Wouldn't that person, forester, or individual, have to stop his activity pending that lawsuit?

Mr. FOX. The short answer is: I don't believe so. But I can spend some more time with my lawyers and your lawyers. As I talked about this earlier, first, the citizens don't have a permit under which to make a lawsuit or make a challenge; so, the citizens would be challenging through a petition process if the State or the Federal Government failed to issue a permit.

Second, you know, if we rejected that, we would then find ourselves in court, and the judge would have to make a finding that the State or the Federal Government acted arbitrarily and capriciously, which is a very high standard. So, I don't believe that is really going to happen. But we do have a very litigious society today, and I'm not going to say that there aren't any attempts at that, but I just don't think that's a practical point based on how we can stretch this rule.

Senator SMITH. I believe that you sincerely believe that. My concern is that litigation does take time; it takes a long time. And that, you know, a year or two in court by some citizen group that has no interest in the land in question could very well have a severe hardship on an individual for no justification if there were no water quality standards being violated.

One of my concerns is that innocent people would be subjected to this when, in fact, there was no reason for this. If they are violating the water standards, that's another issue, obviously; but, anyway, thank you for your answer.

Yes, sir?

Mr. HALL. Thank you. Thank you, Senator. Alan Hall. I'm the Executive Director of the National Farm Bureau. I'd like to ask Mr. Fox some questions about the costs to agriculture and the forestry industry.

What are EPA's cost estimates for these particular industries?

Mr. FOX. We are revising the cost estimates based on comments that we have received. As we proposed this, we estimated a na-

tional cost for the forestry provision of about $10 to $13 million nationwide, based on the economic analysis that we did.

Mr. HALL. And agriculture?

Mr. FOX. The agriculture costs under this, I'm not sure. We found fairly insignificant costs on agriculture as a result of this; and the reason I say that, just so that you'll understand this, we did our costing analysis looking at the impact of this rule, and that is an incremental cost analysis.

It was, actually, the Reagan administration that first required nonpoint sources to be included. So, we look at the costs, the incremental costs associated with this rule, as opposed to the existing base line; and in the average, it cost agriculture quite minimal.

This is not in a vacuum. We didn't just create this with no existing rule that's out there.

Mr. HALL. When will you be able to release the particular estimates?

Mr. FOX. We release these pursuant to the Federal law, Federal Executive order. We give the proposal and the final, as well.

Mr. HALL. Thank you.

Senator Smith. Yes sir?

Mr. PRATT. I am Representative Leighton Pratt from Lancaster, and my question is concerning if we had a forest plan—can't think of the proper title—but forest Management Plan that's being carried out at the State's University, will that be effective?

Mr. FOX. Absolutely. My experience shows that in most cases, that is absolutely going to be effective; and it will be sufficient for me in applying to these rules, that's right.

Mr. PRATT. Thank you.

Senator Smith. Yes, sir?

Mr. DEROSE. Yes, my comment will be to the Senator——

Senator SMITH. If you could just give your name?

Mr. DEROSE. I'm sorry. My name is Joe Derose, D-e-r-o-s-e, and I'm a music teacher at Profile High School, and I'm here with my friends representing the Dalton Gang. We have property up on the Dalton Mountain. We're a cowboy and shooting club.

My question is this to you, Senator, because, Mr. Fox, I—you're paid by the EPA, and you and that great bureaucracy up there, your jobs are dependent upon you doing what you're doing today, and you do a very good job at it. So, with all the smiles and all the politeness, I'm going to change that a little bit.

Senator SMITH, why should I believe that the EPA or any other government bureaucracy that is so top heavy now and have forced their way into our lives, to such an incredible degree, should keep their word anybody anything? I'm looking at the current Administration. Why should we believe that you people aren't liars——

[Applause.]

Mr. DEROSE [continuing]. Liars? That's the question I'm going to ask of you.

Senator SMITH. Well——

Mr. FOX. I see I don't get all the tough ones.

Senator SMITH [continuing]. Well, I guess I could take the easy route out and say, "I'm not a member of the Administration"; but I think that faith and trust in government, government officials, and how one conducts him or herself in government has to be

earned. I think there is ample cause for many people in our country today to be dubious of actions of our Federal Government in many areas; there's also many reasons for us not to be proud of some of the things that our Federal Government does. But I just want to point out here, in fairness, I think that everybody has the same motive, in terms of wanting clean water, and clean air, and beautiful land to enjoy for future generations.

I'm involved in the Everglades restoration, for example, which doesn't have anything to do with New Hampshire, except for the fact that, maybe, your grandchildren 1 day might like to go down and see alligators. You cannot see them in the White Mountains; at least, I don't think so.

And so, my view is this: What is the best way and this is a sincere difference, I think, that I have with the Administration on this—what is the best way to ensure that for the future that we will have clean water?

Now, we're taking a rule here now; and if you look at the true background of this proposed rule, you would have to say, because the EPA says it's going to delay the permit requirement for 5 years, well, it's going to review the Best Management Plan. But it takes time.

And so, I would have to say: "Is there such an urgency that this rule would have to be put in by June 30?" That's less than 60 days away. In other words, have been up here managing your lands for decades, centuries. Have we created some problems around the country? Probably more in other areas than in New Hampshire, yes.

But what is the best way to resolve this? Is it to have some other rule which almost criminalizes the landowner, in the sense, that he's got to or she has got to respond to some permitting requirement? Or would it be better to come and say, "Look, we've got some problems and we need to do this a little better. Here are the reasons why we have to be careful how close we cut trees to streams." Get the science out of what happens.

We used to have the people from the National Environmental Protection Agency tell us that we shouldn't put any trees across a stream, because it blocked the water; but, in fact, we find out that fish spawn in those pools.

My point is that I don't think it's so urgent that in the next 60 days to implement this plan. I'd rather take the next 6 months to a year and get the science—and it's not 3 years or 2, it's 18 months under this process—to find out what science we have on this, and find out how good it is, and that's all. I think that if that were to be done, if that process were to be implemented, instead of proposing this rule assuming that all or many folks are going to be bad stewards, and we need this rule, we need the permitting, we need to make you aware that you're going to have to pay a fine or buy a permit, and then you're going to be punished if you violate this rule.

Rather than that, I'd rather say, "Let's find out what it is we need to do right," so that we're not creating dirty water down the road. Furthermore, someone just said it in a question, that we're not creating parking lots; and how does the development of industrial parks on the land that could be maintained in perpetuity for

the use of all of us? That's my own view. Is it so urgent after many, many centuries of working this land that it's got to be done in the next 60 days? And I am not—I just cannot believe that that is the case; and that's where I'm coming from.

[Applause.]

Senator SMITH. Yes, sir?

Mr. CHERRY. Mel Cherry, Conway, NH, and I would like to ask a question of Mr. Fox. Do you own any farmland or forestry land?

Mr. FOX. No, I don't.

Mr. CHERRY. Do you own any land?

Mr. FOX. Yes, I do.

Mr. CHERRY. Well, may I ask how much?

Mr. FOX. It's probably a quarter acre.

Mr. CHERRY. Thank you. Thank you, sir.

[Applause.]

Senator SMITH. Senator King.

Senator KING. Yes, I would like to ask a question.

I've lived on the banks of the Connecticut River here for about 40 years; and every spring, when the snow melts and the water comes and we have flood conditions, the water looks like coffee grounds. The brooks that are running off the mountains look like you could go out and walk on them. That's been going on since time began.

When the water is going down, all the fish are still there, the muskrat and its mate, and so on, are on the shores, the ducks and geese are healthy. What is so different about that and this issue of a runoff from timber harvest? What are you going to do about that? How are you going to prevent nature from melting that snow and contaminating the rivers in the future?

Mr. FOX. Not only will we not prevent nature from melting snow—I'm really not sure that that would in any way—I think that that is a pollution problem you just described.

My understanding of New Hampshire's pollution problem is they're mostly related to bacterial and microbiological contaminations from inadequately treated sewage from some cities and failing septic systems, that there are some problems associated with industrial facilities; but I do not think of New Hampshire waters as polluted by sediment.

Senator KING. Well, I was describing, what happens. One July, the Connecticut River went up its banks and all the cornfields were flooded. What I'm describing is what nature does to the rivers on an ongoing basis. Timber harvests do not create pollution from sewage, either.

So, with the natural course of a timber operation, it may or may not provide the same type of issues in these brooks and streams. It happens every year on an annual basis. It doesn't do any permanent damage.

Mr. FOX. In fact, timber operations will tend to stop that kind of stuff because of the forestry that streams are much more beneficial of pure water quality.

Senator SMITH. I see two gentlemen standing. So, we'll make these the last two questions, so that we can move to the next panel.

Yes, sir?

Mr. KLEEN. I thank you, Senator. I'm Rich Kleen with New Hampshire Citizens for a Sound Economy here in Concord. Just a brief question for you, Mr. Fox, a point of clarification on your remarks. This is not a new rule. It's a revision.

Is it not true, though, under the revision that the EPA if it rejected a TMDL, it would require a Clean Water Act, some permit for a nonpoint source, and isn't that a change from what currently exists?

Mr. FOX. I would like to make this perfectly clear, because, apparently, this is one of the obvious misconceptions that I've heard.

We require no permits for nonpoint sources. We never have. We never will. We don't have the authority to do so, and that's just, frankly, a falsehood that's been spread.

Mr. KLEEN. Thank you very much.

Senator SMITH. Yes, sir.

Mr. HOUNSELL. Thank you, Senator. My name is Bill Hounsell. I'm from North Conway, NH. I work as a consultant to the environmental end of Federal issues through local communities. From the lowest level, I work.

My question would be: In New Hampshire, the people in the early 1980's passed the constitutional amendment to our Constitution that says that if our legislature passes some laws, mandated programs onto us, that they also find a way to fund them on the State level.

Is there any consideration—Senator Smith offered, as his—part of his bill, a funding; and that issue is how to fund it? Is there any consideration as this EPA rule is impacted onto the State of New Hampshire that our DES is also receiving Federal money that would bring aboard some of the engineers that would help oversee it? Eighty percent of our Department of Environmental Services are now funded by Federal grants. So, when you say we have our Department of Environmental Services, we do have in our Federal Government.

And finally, my simple question is to you, backing up the Senator's bill, is that part of what's already in there? If not, shouldn't we take the time to find out how the funds are going to come in, rather than just leave it to Senator King and the Legislature to figure out how to do it?

Mr. FOX. In listening to comments on our proposal, the State's raised the funding issue, repeated it to me, and I think this is a very important one. We were successful in working with the President and the White House, including a very sizable increase in this year's budget for the TMDL program. We have increased the two main accounts that affect this one. It's called section 106, State Grants Account; and we've increased this from a base line of $150 million up to $250 million—I'm sorry, a $100—we've added $45 million to that. We took the Section 319 program from $100 million up to $250 million; and so, this has been a very sizable increase.

Now, is it enough? Would we like to see more? Of course, we would; but we're having a tough enough time to try and get this one through Congress; given the budget resolutions that Congress has passed, this is not a bad place to start.

Mr. HOUNSELL. And a second, a followup, if I could?

Senator SMITH. Yes.

Mr. HOUNSELL. The USDA is on this rural development. Also, are you taking into consideration funding some grants through their program for communities under 10,000 that would be impacted by this? Or is that another avenue for funds that hasn't been contemplated?

Mr. FOX. That's a very good idea, and I'll take that back. Thank you.

Mr. HOUNSELL. Thank you.

Senator SMITH. I think that's for legislation. We have a bill out. It's $750 million to assist the Department of Environmental Services and other similar departments around the 50 States. So, in that we do increase the money considerably from what it is now, to, I think, it was in the vicinity of—is it $150 million?

Mr. FOX. Right.

Senator SMITH. $150 million nationwide.

Let me thank you, Administrator Fox, for taking the time to be here. I know there were some tough questions and—but I also wanted—to compliment every questioner because you were very polite and considerate. You offered your views, and we appreciate that. These are tough issues that we all face, and we're trying to deal with them as best we can in terms of our own philosophical views. Oftentimes, Congress and Administration doesn't agree. It's not unique. It happens a lot. Even if it's the same political body and, many times, we have major differences in Congress and the Administration; so, I want to thank you very much.

Mr. FOX. Thank you.

Senator SMITH. And you're welcome to stay if you'd like——

Mr. FOX. I will.

Senator SMITH [continuing]. Or you can leave. There will be some questions at the end, if you——

Mr. FOX. No, in fact, I had planned on staying for the whole hearing. If there are any questions, I'd be happy to respond.

Senator SMITH. Thank you.

And at this point, let me call on the second panel, which will be Mr. Harry Stewart, the Director of Water Division, New Hampshire Department of Environmental Service; Mr. Phil Bryce, the Director of the New Hampshire Division of Forests and Lands; Commissioner Ronald Lovaglio of the Maine Department of Conservation; and Mr. Ronald F. Poltak, Executive Director, Northeastern Interstate Water Pollution Control Commission.

While you're being seated, gentlemen, let me just indicate that your entire statements are a part of the formal record. If you have any opening comments you'd like to make, if you could summarize them in 2 to 3 minutes, I'd appreciate that; and your statements will be made part of the record.

Mr. Stewart, why don't we start with you.

STATEMENT OF HARRY STEWART, DIRECTOR OF WATER DIVISION, NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SCIENCE, CONCORD, NH

Mr. STEWART. Thank you, Mr. Chairman. First of all, before I start, I have a letter here from Governor Shaheen, which I will present to you——

Senator SMITH. That will be made part of the record.

Mr. STEWART. Governor Shaheen indicates strong support for the forest products industry in this letter, requests another round of public review and comment with regard to the TMDL rules, once the revised rules have been finalized, particularly, for the forest products component of the rule, and also requests consideration of increased funding at this stage for the TMDL rule which is desperately needed.

Mr. Chairman, I am Harry Stewart, director of the Water Division, New Hampshire Department of Environmental Services.

Thank you for the opportunity to testify before the Senate Committee on Environment and Public Works on the EPA's proposed TMDL rules.

NHDES and other State environmental agencies across the country were highly critical of the EPA's proposed TMDL rule, dated August 23, 1999. The regulated community and the public were also highly critical, as demonstrated by the approximately 30,000 comments received by EPA on the proposed rule. NHDES viewed these proposed regulations as being too burdensome on both the State environmental agencies and the regulated communities, and as too prescriptive, removing the flexibility of States to tailor programs to State-specific priorities and needs.

Since then Chuck Fox, Assistant Administrator for Water at EPA, should be commended for his efforts to be responsive to these concerns, particularly, the State concerns. In letters dated April 5, 2000 to key Senators, including Senator Smith, and the joint statement between EPA and the Department of Agriculture, dated May 1, Mr. Fox has indicated numerous changes in the proposed rule which will address a high percentage of the issues raised by the States and other parties. These proposed provisions go a long way to address the concerns of the States by providing greater flexibility to tailor TMDL approaches to State-specific needs. In my written testimony, I go into detail about these changes.

Similarly, the joint Department of Agriculture and EPA statement indicates a very positive step to address the forestry concerns and suggests an approach that is likely to work in New Hampshire. Under any reasonable criteria, New Hampshire has an ''adequate'' program; ''adequate'' is the term that's been used in some of the EPA documents. With an ''adequate'' program, a State falls out of the scheme of the TMDL regulations with regard to silviculture.

By any reasonable criteria, New Hampshire has an adequate program in place, which includes three critical elements: Implementation of best management practices, training and outreach, and compliance and enforcement.

With regard to compliance and enforcement, in New Hampshire, when water quality problems caused by forestry operations are identified, they are typically short term and are corrected through the joint efforts of the Department of Resources and Economic Development—and Phil Bryce, the State Forester, will be talking in a moment—and NHDES. These efforts virtually always first included compliance assistance; and, when necessary, enforcement under State statutory authorities. In fact, we expect that site-specific water quality problems would virtually always be addressed under State programs long before they rise to any threshold for Federal involvement, such as long-term water quality impairment.

Although, we are pleased that EPA has been very responsive to the concerns expressed by the States and other parties, we have not yet had an opportunity to examine the actual wording of the proposed revisions which address these concerns. Consequently, we urge EPA to publish the actual language of proposed changes for public review as soon as possible, especially for the forestry provisions, to allow evaluation and comment on the changes prior to final promulgation. This approach is appropriate, considering the magnitude of the TMDL comments and expected changes.

Finally, please note that, as in most other States, New Hampshire's TMDL program is significantly underfunded. Additional Federal support for State development of TMDLs is needed, irrespective of the results of the EPA rulemaking.

Additional funding is proposed in both Senate bill 2417 and the President's proposed budget. The President's budget contains $45 million for Federal fiscal year 2001, which translates into just over $200,000 for New Hampshire to assist with TMDL development. We have several concerns with the proposed funding in the President's budget. This is a good start, but we estimate that we need around $420,000 for an adequate TMDL program in New Hampshire.

Due to the way a new EPA Formula for the section 106 moneys work, Senator, if the appropriation were to increase by $5 million to $50 million, all of the extra funds would go to New Hampshire, Vermont, Rhode Island, and, I believe, 10 other States, because of the way section 106 formula works. So, if the present funding were increased by $5 million, the additional funds would go only to New Hampshire and 12 other smaller States.

Under the President's fiscal year 2001 budget, the State match requirements for the proposed new TMDL funding are also too rigid to enable New Hampshire to access all of this money. For the new money, there's been some changes in the rules in terms of the State match proposed, which make it very difficult for New Hampshire, particularly with the education funding problem we have here to use, even the $200,000. So, we suggest that the match requirements be changed.

We urge you to provide additional funding for water quality analysis and TMDL development with minimum match requirements and maximum flexibility on how the Federal funds may be matched. This is the only way to ensure that the funds will be fully utilized by all States to make significant progress toward the goals of the Clean Water Act.

Thank you for the opportunity to testify on the proposed TMDL regulation. We look forward to working with Congress and the EPA to ensure that our Nation's waters are protected and improved, while ensuring that our forest products industry and other traditional activities can continue to flourish in an appropriate and responsible way. Thank you.

Senator SMITH. Thank you very much, Mr. Stewart.

Mr. Philip Bryce.

STATEMENT OF PHILIP BRYCE, DIRECTOR, NEW HAMPSHIRE DIVISION OF FORESTS AND LANDS, CONCORD, NH

Mr. BRYCE. Yes, thank you, Senator. I have submitted a written copy for the record. My name is Philip Bryce. I am director of the Division of Forests and Lands. Thank you for the opportunity to testify today on the EPA's proposed TMDL Rule.

The Division of Forests and Lands is the primary State agency responsible for the enforcement of forestry laws, including, in cooperation with the New Hampshire Department of Environmental Services, those protecting water quality. Law enforcement officers from my agency regularly conduct onsite inspections of logging operations to ensure compliance with water quality and other timber harvesting laws.

The State also provides training in compliance with forestry laws and implementation of BMP's through the Professional Logger Program, which is a volunteer program. The recommended timber harvesting practices that are highlighted in that Program for controlling soil erosion have been around in New Hampshire for, at least, 20 years. And implementation of these practices has been a critical component in reducing the impacts of logging on water quality over that time.

As a State forester, I oppose the proposed rules on three major grounds.

The first is: The proposal is a major departure from the historical interpretation and implementation of the Clean Water Act, and is not supported by statutory authority.

The second is: The proposal ignores the relatively minor contribution made by forest management to water quality problems nationwide, and threatens to disrupt the effective approach taken by the State foresters and our Federal partners to achieve these results.

And third: The proposal will be extraordinarily difficult to implement in practice and will result in drastically higher costs for both States that must develop TMDLs and the landowners and operators who might become subject to NPDES permitting requirements.

I certainly understand that EPA has been working on addressing some of those concerns. However, until we see a new rule written and see the language of that rule, it would be very difficult to tell the degree to which concerns have actually been addressed.

New Hampshire has a long and some proud tradition of protecting personal and property rights while working collaboratively to resolve public issues and problems. I have characterized this as a balanced and collective form of forestry leadership. The top-down approach promulgated by the EPA is viewed by many as a threat to maintaining that spirit of collaboration between the private and public sector that has worked so well here in New Hampshire to address natural resource challenges.

As we work to address environmental protection and forest stewardship through constructive dialog, a broad spectrum of interests, from representatives of the forest products industry to those, who are some of the staunchest critics of that industry, have sat down and identified more than once the need for additional education, monitoring, and enforcement of existing laws.

For example, the final report of the Forest Liquidation Study Committee to the State's Forest Advisory Board concluded that, with respect to improving forest practices, we need increased efforts to educate individuals about sound forest management, better data-gathering on the level and harvesting activity within the State, and enhanced enforcement of existing laws. What we really need are the resources to carry out these recommendations. Specifically, in our New Hampshire Statewide Forest Resources Plan, it's recommended that the State "Provide consistent, swift and equitable enforcement of forestry laws" and that we secure funds for five additional Ranger positions.

I recognize, as I stated before, that the EPA has been working to address some of the issues and our concerns around the proposed rules; and, I, again, would like to thank them for that effort. However, there remains a great deal of uncertainty as to the degree to which the EPA is addressing these concerns. Questions remain: And I'd like to go through these very quickly.

—Do these rules lead to the improvement of water quality beyond the capability of existing State laws?

—Is EPA considering forestry and silviculture as a nonpoint pollution source or not? This is a critical question. And I do not understand this, yet.

—Under what specific circumstances will EPA issue a clean water permit or require the States to do so?

—What is the relationship between the existing BMP's under the 319 Program and BMP's recognized under the new rule? If the 319 BMP's are not acceptable, what are the new criteria?

—Regardless of current policies or the intent of EPA, what is the actual impact on landowners and forestry activities if there is full enforcement of the proposed rules?

To what extent will additional regulation drive landowners to convert land to non-forestry uses? We heard that a little earlier. And if the States have a lead, who has the final say with respect to the application of this rule?

Now, I would like to emphasize that we really need to see a copy of the actual rule in order to understand the degree to which those questions are answered. We really need to see a copy of the language, as it will be presented in the rule; and I would suggest that the major policy changes that have been made, be presented for comment in the form of rule language.

In closing here, while we do look forward to working with EPA to protect our water quality, we know what's important here in New Hampshire. We don't believe that the proposed rule is the correct approach. Even with the changes in policy, we are concerned that it creates ominous and uncertain Federal regulation over silviculture and forest management.

Our collective efforts on behalf of the public to protect water quality should focus not on additional permitting and a shift to Federal control, but on monitoring, education, and additional support to the States to enforce existing law.

Thank you for the opportunity to provide this testimony.

[Applause.]

Senator SMITH. Thank you very much for your testimony, Mr. Bryce.

I neglected to point out that this is a New England hearing. Mr. Poltak is here from Massachusetts and Mr. Lovaglio—have I got that right?

Mr. LOVAGLIO. Yes.

Senator SMITH [continuing]. From Maine, Augusta, ME. Thank you very much, and I appreciate you both being here.

Let me turn to you, Commissioner Lovaglio, for your comments from the Maine Department of Conservation.

STATEMENT OF RONALD B. LOVAGLIO, COMMISSIONER, MAINE DEPARTMENT OF CONSERVATION, AUGUSTA, ME

Mr. LOVAGLIO. Thank you very much, Senator Smith, and distinguished guests. I am Ron Lovaglio, speaking on behalf of the State of Maine. I serve as Maine's commissioner of the Department of Conservation, but today, I am representing all of Maine's natural resource agencies, as well as, the administration of Governor King.

In January of this year, Maine's commissioner of Environmental Protection and I submitted joint comments on EPA's proposed TMDL rules. At the same time, our State Forester, Thomas Doak, submitted comments, as did the commissioner of the Department of Agriculture. Our concerns were substantial and I call attention to those letters attached as part of this testimony.

In the months since the end of the comment period in January, EPA has confusingly restated its position.

In "Achieving Cleaner Waters," that was released in March, EPA acknowledged that forests are essential to maintaining clean water. However, EPA provided no further insight into how costly TMDLs and the threat of permits would enhance State efforts.

In their April 5 letter to Senator Shuster and the committee, the EPA regretted the confusion for the TMDL proposal and summarized the key elements of final regulation: To give States more time to develop lists of impaired waters; to give them more time to develop TMDLs; and they tried to clarify that permits will not be needed for forestry operations, which we heard here today, when these operations are managed by State programs "that are proven effective."

Administrator Fox's April 5 letter is included and a list of "Key Elements of the Expected Final Regulation." The EPA dropped the major components of their original proposal, including: threatened waters, offsets for new pollution, the public petition process, and the potential for Federal permits to be applied to forestry operations.

However, the letter supplied few details about how the remaining program would address nonpoint sources.

On May 1, a joint statement by EPA and the Department of Agriculture attempted to qualify the April letter; it states that no permits will be required for point source forestry operations for 5 years, and it specifies that EPA will develop guidelines for States to follow in designing BMP's. It then states that forestry operations would be exempt from permit requirements, and that the State's BMP's need to be recognized by EPA as "adequate."

And at this time, also on May 1, it did not mention removing the public petition component that was mentioned in April. The letter

also references increases in conservation funding, but identifies no new money to implement BMP's.

This proposal, in our view, effectively leaves EPA with direct oversight over State efforts.

Maine has little confidence that EPA's efforts to finalize a rule by the end of June that will result in a practical mechanism to apply the best analytic tools and the best remedies to the issue of clean water.

Moreover, we are frankly, concerned about a seeming reluctance on EPA to recognize that State, rather than Federal approaches, particularly in the area of nonpoint pollution sources, have proven most successful in recent years.

To suppose that States cannot develop BMP's without Federal guidelines and Federal judgment of adequacy is an overzealous and unnecessary application of Federal power.

I'd like to speak specifically to forestry, as well as, agriculture.

Silviculture has not been identified as a major source of impairment in Maine's 303(d) list. The EPA's own review of that list described Maine's nonpoint source pollution program as "exemplary and one of the best in the Nation."

It is not appropriate to now require States to submit to a one-size-fits-all federally defined, determined to be "adequate" BMP's.

Maine has a strong Forest Practices Act that includes criteria for sustainable water quality.

In unorganized towns, which cover 10 million of our acres, we have land use regulations, whose primary function has been to drastically improve water quality over the last 20 years, principally, from forestry operations. It is a national success story accomplished by the State without Federal intervention.

The gap EPA proposes to close by continuing to include forestry operations, I believe, is largely theoretical. Evaluating threatened or impaired water on the basis of evaluated opinion, rather than data, is akin to being convicted before the evidence is presented.

In nonpoint source issues, without real data, it is difficult to pinpoint which sources are contributing what; consequently, it then becomes guilt by association.

Requiring a major safety margin on top of that evaluative opinion adds insult to injury—a real cost to forest landowners and farmers.

So, what needs to be done?

States should develop BMP's without Federal "guidelines" for approval. There should be——

[Applause.]

Mr. LOVAGLIO [continuing]. There should be real Federal funding assistance; help people without dictating. And we should develop real data on loads. Support pilot programs to find different approaches that work, as opposed to one-size-fits-all.

In our view in Maine, Senate bill 2417, your bill, Senator Smith, is a much preferred alternative. The bill recognizes that the most effective way to improve water quality and reduce nonpoint pollution is to increase funding to State programs that reach landowners directly, and improve practices on the ground. The bill supports innovative State approaches that build on watershed management efforts. And finally, the bill provides critical money to develop

water-quality data and to develop a better understanding of how and where TMDLs can be a useful tool; and, in fact, where they cannot.

On behalf of Maine, thank you very much and we appreciate having the opportunity to comment on this panel today. Thank you.

[Applause.]

Senator SMITH. And we're delighted to have you. I've been fishing up around Moosehead Lake. There are some paper companies up there and it was a pleasant experience. I didn't catch any fish, but I saw a lot of moose.

Mr. Poltak, Ronald Poltak, executive director of the Northeastern Interstate Water Pollution Control Commission from Lowell, MA. Welcome, sir.

STATEMENT OF RONALD F. POLTAK, EXECUTIVE DIRECTOR, NEW ENGLAND INTERSTATE WATER POLLUTION CONTROL COMMISSION

Mr. POLTAK. Thank you, Senator.

Senator SMITH. You had a long ride; longer than mine.

Mr. POLTAK. Quite a long ride. I want to thank you for the opportunity to be here and I want to thank your staff for inviting me to testify. My name is Ronald Poltak and I am the chairman and director, actually, executive director, of the New England Interstate Water Pollution Control Commission. It is an agency that was established by an Act of Congress in 1947 to work with the six New England States and New York, charged with the responsibility to coordinate water pollution control programs.

And, with that said, I appear before you this afternoon as a lifelong resident of the State of New Hampshire, born and brought up in this State. I'm very proud to have worked in the State Government for 20 years prior to have taken on this position.

I appear before you this afternoon with full recognition of the fact that the six New England States and New York have—and I won't go into the details—have submitted very formal written comments relative to the content of the regulations as proposed, and we do have difficulty with many of the provisions within the content of those regulations.

However, we do support the intent of the TMDL process with respect to what it means in terms of enhancing water quality across the Nation. Those comments are submitted for the record. They are available and I also appreciate the efforts of Chuck Fox and, more importantly, to some degree, his staff, who have worked with us in earnest at the State level to try to correct some of the difficulties we've had, in terms of the direction this program will head in.

I expect that many of the changes will be implemented, and I expect many of those changes will result in positives relative to the TMDL process which is essential to ensure water quality across the width and breadth of the Nation.

I also speak on behalf of other interstate commissions. There are six others like ours in this country. We work with the States, as I said earlier, and we have a very important role to play, in terms of the implementation of the Clean Water Act. I want to just elaborate a little bit on what that role is and how important it is, Sen-

ator, that you and the committee understand and recognize the interstate role and the interstate objectives.

We have been charged with the responsibility through an Act of Congress on monitoring and assessing water quality within our areas of jurisdiction. We have established over time a uniform or consistent set of uses and criteria to protect our public waters. We have established wastewater control requirements. We review and approve projects. We also develop, along with other States, 305(b) water quality assessment reports, which are essential to the basis on which section 106 funding is derived; also to explain where water impairments across the country are located.

In accomplishing these roles, it should be noted that the interstate commissions are well established and have developed strong working relationships and trust among Federal, State, and local entities.

Our Commission was established, as I said, over 54 years ago, and our role is to provide consistency and equity among two or more States, and in some basins between EPA regions and the States. We can establish a process to define appropriate goals and program elements of TMDL development processes. We develop and adopt water quality standards. The first water quality standards adopted across New England, in terms of consistency, along with the States of New York, New Jersey, and Pennsylvania, were developed by our Interstate group, and we're proud to say that those standards are still in place, and we are there to provide consistency and assurances to the public that those water quality standards will not be violated.

We have worked and continue to work with the States and dischargers in implementing the TMDL program.

In our view, on waters having interstate basin commissions, EPA should recognize and will, I would assume, work through the interstate commissions in the establishment of TMDLs. There's a very important reason for that. It is because the commissions can help secure agreement on management approaches and maintain consistency across State lines. We are, as commissions, made of State members, and we also have the Federal Government through EPA at our table on our executive committees.

We have a strong working relationship and trust, and operational plans that matured over time. We have the ability to implement TMDL activity among the 25 river basins that come under our jurisdiction in New England, not the least of which are the Connecticut and the Merrimack, and we've already begun coordinated efforts to make TMDLs happen.

I just want to take 2 more minutes to talk about two more subjects. In terms of the regulations themselves, the subject of flexibility must be discussed.

In order for the TMDL program to be effective, flexibility and consistency with existing statutory authority is critical and must be provided in the final TMDL regulations. The final rulemaking needs to adequately reflect the partnership established with the States under the 1972 Clean Water Act. It is important to note that the Federal Water Pollution Control Act, section 101(b) gave States "the primary responsibility and rights to prevent, eliminate, and reduce pollution."

These presently proposed regulations do not reflect this leadership role for States outlined by Congress. State and interstate organizations must be afforded greater flexibility and resources to support their important role in implementing this critical program.

If the TMDL program, in fact, utilizes a watershed approach to reduce pollution, and we know that it intends to, then State and interstate organizations need to have the primary role and responsibility in implementing this program. Since these entities are better suited to that role than the Federal Government, it is critical that sufficiently flexible provisions be granted to States and interstate organizations in order to account for and address local site-specific factors which deviate from the national perspective and the one-size-fits-all phrase.

With respect to current funding, Harry elaborated on that. On a national basis, I just concluded working with EPA Headquarters on a gap analysis study within the context of program implementation capability. That gap analysis study, which will be shared publicly in the near future has demonstrated that, in fact, on the whole, States and interstates on an annual basis are $26.5 million short on an individual basis of implementing all of the program objectives that are subjected to them through the Clean Water Act process.

If we're going to be able to make strides to narrow that gap, it's going to take substantial funds. While the current level of funding will be very much appreciated, in the sense of the additional $45 million in the 106 program, in my opinion, funding is still woefully inadequate in order to get the job done, it should be a threefold increase in funding in order to make the right things happen.

Additionally, I would simply mention the fact that there is, within the context of the Administration's proposal, 60 cents of every Federal dollar to be matched with 40 cents of State and interstate money. We simply can't make that match. This is a mandated program, and a match of that size is of an amount that is excessive, in our estimation, and that should be no more than 10 percent of it; or, better still, given the level of record matches presently under the 106 program, it should simply be maintained at that. I think that is a thought for consideration; but simply stated: "The match is too high for us to make the program work."

With that said, I thank the committee. My bottom line is: Don't forget the benefits of the interstate basin commissions, and I appreciate the opportunity to talk with you all today. Thank you.

[Applause.]

Senator SMITH. Thank you very much, Mr. Poltak. I also wanted to congratulate your City of Lowell for its participation in the Merrimack River Basin Study. We have several mayors now, both in Massachusetts and New Hampshire, looking at the holistic approach to managing the water quality of that river. You know, it's great to have all of them on the same level, two different parties, different philosophical, political views; however, all united on the holistic approach to the use of the Merrimack River study. It was great, and we appreciate your support there.

Let me just remind you that the same rules as the previous panel, if someone has a question, feel free to step up to the mike and ask any one of the panelists. I'll start with a couple of ques-

tions, in the event that you want to take some time to think of a question.

Mr. Stewart I was interested when you use the term "re-propose the rule." Could you elaborate on what you would expect in re-proposing the rule?

Mr. STEWART. We were thinking in the New Hampshire context and how we would work on rulemaking, and I know that Chuck has his own rules, and so forth, on how he has to do things.

But in the New Hampshire context, if we had the magnitude of comment and very significant changes to the rule, we would likely go out with another public process for review, receive comment again, and then promulgate the final rule.

Senator SMITH. How long would you want?

Mr. STEWART. It could be a couple of months in New Hampshire. Now, he's dealing with the national rules; so, I don't want to make any assumptions as to what that would take on the national level, and he has his own deadlines.

Senator SMITH. Under the rule as proposed, do you have any idea what it would cost the State of New Hampshire? Mr. Poltak brought up a very good point about the Federal/State split in the mandate. What would that cost the State of New Hampshire if it was to be implemented, as is?

Mr. STEWART. I have an estimate of the DES costs, but that's really under the existing rule or the new rule; and, again, I would estimate that $420,000 to $430,000 is really the cost for an adequate TMDL program, in terms of our ability to start the program, to do the studies, and perform a necessary water quality analysis. I don't have a handle on the regulated community costs.

Senator SMITH. Mr. Bryce, you mentioned that the rule would be hard to implement in practice. Walk us through what would happen?

What obstacle would a landowner or a forester in the scenario we have here have to address to deal with this role.

Mr. BRYCE. I'm not sure that I completely understand that myself right now.

With respect to bad actors, I would say, as stated in my comments to the EPA, I'd say, that bad actors won't even bother filing for the permit. They don't comply with the law. That's why they're bad actors.

Issues with respect to permitting the landowners, include making sure that they are able to do it correctly in time. Time is a big issue when you're looking for a permit, because you don't always know 2 months, 3 months, 6 months, a year in advance, exactly what you're plans are going to be. So, when it comes to permitting for forestry activities, the shorter the time period that's involved, the less burdensome it is on the landowner.

Senator SMITH. Let me just go back to Mr. Stewart for a moment. In terms of budgeting, wouldn't it be beneficial to know the costs in a little more detail on the proposed rule before you were asked to adhere to it or asked to follow the Federal rule?

Mr. STEWART. Yes, I understand what Mr. Fox is suggesting is his estimates of the costs and I don't know what the timeframe for that is, but I understand that there are adjustments being made in terms of the total fiscal impact of the rule.

With regard to the permitting elements, the way I see this is that the reality, because we're talking about impaired waters here, and identifying an operation that has impaired water, and then it qualifies and comes under the NPDES permit. In New Hampshire, I believe, that before we go to that point, that Phil's operation—the Forest Division and the DSY Division—would be the only fact particular operation, first with technical support and then reinforcement necessary long before the NPDES permit program kicked in.

Senator SMITH. Let me ask for a brief comment from each of you—you all deal with water quality one way or another in your current position.

Would an 18-month delay, in your view, do any damage to the environment? I'll start with you, Mr. Poltak. Would an 18-month delay for science cause any damage to the environment. It's tough to quantify that, but, in your professional——

Mr. POLTAK. I would respond this way: What is proposed, as Chuck said earlier, are revisions consistent with the existing rule and this rule will remain in place, the programs would remain in place, the efforts of the States and Federal Governments, to the extent that we've observed today, would stay in place; the opportunity to move forward, in terms of the importance of the TMDLs, and in light of the various court orders and decisions that have been handed down across the country, could be impacted relatively, in terms of our need to move forward.

My suggestion, and it's only a suggestion, and we are going to take it up soon, the six New England States and New York, when we meet a week from Monday, is that in the spirit of compromise a second review of the revised rules is in order prior to enactment. Chuck, as I said earlier, has been accommodating to state comments in order to make this rule a more palatable one from the prospective of implementation.

I think, on the other end of the spectrum, with respect to your legislation, which we're also going to be taking up in depth next Monday. We will be commenting on formally regarding provisions which we do support. Getting back to the issue of the question you asked, I believe, there's some middle ground that could be struck if we, as States and interstates, had the opportunity—and I suggested this to Chuck earlier—to see the actual language shared with the public and be able to have assurances that all of our comments and the majority of the sense have been responded to. I believe they may well have. There is the opportunity to put this initiative into effect prior to 18 months, but that remains to be seen. I do not see the waters of the country, if you will, being significantly deteriorated if there were to be a delay.

Senator SMITH. Mr. Lovaglio, same question?

Mr. LOVAGLIO. Well, first, to quickly answer the question, when I look at the great success we've had in Maine, including the levels of praise from EPA, a delay of that level would have absolutely no affect on water quality. We're already doing what needs to be done.

I think the logical question is: Why are we even considering this? This whole change appears to me to be a solution in search of the problem.

[Applause.]

Mr. LOVAGLIO. I don't think we should be arguing the delay. I think we should be arguing whether we go forward with this at all.

Senator SMITH. Do either of you other gentlemen wish to comment, or is it pretty well clarified? Do you wish to make a comment to that question?

Mr. BRYCE. I stated that if you want to work on protecting water quality, it should be in other areas, and I made some suggestions in my testimony of monitoring, consistent enforcement, and education.

Mr. STEWART. From the prospective of the State programs, I really see this rule in two pieces: One is the silviculture and—and the agricultural funding, and it really doesn't matter much, to be honest.

From a prospective of the State programs, as Ron indicated, there are some benefits, in terms of moving forward. The 18 months involvement, you know, it's kind of an incremental risk, because what we've seen across the country is a bunch of lawsuits related to the TMDL program. We have been fortunate in New Hampshire not to have one of those, and so there's this incremental risk that could be incurred, if you will, as the program component of the rule is delayed.

Senator SMITH. Thank you very much. Yes, sir?

Mr. POLTAK. Just in closing, I just wanted to make sure that there was clarity. The judicial branch of Government has mandated that we must move forward as States and in response to public needs, in terms of what we do with regard to managing TMDLs.

And with that said, I think our job is to have a total understanding and appreciation of the effort and where this program is going to head with respect to these revisions; but relative to its impact on water quality, there's no doubt that the impact on water quality will be positive.

Relative to your question earlier, we developed a TMDL on the Long Island Sound estuary. The cost of developing that TMDL, yet to be implemented, is in excess of $3 million, alone.

On the other hand, we can develop a TMDL for a local stream segment, a part of a watershed, for as little as $50,000. We have put together a national assessment of the costs associated with developing TMDL for a specific purpose, and we'd be glad to share that with the committee.

We've had long discussions with EPA relative to our differences of opinion between EPA and the States and interstates relative to what they see the cost to be. There is a disparity there. Chuck and the States recognize that; but it has been well defined, and it can be answered in detail for you.

Senator SMITH. Thank you very much.

I'm going to take these three gentlemen's questions and then we'll move on to Panel 3. Go ahead, sir.

Mr. MITCHELL. I'm Steve Mitchell from Vermont. Is it all right to speak here?

[Laughter.]

Senator SMITH. Yes.

Mr. MITCHELL. I've been a logger here for 50 years, and I don't know if these gentlemen have ever been in the logging business. I've taken programs, the State of Vermont has got the 40-acre

clear-cut deal; I've been to classes; I've logged for 50 years. I started with a horse and a bucksaw, and I've worked my way to skidders, and stuff.

We have all of these laws on the books for revenue. Just to give you gentlemen an idea of what it cost—a lot of times, putting a culvert in for a brook is 500 bucks, easy. That's just the one cost. But what, to me, a lot of you people in Washington are not realizing, I'm an independent logger. I don't work under a forester, but I still have to go by the best forest management practices.

What is going to happen, not just to me, but to thousands of us loggers across the Nation, if I have to wait a year for a permit?

I'll tell you how I log. Right now, I've got probably seven more loads of wood to cut on one particular landowner's land. I've logged it since 1976. This is the 50th time I've been back through there. The loggers are doing a hell of a job; but the point is, what if I had to get a permit? Tomorrow, I don't have a job after I get this done. I'll go out and hunt for a woodlot, and I drive to Massachusetts to get people to visit with them. This is the problem.

I believe in clean water. I do everything I can. I clean the brush all out, and all that. But for me, if this is implemented, this isn't just going to affect just the logger. It's going to affect machinery operators—the Caterpillar, John Deere, all of the people. It's going to affect the building industry; because, with these regulations that we are getting today—if you only go look around—go to Berlin, the paper mill, how much wood do they have in their yard? Not very much. Go to Davison's in Littleton, NH. They're down to 1 day sawing. They saw about 200,000 feet of logs a day. These industries are going to suffer. The Nation will suffer. We don't need this rule.

I can understand furthering the loggers' education. I've got no problem with that. I go to classes. I don't like it, but I go, anyway.

Think about something. You want to propose a $27,000. Think about it, $27,000—would you pay $27,000 for a small violation?

Mr. FOX. No.

Mr. MITCHELL. OK. All right, if you took that, the landowner can't—most of them couldn't. OK, that's enough to stop the landowner from wanting to do any logging.

What's it going to do to the farmers? He can hardly spread his manure on his own place. You're going to fine him $27,000, too?

Senator SMITH. Do you have a question for the panel?

Mr. MITCHELL. OK, the question to Mr. Fox is: Do we need this regulation?

[Applause.]

Senator SMITH. Maybe, at the end, if Mr. Fox wishes, he'll respond to your point.

Yes, sir?

Mr. BOGEU. My name is Doug Bogeu, and I'm the representative of Clean Water Action from the southern part of the State. I traveled a long way to be here, as well. And I'm very concerned just on the last point that there hasn't been much discussion of the benefits of dealing with the problem of water pollution and the need to address this problem, both in-state and nationally. But I will make more comments further in the comment section. Right now, I just have a couple questions. One, really, for Mr. Stewart.

Can you tell us—I don't know if you have a copy of the list of impaired waters with you today. Can you tell us how many impaired waters there are on the current list for the State of New Hampshire? How many are in the north country in New Hampshire right now?

Mr. STEWART. I don't have that list with me. I believe that four or five reach across the State. I don't believe there's any in the north country. I haven't looked at the list in a good while; so, I'm hedging. So, yes, I guess that's the best I can do off the top of my head.

Mr. BOGEU. OK, thank you.

I looked at a report that DES sends to Congress every 2 years. I only have the 1996 report; but in that report, they listed 70½ miles of rivers that were considered impaired under the Clean Water Act. And then when you look at the list of how many were due to silviculture and to agriculture, silviculture was zero. OK? And I'm sure, I think everybody's pretty much pointed that out, that silviculture is not known to cause any of the water problems at this point.

[Applause.]

Mr. BOGEU. And with agriculture, as well, there was a total of 5.5 miles. That's 8 percent of the rivers. Now, this is enough to argue that we don't need the rules. It is enough to argue that people shouldn't be so concerned about the impact on their operations here in New Hampshire.

Isn't it right? I know this has been said before, but we seem to have to keep making the point. Isn't it right that there has to be an impaired water designation before any permits can be required of any landowner, or any timber operation, or any agricultural operation in the State under these proposed rules?

Mr. STEWART. That's correct. I would reinforce that whether these rules exist or don't exist, the reality is that if there's an impaired water caused by a silvicultural operation, and the State Division of Forest or the Department of Environmental Services becomes aware of it, it will be addressed. By technical support, education, and then, ultimately, enforcement to get compliance, if necessary. So, yes.

Mr. BOGEU. Well, based——

[Applause.]

Mr. BOGEU [continuing]. Based on what you know of the current practices in the north country throughout the State, do you think that there is likely to be any impaired waters designated in this region or any permits required of anybody in the region because of that problem?

Mr. STEWART. I don't believe that this NPDES element is going to kick in in New Hampshire if the rule existed, no.

Mr. BRYCE. And the question then becomes: What is the reason why we would need the rule; and what helps does bringing anything else along with it? This gets back to my questions about some of the new policy changes. What do they really mean to the landowner? I don't believe I understand that.

We see no reason for the rule. We see that we don't need to have that hanging out there. It doesn't help us protect water quality.

Mr. BOGEU. Well, if you're asking the question to me, and not just rhetorically, we do need more effort on clean water. I live downstream. OK? I know it's probably not as big a problem up in the north country, but we have quite a few impaired waters down in the southern part of the State, and we're finding more and more pressure to use other water supplies. People are tapping into the Merrimack River for drinking water, and we need to ensure that the quality of those waters, so——

[Inaudible comment from the back of the auditorium.]

Mr. BOGEU. I think, though, there really hasn't been enough discussion of the benefits of the TMDL rule, in general, and I think this hearing has been somewhat one-sided. I just have one other question. This is, I think, to someone involved, either Mr. Bryce or Mr. Lovaglio—to the timber industry.

Now, it's my understanding that the forestry industries have been exempted in a regulatory way, not written into the Clean Water Act; but for the last 28 years, since the Act was written, the forestry industry has not been a subject to Clean Water regulations.

And I would like to ask you if any one on the panel can explain to us why you think that exemption should be continued indefinitely. It is being discussed to not try to move forward with these rules.

Mr. LOVAGLIO. Well, I can only speak for Maine, but I have a strong suspicion, it's equally the same in New Hampshire. We have strong water quality rules and regulations in place that are well informed and have proven effective; have received compliments of the EPA. And so, I think that we have something that's working, and we just have no need to start developing new rules. We have, basically, a state-level, statewide approach to water quality that's working.

So, I don't find a need to be considering what the Feds believe are adequate BMP's, and trying to bring in a new regulatory mind frame into an infrastructure that already exists within the State that is doing an outstanding job on water quality.

[Applause.]

Mr. BOGEU. So, if I could make just a final comment, I really feel that we should be thinking of the issue on the national level. I agree that there probably aren't great problems in New England and, certainly, not in the north country area in this regard, but there are many in other parts of the country. I mean, people have died from runoff from floods, from clear-cutting out West, and we shouldn't be trying to dictate in how they deal with problems out there, just as we don't want them to dictate how we deal with the situation here in New Hampshire. So, you know, we really need to be thinking more on those lines, rather than just how does it affect us here. Thank you.

Senator SMITH. While the last gentleman comes up, let me just say, in balance, as the chairman of the committee, I hear your comment and I respect your views, but I've made a very determinate effort to be as balanced as possible on this. Indeed, Deputy Administrator of EPA has a different position and most of the people have in this room, I thought, testified very forcefully on his position. He

was a single panelist; so, he had the opportunity to do that with no interruption.

In addition, there will be two additional panels who will come on and there will be individuals on those panels, who, perhaps, have a different position; and, fine. We have anyone of the audience who—allow the microphone pretty much to be open to anyone like yourself who has different views. We are trying to keep it as balanced as possible, but I understand your point.

Yes, sir.

Mr. LEBRIE. I am Cliff LeBrie and I'm a forester in the New Boston, New Hampshire area and have been for 45 years. And I'm in agreement with the fellow with the pad; and after hearing what they had to say, the question arises: Why do we need EPA?

[Applause.]

Mr. LEBRIE. And you, Senator, have you had an answer to the question you asked at the very beginning when you opened the panel in regards to EPA's input?

It doesn't do any good to get into calling them bad names, and what not; but, traditionally and historically, their mandates have imposed great hardships on the average landowners throughout the country. And I'm skeptical when they make a power play to enter into any other activity that affects the individual landowners in the State. Thank you.

[Applause.]

Senator SMITH. Thank you. Thank you very much, sir. And unless anyone—anyone have a comment on the panel? If not, let me say thank you to the four panelists who have been here, especially, those who came from Maine and Massachusetts, quite a ways away. Although, some of us came from New Hampshire almost as far I guess when you go south to north.

At this point, I call up the third panel, but before we do, we'll take a 5-minute recess.

[Recess.]

Senator SMITH. The hearing will come to order. We have two more panels; and then at the end, as I indicated, we'll have a few minutes at the end if anyone wishes to make a statement or ask a question of any of the panelists who might still be here at the end of the session.

I'd like to introduce Mr. John Hodsdon, director of New Hampshire National Association of Conservation Districts from Meredith; Mr. Eric Kingsley, executive director of New Hampshire Timberland Owners Association; Mr. Charles Niebling, policy director for the Society for the Protection of New Hampshire Forests; and Mr. Joel Swanton, manager of Forest Policy of Champion International in Bucksport, ME. Welcome to all of you, gentlemen. Glad to have you here, appreciate your time, and your testimony; and why don't I just start with you, Mr. Hodsdon, and move right down the table.

Please proceed, Mr. Hodsdon.

STATEMENT OF JOHN HODSDON, DIRECTOR, NEW HAMPSHIRE NATIONAL ASSOCIATION OF CONSERVATION DISTRICTS, MEREDITH, NH

Mr. HODSDON. Thank you. I'm John Hodsdon. I'm here as one of the directors of the National Association of Conservation Districts, NACD; but I'd like to let it be known that I'm a vegetable farmer in Meredith, down in the Lakes Region, and some of these other things are volunteer jobs I get into. You have my testimony from NACD's position on TMDLs. Also, a letter that I sent in as the chairman of the Water Committee of the New Hampshire Association of Conservation Districts for comment back in January on the TMDL process, and I'm also one of the volunteer supervisors on the Belnap County Conservation District.

I would like to thank Senator Smith and his committee for this opportunity for Conservation Districts to reaffirm their support for clean water, and also to express some our concerns with the proposed TMDL process. Good to have you back in New Hampshire.

Senator SMITH. Thank you.

Mr. HODSDON. Some of you may not be familiar with Conservation Districts. There are roughly 3,000 nationwide, led by some 16,000 volunteer supervisors or leaders, volunteer boards; and, incidentally, there are 10 districts in New Hampshire organized along county lines.

We are involved in protecting and enhancing water quality, as well as, especially, soil quality. We were at one point known as the Soil Conservation Districts, and then Soil and Water Conservation Districts, and then just Conservation Districts.

We work with landowners on a voluntary basis, helping them protect their natural resource concerns. And this we do for landowners, it started out 60 years ago, primarily, working for the agricultural community; and then quickly, the forestry, as well. A lot of our work now is also with the communities, the planning boards, and other land use agencies to help provide advice, again, strictly on a volunteer basis. We're nonregulatory.

I would like to mention our partners, especially the Natural Resources Conservation Service, formerly known as the Soil Conservation Service, as you may remember. They are invaluable assistance. They provide the technical advice, conservation, and technical assistance that is indispensable for getting sound conservation out there on the land and protecting our natural resources.

I would also like to mention that there's been an attrition in the number of personnel they have to help us, even as we had more to do over the past 20 years, with level funding or worse. The NRCS personnel in New Hampshire is now just about half of what it was 20 years ago. And if we could get more funding into 319 and other such programs, which is what we need to increase the rate of progress. We also need more funds in the conservation technical assistance line item of NRCS's budget, so that there'll be somebody there to do the job with us.

We found that a voluntary incentive-based approach has been very effective in reducing polluted runoff, sediments, nutrients, erosion. Farmers are more than willing to cooperate.

As a matter of fact, if we look at last year, farmers' requests for cost-share assistance in one program, the Environmental Quality

Incentive Program, which we used to help in the funding of various conservation practices, in New Hampshire, in the middle of the year, was about $2.2 million. I think it went a little higher than that. The total money available was just a little over $400,000. About a 5 to 1 difference there. And that much more that could have been done if money was available and the farmers were willing, but some of these things are very expensive, particularly, in the manure management. The manure storage structures, with some of the newer, more modern standards that are required for a stream-bank erosion, go beyond the financial ability of the farmer.

And remember, there's a big public input into this, a public benefit from having these done, as well.

Basically, the program has been effective the way we've been doing it, and we can make more progress if we had more money going into the conservation/technical assistance, into the EQIP funding, into the 319 to help out those EPA-funded programs.

And also, I would like to bring up another one, 208(j), which has been, more or less, dormant for quite sometime. I believe it would be worthwhile to put some funding through that process and that would get it much more directly to the farmers or foresters that need it than necessarily spending so much of it in the State bureaucracy. I'm sorry, Harry.

Mr. STEWART. [Inaudible comment from the audience.]

Mr. HODSDON. These regulations, which came out last August 23, as I read them, for TMDLs, are very prescriptive. The one-size-fits-all approach, I would say, is inefficient and will be expensive.

It is quite clear that Congress did not intend TMDLs to be used to regulate nonpoint source pollution; plus the fact that this regulatory approach will not be as effective as a voluntary incentive approach for the vast majority of what we are facing.

Therefore, EPA should not try to use the TMDL program to regulate nonpoint source pollution; also, that it should not direct the States to do it.

Chuck Fox said, essentially, that they're not doing that, so the regulation should not call for using TMDLs for nonpoint source pollution.

There's another concern I have concerning the tendency to try to convert what we now call nonpoint sources to point sources. I know the dairy industry in this State is worried about that. Cows would become a pollution source by calling them a point source. If EPA decides they wanted to do that, it would not be good.

Now, another concern I would like to throw out at this point is we talked about the margin of safety in the TMDL regulations, and it is not at all clear what you mean by this. I took a guess at it, and I may be wrong. I think possibly that you may mean that when our level of understanding, in other words, our ignorance, about what the actual situation is, how bad it is, in a watershed, or what would it take to reduce the pollution that the standards should be much stricter?

Now, in a traditional margin of safety question, when we were, say, introducing something new into the environment that hadn't been there before and we really weren't sure just what the effects were going to be, we'd want to be more cautious, and that is appro-

priate. But you're trying to use that kind of reasoning to justify stricter standards. I think it is not what should be done. There's no scientific reason to use stricter standards for effluent limitations.

OK, I think I've used up my time and then some. I'll take questions later.

Senator SMITH. That's all right. Thank you very much, Mr. Hodsdon.

Mr. Kingsley.

STATEMENT OF ERIC KINGSLEY, EXECUTIVE DIRECTOR, NEW HAMPSHIRE TIMBERLAND OWNERS ASSOCIATION

Mr. KINGSLEY. Thank you, Senator, and I certainly appreciate the opportunity to discuss the EPA's proposed TMDL rules with you. And I also want to thank the couple hundred or so people who took one of the first nice Saturdays in the spring to join us.

As the executive director of the New Hampshire Timberland Owners Association, I have the honor of representing over 1,500 landowners, loggers, foresters, and wood-using industries in this State. Our members own and responsibly manage well over a million acres of productive forestland. The forest industry in this State contributes, roughly, $4 billion, or 11 percent of the State's gross product to our economy annually. We're the second most heavily forested State in the Nation, and we're covered with mixed hardwood, white pine, and spruce-fir forests. Very, importantly, and different from other—4 out of every 5 acres of our land is in the hands of private landowners.

New Hampshire's commercial forestry has long contributed to the State's efforts to protect water quality, and we make every effort to assure that our activities do not unnecessarily contribute to impairments of streams, rivers, lakes. I think you've heard this throughout the day.

In recent years, efforts on the part of landowners, loggers, foresters, and forest industries have significantly increased awareness of steps that can be taken to improve water quality during a forestry operation. This list is far, far from comprehensive, but I want to share with you some of those things: The Tree Farm Program is part of a national program; and it recognizes private landowners for making good stewardship. We have over 1,650 tree farmers managing a little over a million acres here in New Hampshire. I'd point out that the White Mountains Regional High School is a registered tree farm.

The Professional Loggers Program, which has been mentioned before, is a joint effort of our organization, as well as, the University of New Hampshire and the Cooperative Extension. This provides training and professional development opportunities through the State's logging community; and one of the areas it focuses upon is Best Management Practices.

We conduct landowner workshops in cooperation with the National Resource Conservation Service to help landowners and municipal officials understand the opportunities to protect water quality during timber harvesting operations, and we participate in the Sustainable Forestry Initiative, which is part of the national program sponsored by the American Forest and Paper Association.

New Hampshire's forestry community has made a commitment to water quality. These programs demonstrate that commitment. Unfortunately, what we're seeing from EPA's strict new rules may undermine these efforts.

As part of the rules proposed last August, EPA may reclassify some forestry activities from nonpoint source activities to point source activities, placing forestry under an entirely new regulatory regime. The EPA proposal has the potential to treat forestry activities, including those that contribute significantly to wildlife habitat, under the same regulatory regime as factory discharge.

New Hampshire's private landowners, who have a long history of contributing to the State's water quality, are threatened by this bureaucratic, top-down proposal, and understandably so. It's very difficult to understand the benefits that this would bring to New Hampshire, but it's easier to grasp the downside.

One of the problems that comes out of the EPA proposal is that it is made in isolation without connecting to the larger environmental and economic system. New Hampshire is a rapidly developing State; and it's been mentioned before, the landowner's constantly under pressure to convert forestland to other uses. We permanently lose, roughly, 20,000 acres of working land each year to development. Managing forestland for economic return is a very, very marginal business, and requires a long-term commitment on the part of the landowner. Actual imposed costs or landowner expectations of future costs will be capitalized into land values. This reduction of forest land values relative to other land uses—typically, development—will increase the pressure to convert to land to these other uses. The EPA's proposal fails to recognize that, given the choice between bureaucratic red tape and development, many landowners may be forced to develop their land. This is particularly true of small, nonindustrial landowners, upon which this proposed regulation would fall quite heavily. Nonindustrial private forest landowners, many of them who harvest infrequently have responsibly managed their holdings for generations, own almost 70 percent of our State's farmland and forestland. Many of these landowners, it's estimated by the USDA's recent survey, to be roughly 84,000 in New Hampshire alone, do not have the technical expertise necessary to comply with the complicated Federal requirements. While the impacts of the EPA's proposed TMDL regulation is of enormous concern for our entire industry, we believe that it would hit these landowners first and hardest.

I urge you to use your influence as Chairman to help the EPA recognize the positive, proactive steps that the forest industry and forest landowners have taken to protect water quality. Instead of pursuing their Washington-based approach, EPA would accomplish far more by working with citizens and industry to support and expand upon existing activities to protect water quality. By encouraging collaborative approaches, rather than the confrontational actions proposed, the Environment and Public Works Committee, can take a leadership role in developing solutions that work.

I would note that the EPA has said a number of times that, at this point, we have no impaired streams due to silviculture. Of course, the New Hampshire Department of Environmental Services

has to revise that list every 2 years. We may not have anything to worry about for 5 years.

Senator, forest landowners need to take a view that is much longer than 5 years. My members grow and manage crops in their forest on a rotation of 50, 100, 100-plus years. Saying that something won't happen for 5 years is akin to telling a corn farmer, "Don't worry. The new harvesting regulations don't kick in until July." It's as simple as that. Thank you.

[Applause.]

Senator SMITH. Thank you very much. Charles Niebling, the Society for the Protection of New Hampshire Forests.

STATEMENT OF CHARLES R. NIEBLING, SENIOR DIRECTOR, POLICY AND LAND MANAGEMENT SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS

Mr. NIEBLING. Thank you, Senator Smith, Senator King, Staff. I am Charles Niebling, director for Policy and Land Management with the Society for the Protection of New Hampshire Forests. The Forest Society is a nonprofit conservation organization dedicated to the wise use of New Hampshire's natural resources, and their complete protection in places of special environment or scenic quality.

In addition to our role as a land trust and a conservation advocate, we also own and sustainably manage 33,000 acres of productive woodlands in 123 reservations across the State. We not only preach good forestry and conservation, but we practice it, as well.

I appreciate the opportunity to offer these remarks on the EPA's proposed TMDL and NPDES rule revisions. I'm here today to offer our general support for the new directions addressing agricultural and silvicultural issues set forth in the May 1, 2000, joint statement issued by the Department of Agriculture and EPA, but to also express views about further changes that need to be made.

Throughout our 99-year history, the Forest Society has championed the importance of water quality as a core part of its land conservation and forest management work.

Senator, my written remarks summarize that history and we're very proud of it, but I won't belabor that right now.

Senator SMITH. That will be part of the permanent record.

Mr. NIEBLING. Thank you.

When we submitted our comments on the proposed TMDL rule revision in January, we indicated that we opposed the revisions, because we did not support the reclassification of forestry operations from the nonpoint source category to the point source category.

We also opposed the removal of authority for monitoring TMDLs from the State to the Federal level. We argued that placing too heavy a regulatory burden on private landowners, especially in a State like New Hampshire where development pressure on our forests is very great, might predispose land to development. From a long-term nonpoint source water quality or forest sustainability standpoint, Senator, forestry operations will always be better than the best parking lot or residential subdivision.

Thus, we were encouraged this week when we received a copy of the joint statement issued by USDA and EPA, announcing modest changes in the proposed rule. It would seem that EPA is listening

to the people of New Hampshire and thousands of others around the country, who believed that the original draft rule simply went too far.

We want to particularly commend EPA and USDA for formally recognizing the following points in their joint statement:

First, that State governments and local citizens should take the lead in developing pollution budgets for impaired waterways;

Second, that voluntary and incentive-based approaches are the best way to address nonpoint source pollution;

Third, that EPA will work with States that may need help in developing forestry BMP programs for a period of 5 years before they start issuing NPDES permits;

And finally, that only if a State does not have an approved forestry BMP program, after 5 years, will the State or EPA have the discretion to issue permits.

Unfortunately, from our standpoint, the joint agreement does not go far enough. Our greatest concern is that the final rule will continue to define forestry activities as a point source category, controverting over 25 years of Clean Air Act statutory interpretation. We are also concerned that EPA wants to have the authority to approve State BMP programs based on, as yet, undefined criteria.

Until and unless the silvicultural aspects of the rule are modified to affirm forestry activities in the nonpoint source category, the Forest Society cannot support it. We are encouraged by the movement EPA has shown in recent weeks. Regardless of whether EPA makes further modifications, we hope that they will re-notice the draft rule for further public comment.

The Clean Air Act will go down in history as one of our Nation's most successful environmental laws. The improvements to New Hampshire made through regulation of point source pollution are extraordinary and well documented.

Now, we face the far more complex challenge of reducing nonpoint source pollution. With respect to forestry, we believe that New Hampshire's approach of aggressive promotion and education of voluntary BMP's has worked relatively well and can continue to work.

Are there problems with some forestry operations? Absolutely. We do not believe more burdensome regulations will necessarily solve the problem.

Senator, we support elements of the Water Pollution Enhancements Act of 2000 because we believe it targets Federal assistance and support where it will have the greatest positive impact. Three specific needs in New Hampshire that could be addressed through provisions of this Act are:

First, improved compliance education of forestry BMP's;

Second, support for a stronger enforcement capability within the Water Resources Division of DES and the Division of Forests and Lands within our Department of Resources and Economic Development;

And I will note, for the record, that New Hampshire has had 10 forest rangers since 1949, when their only responsibility was fire detection and prevention. It's time that that was addressed; and, perhaps, these funds could enable an enhanced capability in that area.

And finally, support for BMP compliance monitoring on active forest harvesting operations.

You know, we have said for years that BMP's are being widely implemented on forestry operations and they're working; but the fact of the matter is, we don't have good information to support that contention, and we need that. And we certainly need it before we contemplate any further regulation of those practices.

So, with that, thank you for the opportunity to testify on this important issue.

Senator SMITH. Thank you very much. As I——

[Applause.]

Senator SMITH [continuing]. Introduce Mr. Swanton from Champion International, I'd like to also applaud his company for its leadership in making, at least, initiating a proposal, making thousands of acres of timberland that they own accessible to the public for a recreation's partnership and initiative. I think it's certainly far-reaching and it's certainly welcome. And I know there are many folks in the north country, and probably some of the flatlanders, as well, who get up here to enjoy it; but let me introduce you and thank you for being here today.

STATEMENT OF JOEL SWANTON, MANAGER OF FOREST POLICY, CHAMPION INTERNATIONAL

Mr. SWANTON. Thank you, Senator. Senator Smith, and Senator King, and members of the staff. My name is Joel Swanton. I am a resident of Holden, ME, but I have responsibilities of representing Champion International in its forest resources operations as manager of Forest Policy in the Northeast region. We appreciate the invitation to share our concerns about the EPA's proposed rules, and also our comments concerning your proposed legislation, S. 2417.

Here, in the Northeast, we are responsible for the sustainable management of over 1 million acres of forestland between Maine and New Hampshire, part of a large ownership of close to 5 million acres in the United States. We, the foresters, and the people who work on these lands, and the communities that we live in, depend directly on the health and productivity of these forests for our livelihood.

One of the core values and responsibilities of the forestland ownership is water quality, and we take that responsibility personally and seriously. Our ownership in New Hampshire, 170,000 acres, I just referred to, just north of here right at the tip of the State, includes the headwaters for the Connecticut and parts of the Androscoggin Rivers. Both are very important bodies of water in this region.

EPA's proposed changes are not justified, either in terms of need or improved environmental benefits as they regard to the implications on silvicultural operations. I think you've heard that over and over again today, and probably many times more before we complete the hearing.

In our region, and you heard also, silviculture and forestry is not a significant threat to water quality. The successful voluntary and regulatory initiatives in this region are already in place to ensure that silvicultural activities are undertaken with measures to pro-

tect water quality. These programs would be jeopardized with the proposed changes in the rules. And while we appreciate Mr. Fox's efforts to improve the proposed rule with the recent joint announcement, the proposed changes falls quite short of what we would see as improvements.

I'd like to talk a little bit about our forest management activities. We've talked a lot about the rules, and processing, and policy today. If we could for a minute, let's go out in the woods.

Our activities in the Northeast region include harvesting, forest management road construction, and other silvicultural activities to improve the health, and quality, and productivity of our forests. All of these activities that we conduct on the ground have planning and monitoring components that address water quality.

Before we begin any activity on our lands, our foresters develop plans incorporating State regulations and Best Management Practices, development under the Clean Water Act, as well as, our own riparian management and guidelines. We consider the silvicultural prescription for area, the timing and season of the operation, the type of soils, the potential for erosion, and the type of equipment or operation. Once activity begins, we monitor and inspect these operations on a regular basis. Should a water quality issue arise, we are able to address it quickly.

As you heard earlier from the State agencies, there is ongoing monitoring of all of our operations on our property at all times by State agencies; and an informal amount of monitoring by the many members of the public using the land that also assures that if a water quality concern arises, we're going to hear about it.

We also conduct a broader annual water quality BMP audit of our operations in this region, often involving outside natural resource professionals who identify areas for improvement.

In addition to what is required by law, Champion International, and many other members of the forestry industry, are participating in a voluntary national program called the Sustainable Forestry Initiative, SFI.

Under SFI, we must meet or exceed all established BMP's and State water quality regulations under the Clean Water Act. And for us, that has the strength of membership requirement within our trade organization. If we don't meet those standards, we're not a member.

SFI requires that we establish riparian protection measures for all streams and lakes; and Champion has developed and implemented riparian management guidelines for our ownership, that, in most cases, far exceeds State standards.

We're also the first company in the United States to commit to full third-party verification of our performance under the SFI standards; and these reviews look at both the systems we have in place to protect water quality, as well as, our performance on the ground. We have engaged Price Waterhouse Coopers to conduct these audits on a national basis, and we'll have all of them done on the U.S. ownerships by the middle of 2001; but, in the Northeast region, it will be reviewed again in October of this year, and it will be the fourth time since 1996 that we've had an external review of our operations.

We also support the efforts you've heard about to encourage other landowners to protect water quality. We purchase wood from many of the landowners in this region, and our foresters require that loggers and landowners that sell wood to us to comply with State water quality regs. and BMP's, and we audit those operations for their performance.

Also, under our commitment to SFI, we sponsor and support training for loggers and landowners to address water quality issues. And in Maine and New Hampshire, under SFI, we participate in a process for the public to raise concerns about forest practices. By calling an 800 number, people can identify site-specific areas of concern, such as water quality, and be assured of a followup on that operation by a forester who will focus on education and change in behavior, if necessary.

You've heard over and over again, the EPA, nationally and regionally, recognizes that silvicultural and forest management activities are not a significant source of water quality impairment. I believe, in part, due to the efforts that we've just described.

I attended the March meeting this year with the members of the New Hampshire forestry community with the EPA's Regional Staff, and heard EPA staff's statement which you read earlier, that "silviculture in New England is not a threat to surface water," it begs the question: Then, where is the problem?

EPA's own data illustrates silviculture nationally is at or near the lowest source of water pollution, again, even below the natural sources.

We think that the existing network of regulatory and voluntary oversight works very well, and EPA's own statistics tell us that that's accurate. These rules are just plain unnecessary. The inclusion of these activities as point source discharges subject to TMDL's in impaired waterways could pit forest landowners and sparsely populated rural areas, like the north country of New Hampshire, against heavily populated municipalities when it comes time to determine TMDL's determinations.

One point that I would like to make and it's very unique to this region, and I'm a little bit upset that we had to share it, because it's very obvious to those of us who live here, a Federal permitting process, such as this, would invite increased intervention and lawsuits by special interest groups who want to challenge private forestry practices. Large, private forestland ownerships, like ours in this region, have been targeted by national and regional preservation groups for the purpose of conversion to public ownership and removal from those lands of the timber harvesting and management that sustains our economy in this region. This is not some thought up agenda. It's very real.

Since 1995, numerous legislative and public policy initiatives to ban or restrict forest management practices have been initiated in attempts to make private ownership of these lands economically unviable. Including silvicultural activities in this rule as a point source would provide a valuable tool for that agenda.

Consider simply the impact on our operations just from the NPDES permitting process. Let's go out into the woods, as I mentioned earlier.

Last winter, folks in this region had a heavy snowfall. The snowmobile industry loved it, but it makes our operations very difficult. Loggers on our ownership were faced with 5 to 6 feet of snow. We had to make some decisions to move into areas where we could safely and economically operate for the rest of the winter on relatively short notice. How long would it have taken us to get a Federal permit under EPA's proposed rule in order to meet that need?

This year, we had an early spring thaw; perhaps, just today. We always shut our operations down during mud season; but toward the end of the winter season, we'll move the operations to areas where the environmental risk is going to be minimal. That happened in late February and early March this year. Much earlier than normal. We had to react fairly quickly, and the flexibility to react to weather changes like that to minimize risks could be lost under the requirements for Federal permits.

And the last example, many of the loggers and landowners in this region deal with on a constant basis. Our business is not a steady, ongoing business. It's not always the same every day. Markets change. Last summer, the market for hardwood pulpwood in this area was glutted for a variety of reasons. Our operations had to be changed and moved on relatively short notice, so that they could be put into areas where we could productively work and operate throughout the summer with the change in market conditions. How would we have that kind of flexibility under a NPDES permit?

The proposed revisions to the rule announced last week do not address our concerns. The revised proposal still calls for changing the designation of silvicultural activities from the nonpoint source to point source. We would still be subjected to NPDES permits, and there's no justification for it.

The revised approach is even more expansive than the original rule; and, again, once EPA and USDA impose that jurisdiction over forestland activities on private lands, for the first time, as a result of that, environmental and governmental organizations would have the ability to dictate those forest management activities on private lands. And that's not what this country's all about, Senator——

[Applause.]

Mr. SWANTON [continuing]. Also, we heard earlier, the criteria for acceptable State programs is unclear; and we've heard that from the State agencies, as well.

The real test of whether this proposed rule and the recent changes are needed at all lies with this question, and I will even venture an answer to that: Will this proposal result in any improved ability of EPA, or the State agencies, or private landowners to prevent or correct water quality problems from forestry operations? The answer is: No.

We do not believe this rule should be finalized.

Senator, we support your efforts to address water quality issues in a more meaningful way through your proposed S. 2417. We think its focus on improving resources for the State along the lines of funding and improving the data quality makes sense, and we think really states the issues here.

We also support legislation introduced by Senators Lincoln and Landrieu to codify the existing nonpoint regulatory status of silviculture, so we're not constantly battling these issues every few

years; and we hope you will consider these issues as an important part of the debate when you hold hearings.

Senator, you made the comment in your opening statements about a little bit of the history here; and on my way over here this morning, I was thinking back. Think of where we were a generation ago, or, perhaps, less than a generation ago. A little bit west of here lies the Connecticut River; and on May 6, a generation ago, that river was full of logging activities, moving the product to market. How far we've come in less than one generation, where Society used to manage land—the water is edge out for towns, and farms, and the forest; and we've now turned 180 degrees in less than one generation. We don't need to be making things more complicated. We need to make things work, and some flexibility and reality here would help.

We appreciate the opportunity to testify. Thank you very much. [Applause.]

Senator SMITH. Thank you very much, Mr. Swanton. If anybody wishes to speak, step up to the microphone, and I'd be happy to take your questions.

If I thought for 1 minute that any legislation that I proposed or would vote for would contribute to the destruction of the water quality in any way, I wouldn't support it. People want to do better. And I think if we went back a hundred years, there's no question that the waterways were used for logging, and the rivers were certainly the main centers of commerce. Everybody expelled their waste and to move it out, as if it would never come back to haunt us. Well, we've changed that now. Some of these laws that were passed in the 1960's, 1970's, and 1980's, including the Clean Water Act, were good laws that were emergency measures that needed to correct the problem. I think if you look over the last 30 years, however, with good stewards—folks like all the people here at this table and others who will testify—that people are attempting now to move away from the Federal regulation and into good long-term stewardship. That's what we're trying to accomplish on the committee. It's difficult. Mr. Fox and others from EPA I think have the same goals that we do, but we all need to look now forward to a different approach, a new paradigm, if you will. This is an opportunity to bring in cooperation, rather than confrontation. This is a confrontational rule that, I think, will be not productive; although, it may be well-intentioned.

Mr. ROBINSON. A question for Mr. Swanton. You made the comment about the river being full of trees 80 years ago; but 80 years ago, the White Mountain National Forest was pretty much totally stripped of trees. It's through efforts, such as your company's doing now, that we don't do those practices any more. I think that's been pointed out, that we do work with keeping our forests going all the time, instead of stripping them once every 80 to 120 years. And, maybe, you could add some comments to that?

Mr. SWANTON. Yes, my comment was not meant to denigrate our ancestors. At the right time and the right place, that was the situation that they dealt with.

The White Mountain National Forest looked pretty good this morning as I had an opportunity to fly over it, despite what it may have looked like over 100 years ago. And I think as our society

evolves and our economy improves, we are fortunate to live in a country that's got the wealth and the ability to ensure natural resources the way we do, and we do things differently than we did 50 years ago. We think differently than we did 20 years ago. We've got that opportunity to move ahead.

When the river was full of logs 70 years ago, that was the right thing to do during that time. When our first European ancestors settled here, they cut from the water's edge in and they cleared land for cities, and cleared land for farms, and they managed land for forests.

My point was that in the case of the short time of a generation, we now treat the edges of water bodies and water quality 180 degrees differently than we did less than a generation ago. We preserve, we conserve, and we make sure that that water quality stays clear, and we continue to learn. But prescriptive rules are not going to achieve those goals.

Senator SMITH. I might also add to that, Mr. Swanton, in what I would consider a new paradigm of environmental policy, we would have to expect that as we did 50, 75 or 100 years ago, the next century will have different practices from what we have now. We need to give ourselves the flexibility to adjust with new technology that comes our way. We're doing that with the Everglades in South Florida. We're not going to implement a 36-year plan that says we're locked into it for 36 years. We're implementing a plan that says every 2 years or so, we can look and see if the pilot project is working on some particular aspect of that project; and if it isn't we can make changes. That's sound science and prudent management.

Let one ask a question of the panel.

When I made my opening remarks, I mentioned the EPA Region I individual—I don't mean to get him into trouble here but Mr. Manfredonia, who was quoted as saying that ''forestry is not an, issue for water quality here in New Hampshire.''

I'm asking the three of you: Have you been getting direct comments from anybody from EPA over the past several months, over the last year or so, that somehow you're doing something wrong; or that any of your members are doing something wrong? Are you not following good environmental standards or quality, water quality standards? Is there something that's happened that would lead you to believe from any comments that any individual made here on the ground that EPA or DES, that somehow there was a problem here with water quality based on the forest?

Mr. KINGSLEY. Senator, the comments we've been receiving is that we're doing things right, and that the commitment that the forest industry has made, and the commitment that the State's Conservation Community has made, and the partnerships that we've made with the State Government here have paid off in terms of water quality. You know, I heard Mr. Fox, he and I spent some time together before coming here, saying that this really should not be an issue for us.

Once this rule is in place, it is not going to go away; and I think one thing that everyone knows in this room is it's never going to get ratcheted down. And we have some very real concerns about how this rule may be implemented in the future.

The core issue remains unresolved and that is: In some circumstances in the EPA's proposal, they will regulate forestry as a point source solution, and that simply is not acceptable.

Mr. NIEBLING. I haven't heard any comments. I would say that in the 14 years that I've been involved in forest policy, we've really seen extraordinary improvements, both in terms of our understanding of BMP's and which are most effective; in terms of landowners' receptivity to apply them and without having to be retold to do it, on a strictly voluntary basis; in terms of the relationship between the regulated community and the Department of Environmental Services, and the Division of Forest and Lands, it seems like much more of a team approach. Now they resolve what issues there may be and become less confrontational.

Mr. ROBINSON. Thank you.

Senator SMITH. Thank you. What about from your perspective or Champion's?

Mr. SWANTON. Senator, we're not aware of any implications from EPA that our organization has a problem with forestry operations that would constitute the need to move them to point source.

As you've heard, we continue to receive positive comments from both State agencies and EPA about the voluntary efforts and the collaborative efforts that we've taken with State agencies and the EPA; to address forestry issues from a nonpoint source prospective to existing State regulations and BMP's, it's working.

Senator SMITH. Mr. Hodsdon, do you have a question?

Mr. HODSDON. Yes. You'd be interested in the comments that I have heard a couple of times. The Professional Loggers' Program and the practices and workshops of the Timberland Owners' Association, that Mr. Kingsley has been promoting over the last few years, have made a dramatic improvement in the forest practices of BMP's.

Senator SMITH. Thank you very much. I'll make this the last question for this panel.

Mr. WOOD. Thank you very much, Senator. My name is Jonathan Wood. I am here today as the chair of the Policy Committee for the New England Society of American Foresters, and I thank you for the opportunity to have a field session here in the northern country. It's truly refreshing. Thank you very much.

My question relates to our role as foresters. The New England Society of American Foresters is about, oh, 1,200 natural resource professionals throughout the New England States who do everything from implement the Best Management Practices on the ground and harvesting operations, educating young foresters in our schools, working with an industry, private consulting, and also in the policy arena; and we're finding the policy arena more and more important because the impacts that far-reaching laws like this might have on our ability to manage those resources.

Our organization opposes the rule. We have great concerns about it, and it's unusual for our organization to actually take a public standpoint. Because of the diversity of the organization, we have a lot of dedicated scientists who are truly, truly dedicated to the health of forests and ecosystems and to the quality of the waters that they provide for all Society.

My question is: As we, as practicing foresters, delve into the arena of policy on a more and more necessary basis, how do we get our word across? How can our understanding of the science be put into the political arena in a meaningful manner?

I respect the panel very much, and I think you might have some insight into that. You spoke very eloquently about forestry being on a 100-year basis. Yet, we are consistently faced with opportunities and challenges of new regulations that impact us on a much more frequent basis; and it's very challenging to adjust to that.

How can scientists get their influence more effectively put into the political process so that we're not challenged in this manner in the future?

Mr. NIEBLING. Is it Bruce Vincent who said that the world is run by those who show up?

[Laughter and applause.]

Mr. NIEBLING. And I think many in the forestry community haven't been showing up, and that goes for practicing foresters, and loggers, and scientists, researchers—particularly, researchers.

You know, people in research tend to want to seal themselves away from controversy and simply go about their science without having to concern themselves about how that it is going to be used, and maintain some impartiality, independence from the issues of the day so that they're not inadvertently influenced by it.

But I think we don't have the luxury in this country or on this planet of those of us involved in the business of producing the goods that people need to use every day to not be engaged in and participate on a regular basis in these policy discussions. We just don't have that luxury any more.

Mr. WOOD. Thank you.

Senator SMITH. I just might add a footnote. The Environmental Protection Agency has a wealth of data and information. A lot of people who do research that could be provided in a nonconfrontational and an informational way, could also enhance what we do. Sometimes, you get the Madison Avenue lawyer who comes in before the zoning board with the big proposal for a development. He or she is somewhat intimidating for a person who works on the Board of Adjustment, or the local planning board, or zoning board. I think we certainly could do much more to seek partnership and cooperation rather than confrontation.

Does anybody have a final comment?

Mr. KINGSLEY. Senator, I just simply wanted to ask if I'd be able to enter a few things in the record?

I think you know that a lot of New Hampshire landowners have some real concerns about the TMDL proposal. I have some letters from people that I'd like to enter into the record.

Also, given the fact that Mr. Fox took the opportunity to enter the USDA/EPA statement earlier this week into the record, I'd like to provide the response to those concerns.

Senator SMITH. All of this will be made part of the record. Let me just State for the record that I will leave the record open until next Friday, close of business, the committee records; so that if anybody wishes to provide me with testimony or statements on either side of the issue, or any agency or individual, we'd be happy

to make that part of the record. So, any new information that you have will certainly be received and put in the record.

Mr. KINGSLEY. Thank you, Senator.

Senator SMITH. If the next panel would come forward?

Mr. Tom Buob, University of New Hampshire Cooperative Extension; Ms. Nancy Girard, Conservation Law Foundation; Mr. Scott Mason of Northwinds Farm, Coos County Farm Bureau from North Strafford, NH; and Mr. David Paris, Water Supply Administrator, Manchester Water Works, Manchester, NH. This will be the last panel; and, as I indicated earlier, we will have some time at the end if anybody wishes to make a statement for the record at the end of the hearing.

It is going a little bit longer than I anticipated; but with your patience, we'll finish. I did not want to be in a position to shut people off from making comments, because that's what we're here for.

So, let me start with you, sir, Mr. Buob.

STATEMENT OF TOM BUOB, UNIVERSITY OF NEW HAMPSHIRE COOPERATIVE EXTENSION

Mr. BUOB. Senator, my name is Tom Buob and I work for the University of New Hampshire Cooperative Extension located in Grafton County at North Haverhill. And in my position as an extension educator, I've spoken with a lot of farmers over the past year or so on the issues related to improving management; and, basically, they have some concerns about the increased level of proposed regulatory guidelines from EPA.

Most of their concerns seem to be that regulations or increased regulations will not necessarily address the nonpoint source pollution issues and it will result in increased costs for agricultural production. Regulation is or can be fairly complex, resulting in confusion, frustration, and undue paranoia. I think some of this has been evident in some of the meetings that we have held, and that Scott Mason has held for the Farm Bureau in other parts of the State.

I realize that many people do not give much credence to voluntary methods of reducing nonpoint source pollution. But as an extension educator in the crop and soil management area for more than 20 years, I feel that a voluntary stewardship effort based on education is much more effective than any regulatory approach. Farmers basically live in their own environment. They're very interested in protecting that environment, because they're the first ones that are affected.

Farmers have been doing many things correctly and are actually very interested in making changes which will improve the environment and reduce the risks of nonpoint source pollution.

The USDA agencies, including UNH Cooperative Extension, the NRCS, FSA, Farm Services Agency, local conservation districts, and local conservation groups have all been working together in the Connecticut River Valley to address issues in agriculture, which will reduce or minimize the impact on nonpoint source pollution on water quality, both ground water and surface water quality.

Through on-farm research and education, I feel that the risk of nonpoint source pollution has been decreased. We have a decreased

nutrient loading annually by 70,000 pounds of nitrogen and 25,000 pounds of phosphorus just in Grafton County.

A renewed effort is now underway to take the work that has been done in Grafton County and spread throughout the Connecticut River Valley from the Canadian border down to the Massachusetts border.

Obviously, financial incentives work. But there also is a need for increased funding for research and educational needs.

I'd just like to make a few points. The bottom line is to protect or enhance water quality, while sustaining the viability and profitability of agricultural operations, and maintain the working landscape.

Most farmers and their families live where they work, and they're the first ones to be affected by anything that goes wrong. They do not ignore the environment around them.

New England is not like the rest of the country. In fact, if you look at the three northern New England States, their approaches to nutrient management are very different. One-size-does-not-fit-all.

There are more than 250 different soil types across New England States; so, site-specific management practices are necessary.

There is a need to develop better tools, and they have to actually work on the land. You can't just develop tools and hope they'll work. You have to show that they will work.

Regulations are static; management has to be dynamic to be successful. Technology, unlike regulation, is in constant motion; and all you have to do is pick up the paper, and you'll see that.

Voluntary stewardship, based on good science, education, and learning, will allow agriculture to adapt to changes and still minimize the risk of pollution.

I believe that a program that supports research, education, and training along with financial incentives to make the needed changes that are identified, will be far more successful in addressing the environmental issues than any regulatory program. Thank you, sir.

Senator SMITH. Thank you very much.

Ms. Nancy Girard of the Conservation Law Foundation. I made a mistake of calling it the Conservative Law Foundation and, maybe, that was wishful thinking. I apologize for that. Welcome, and I'm glad you're here.

STATEMENT OF NANCY L. GIRARD, VICE PRESIDENT & DIRECTOR, CONSERVATION LAW FOUNDATION NEW HAMPSHIRE ADVOCACY CENTER

Ms. GIRARD. Thank you, Senator; and good afternoon, Senator Smith, Attorney Pemberton, and Attorney Klee.

For the record, I am Nancy Girard. I'm vice president and director of the Conservation Law Foundation's New Hampshire Advocacy Center. Thank you for this opportunity to testify before the committee to address the Environmental Protection Agency's proposed revisions to regulations implementing the Clean Water Act's Total Maximum Daily Load, National Pollutant Discharge Elimination System, and Water Quality Standards programs.

As the committee is well aware, EPA proposed substantial rule revisions to these programs on August 23, 1999. Like numerous interested parties, the Conservation Law Foundation filed comments with EPA to address concerns with the proposed revisions. In our comments, CLF strongly opposed the proposed revisions and requested that EPA withdraw them and reconsider its approach.

By way of background, let me describe the Conservation Law Foundation. CLF works to solve the environmental problems that threaten the people, and natural resources, and the communities of New England. We maintain an advocacy staff including over 25 lawyers and scientists. Our advocates use law, economics, and science to design and implement strategies that conserve natural resources, protect public health, and promote vital communities in our region. Founded in 1966, CLF is a nonprofit, member-supported organization with over 10,000 members. We maintain advocacy offices in Maine, New Hampshire, Vermont, and Massachusetts. Our advocates focus on issues of national, regional and local significance, as well as, those issues that may affect States, such as Connecticut, Rhode Island, and New York.

We firmly believe that EPA's proposed regulatory revisions will significantly affect efforts throughout New England, including New Hampshire, and nationally, to correct major water pollution problems and clean up watersheds.

New England, like many other regions, continues to have significant water pollution problems. Each of the New England States has identified waters that fail to meet State water-quality standards. These pollution problems include: nutrient pollution that imperils recreational use and aquatic habitat in our lakes, ponds and coastal areas, sedimentation that harms important fisheries, disruption of natural river flows, and toxic pollution and pathogens that threaten public health. EPA and the States must enhance their efforts to document and correct these critical pollution problems.

As an important component of the approach to clean up New England's polluted waters, CLF strongly supports the Clean Water Act's TMDL provisions set forth at 33 U.S.C., section 1313(d).

Over a quarter of a century ago, Congress enacted the 1972 Clean Water Act, which established detailed provisions, designed to ensure prompt clean up of the Nation's waters. Indeed, water-quality-based effluent limitations were to be achieved over 22 years ago; water quality suitable for fish, wildlife, and recreation was to be attained over 16 years ago; and discharges were to be eliminated over 14 years ago.

Central to achievement of these timelines, section 303(d) of the 1972 Act mandated the total maximum daily load, TMDL, program, which is designed to ensure prompt identification of impaired and threatened waters, and the setting of maximum daily pollutant loads for those waters. Under the time line intended by Congress, pollutants suitable for load calculation were to be identified by October 1973, States were to identify impaired waters and submit TMDLs for those waters by April 1974; EPA was to approve or disapprove that identification and those TMDLs by May 1974, and in the event of disapproval, was to establish TMDLs by June

1974. Thus, TMDLs, whether EPA approved or EPA established, for all impaired waters were to be in place 25 years ago.

This clear congressional intent remains unfulfilled, and remains unfulfilled to this day. The cause is not far to seek: EPA has massively failed to comply with their statutory obligations.

Only recently, in response to numerous lawsuits filed across the Nation challenging the inaction of EPA and the States, have initial steps been taken to implement the TMDL provisions of the Clean Water Act. Only with significant additional funding and effort devoted to implementation will the TMDL provisions of the Clean Water Act achieve their initial purpose and promise. The proposed regulatory provisions will simply confuse and undermine implementation efforts.

The TMDL requirement is one of the cornerstones of the Clean Water Act. In order to assure that remaining water pollution problems are effectively addressed, it is critically important that the TMDL program not be undermined or weakened. Instead, the program should be strengthened and fully implemented. The first major step taken in actually implementing these long-ignored provisions of the Clean Water Act should not be to substantially revise existing regulatory requirements.

CLF's comments to EPA raised several important substantive issues, including that the rule revisions would: unlawfully delay development of TMDLs; unlawfully abdicate EPA's responsibility to develop TMDLs when States fail to; undermine public participation in the TMDL development process; unlawfully add factors for determining whether agricultural and silvicultural activities fall within the CWA's definition of point source discharge of a pollutant; create an inadequate and unlawful offset or trading program that would allow polluting discharges to continue without meeting water quality standards; and exempt existing discharges from compliance with water quality standards, even if they expand their discharge up to 20 percent.

Each of these concerns address facial violations of specific statutory requirements of the Clean Water Act. Unless each of them is addressed, and EPA's approach substantially revised, the proposed regulatory revisions would cause endless legal challenges and interminable delay in correcting critical water pollution problems.

Due to the complexity of the proposed regulatory revisions, their broad scope, and their fundamental flaws, EPA should revisit its approach and provide an additional opportunity for public comment. Indeed, each of the provisions of the proposed revisions warrant an independent rulemaking. As a result, CLF has requested and continues to urge EPA to withdraw the proposed revisions and take a fresh look at needed improvements in the TMDL program.

What we're asking is the same thing you've heard at the State House, which, essentially, under New Hampshire law, under 541-A, would be to pull the rule. Start again. We're advocating for this.

CLF is very concerned with recent written and oral EPA statements to Members of Congress, including Senator Smith, highlighting potentially major changes to the initial rule proposal without providing any detail or specificity regarding possible changes.

Given the likely major revisions that will occur in a final rule, CLF believes that the rule revisions should be noticed for addi-

tional public comment. Without an additional opportunity for public comment, we are concerned that all interested parties, not just special interests, but all interested parties will be deprived of an opportunity to meaningfully express their views in the process.

In conclusion, CLF continues to oppose EPA's proposed regulatory revisions. Without substantial changes, the proposed revisions will violate specific requirements of the Clean Water Act, cause major confusion and unnecessary controversy, and massively delay clean up of polluted waters. The TMDL program should be implemented, not weakened. Adoption of the proposed revisions without substantial changes would represent a major setback for efforts to clean up polluted waters across New England and the Nation. Thank you, Senator.

Senator SMITH. Thank you very much.

Mr. Scott Mason of Northwinds Farms, Coos County Farm Bureau.

Mr. Mason, you may proceed.

STATEMENT OF SCOTT MASON, NORTHWINDS FARM, COOS COUNTY FARM BUREAU

Mr. MASON. Thank you very much. I am Scott Mason from Northwinds Farm, Coos County Farm Bureau. I would like to submit for the record my written comments. I'd like to thank you for providing this opportunity to speak on the EPA proposed TMDL and AFO-CAFO rules. I am Coos County Farm Bureau president, a vice president for New Hampshire Farm Bureau, chairman of the AFO-CAFO Committee, chairman of the American Farm Bureau Dairy Committee, a member of the Coos County Conservation District, member of the State Technical Committee for NRCS, and serve on a bi-state committee developing certification standards for Nutrient Management Planners. I'm also a commercial dairy farmer milking 150 registered Jerseys, and we also raise sweet corn.

I would also like to thank Senators Smith and Crapo for introducing Senate bill 2417. This bill shows some common sense. EPA is trying to treat the nonpoint pollution problem the same way they have dealt with the point pollution—point source pollution problem. It is my understanding that Congress saw a difference in the way the two should be dealt with when the Clean Water Act was written.

If the EPA is allowed to proceed with TMDL and AFO-CAFO, as proposed, American agriculture will be greatly reduced. The bill points out that there is a lack of funding to deal with nonpoint problems, both at the State level and at the landowner level.

EPA is unwilling to look at the progress agriculture has made through true voluntary programs. EPA's idea of a voluntary program is that you will voluntarily conform, or we will fine you into voluntary compliance. Natural Resources Conservation Services have had a long tradition of voluntary conservation programs.

There is a major difference between agricultural and industrial pollution. Ag pollution is not profitable to the farmer. Any farmer that is a livestock/crop farmer needs his or her nutrients in the field to grow the crops. Manure may be a byproduct of livestock, but is also an input for crop farming. Whereas, in industry, pollution is a cost to get rid of as cheaply as possible.

If you come to my farm, and test the water, and find nutrients that have come from my farm, then I'm losing money. That is also true with pesticides. At $40 a gallon, I want to make sure that the spray stays in the field and keeps working. This is why nonpoint Ag pollution control can and should be handled differently than industrial pollution.

In order to make good policy decisions concerning the relationship with forestry, agriculture, and the environment, you must also take a look at the traditional cost-share programs of NRCS. Funding is the major problem with trying to improve water quality today. This Administration has replaced funding of government programs that actually clean up the environment and reduce possible contamination with programs that educate the general public and create more government bureaucracies.

The current EQIP funding for New Hampshire is a third of what the old ACP program was. However, the Connecticut River is listed as a historic river and Silvio Conte is building learning centers. Not only has funding levels gone down, but bureaucracy has gone up.

It is now a 2-year process for money to be made available to the farmers through EQIP. Money is made available by priority watersheds, within which many watershed projects are rated, for environmental impact. Each project must be estimated for the cost and the impact that it will have on the environment at this time. This creates quite a bit of excess work. For instance in our county this year, we have six projects and we probably only have funding for two or three. There probably will be man-hours, of well over 300 hours, in deciding which one of those three will get funded. It is possible for a better-quality project not to be funded because it is outside of a priority watershed. Most farms in New Hampshire are not eligible for funding, because they are outside of the priority watersheds; or the money available for their watershed is not sufficient to do the project. There are only two watersheds in New Hampshire currently receiving enough money to build a manure storage system for a family sized dairy farm.

A farmer can only apply once every 5 years for cost-share money. That means that he must apply all funding for all of the projects he needs to complete within the next 5 years at the time he applies. In order to comply with both AFO-CAFO and TMDL requirements, some farms would need almost the entire EQIP money for the State of New Hampshire at that one time.

However, another rule would cap the cost share at $50,000 per farmer per contract. Remember, you do not actually have to be polluting to be held liable in citizen litigation. All they need to prove is that you are not in compliance.

We have seen a growth in EPA and DES funding of farm projects. However, to qualify for funding, the watershed must be identified as a problem area and the individual farm must be identified as a problem. DES has assured farmers that they will not penalize farmers for participating in these programs. However, I question whether the farmer is creating a public record of environmental misdeeds that could be later used against him in a citizen litigation. This has been done in Washington State by at least one citizen litigation lawsuit out there.

I'd like to take a few minutes to talk about my experience on the SBREA Panel that reviewed the current proposed changes to the AFO-CAFO regulations. Most of the farmers are aware that the EPA currently classifies all farms over 1,000 animal units as a CAFO. EPA is currently in the process of reducing the minimum size of a CAFO to 300 animal units. They also would like to change the definition to include replacement heifers on a dairy farm.

If these changes occur in the regulation, then all the dairies above 150 cows will be classified as CAFOs. What this does is it subjects the family farmer to citizen litigation. Congress allowed citizen litigation with point pollution sources. I'm guessing that it was because Congress felt that a private citizen needed more power to defend him or herself from corporate America.

But to now allow citizens, or maybe more aptly put as multi-million or billion dollar environmental organizations with well-paid attorneys to sue family farmers, seems a bit unfair. Most farmers will choose to either sell or to settle out of court. Farmers do not have the money to fight these cases. The legal fees alone can run into the hundreds of thousands of dollars.

EPA is also looking at mandatory 100-foot setbacks from the water for spreading manure. Yet, they allow me to spread sludge to within 10 meters of the river. I think the difference between these two setbacks have more to do with the fact that cows don't vote than good-quality science.

In conclusion, I feel that the EPA is over-responding with the TMDL and the AFO-CAFO regulations. Nonpoint pollution can and should be handled better at the State level. Currently, there are economic forces at work driving the dairy industry in two different directions: (1) smaller part-time farmers; and (2) larger and larger farms. I feel that the cost to comply per cow will be greatest on the mid-size family farms if these changes come about.

Farms, such as myself, will have a choice: We'll either have to get bigger in order to comply; we'll either have to get smaller; or we'll just have to get out. In the Northeast, that means more farmland will be made available for development. Privately, most DES and EPA officials I have spoken to feel that farms are less of a problem than sprawl for the environment. Congress must also look at the NRCS EQIP program. The application procedure needs to be simplified and the funding level needs to be restored.

EPA cost share needs to be given to NRCS and distributed to farmers and landowners. NRCS had a perfect vehicle to get this money out to the right landowners. We need to empower State technical committees to develop funding procedures that make sense to the individual States. More research needs to be done to make sure that the proposed regulations will actually have the desired effects and won't actually cause some of the problems they're trying to prevent.

I would encourage this committee to call a halt to the EPA trying to expand the Federal Government's role in nonpoint pollution. Thank you.

Senator SMITH. Thank you. Mr. Paris——

Mr. FOX. [Indicating from the audience.]

Senator SMITH. I want to thank Mr. Fox for coming up. He does have a plane to catch, and there aren't too many right here. So, he

has got to go. But, that he has also indicated that he would take any questions for the record and respond to them in writing. So, thank you very much, Mr. Fox, for your time here. We really appreciate it.

[Applause.]

Senator SMITH. Mr. Paris, welcome.

STATEMENT OF DAVID PARIS, WATER SUPPLY ADMINISTRATOR, MANCHESTER WATER TREATMENT PLANT

Mr. PARIS. Mr. Chairman, thank you very much for this opportunity to address the committee today. I understand that our written statement, and that is the statement of American Water Works Association, on whose behalf I'm appearing here today, has been introduced for the record. I will briefly summarize those comments, and would like to elaborate on how this measure may possibly impact us in New Hampshire, actually, Manchester Water Works.

But before I get into that, it's important to note that this is the beginning of National Drinking Water Week and it's not one of those things that comes up on everybody's calendar, unfortunately. I have brought along some hats from Manchester Water Works and you are welcome to take them back to Washington. I would hope you would wear them in the Beltway because they reflect upon actually some efforts that we made in Manchester to educate fourth graders.

The measure that we have before you today,——

[Laughter and applause.]

Senator SMITH [continuing]. There's a message in there somewhere——

Mr. PARIS. There is a message in there somewhere, yes. The message I would like to review, though, is that——

Senator SMITH. There goes your hat.

[Laughter.]

Mr. PARIS [continuing]. Is that the opportunity to implement measures today will provide protection for water quality for the future, and we heard speakers speak to how today's water quality is different than it was a hundred years ago; and with the change in our demographics in Society, it's important that we take steps, be them contentious and controversial, to assure that drinking water, in particular, is protected for the future. A little bit about the American Water Association for those of you who have never heard of it, it represents the water utilities in the United States. We have 56,000 members; Manchester Water Works, and the fair share of the larger utilities in the State of New Hampshire are members and overall AWWA represents about 161 million Americans who drink community waters, from a community water source.

We, at AWWA, support the efforts to establish TMDLs. It's a good concept and we see it as a step toward the future, toward the 20-year, the 50-year, a hundred-year look toward the future of protecting water quality. However, we have to tell you that we feel it falls short currently in a couple of really important areas.

First, the controversial elements of TMDL, our concern whether it can be implemented by EPA and to provide assurances that TMDLs will be followed. We think that some measures have to be done here to provide assurances; but we feel strongly, and I feel,

personally, very strongly, that voluntary incentive-based measures are far more effective in establishing a long-term guarantee that these types of measures will be followed in the future.

The types of things that water suppliers are concerned with, some of them that you have heard mentioned are nutrient loading, pathogen loading, and sediment release, and those types of issues become very important for people who are drinking the water that is effected by those things.

The second issue that American Water Works brings forward to the table here, and it's been one of the issues that we brought up before, is that we feel the Nation's waters—and it's too bad that Chuck has left—need to be classified with drinking water as a highest and best use.

Currently, for those of you that look at these types of standards, drinking water, and the use of our Nation's water for drinking doesn't receive any significant reference. We felt that this was a good opportunity to put that into the rules. It becomes a very pertinent issue when these rules are implemented. Citizens of our great Nation deserve that consideration.

Now, getting on to Manchester, I have a unique opportunity to speak from both sides of the podium. It's almost too schizophrenic for me to handle. I'm here from the American Water Works Association and I'm speaking to you as a water supply administrator. Manchester Water Works, and there are a fair number of timberland owners here, who might recognize it as one of the major landowners in the southern part of the State of New Hampshire. We own 8,000 acres of property, forested watershed and we maintain that forest with the services of a professional forester, Mr. Ethan Howard, for those of you who know Ethan.

Additionally, within 10 years, Manchester will be looking toward the Merrimack River as a source of its supply to supply that community of 128,000 people and that continues to grow on about a 2- to 3-percent basis annually.

One critical aspect that we see with the Watershed Protection Plan is that in order to maintain a healthy forest, periodic cutting and releasing is important. We have practiced those—I say "we" in the collective—for over 120 years in Manchester, and that those practices assure, really, a higher-quality water than it would without those practices being followed.

The Best Management Practices involved with this forestry release program are of critical importance. Demonstration plots, and when I was a young employee of Manchester, just running the Water Treatment Plant, I had an opportunity to go to Hubbard Brook Experiment Station. That's right up the road here in Lincoln, NH. The Forest Service ran a demonstrate plot there; and they demonstrated that if you did not follow Best Management Practices with your forestry release programs, you would release nutrients, and nitrates, and various other, and you could demonstrate sediment and erosion if you did not do it right. And I think the people in this room do it right. I think we've heard today from people who are very responsible in their forestry practices.

Senate bill 2417, Senator, is another opportunity to expand the science. We support that. We support its provisions for resource development and resources that will help implement the aspects of

the rule. Our interest is to see that they get followed in some way, shape, or form.

And another interest, certainly, that's important here is the urban nonpoint source discharge issue. It hasn't really seen a whole lot of discussion here today. But as well as agricultural and silviculture can have a significant impact, it does have a significant impact on water quality.

And dealing with the issues of emerging pathogens, those things that make you sick that get into water, and ever tightening regulation, again, I wish Chuck was still here, it's important to understand that drinking water is ever more dependent upon source water protection initiatives. Things that people do to protect the water before it gets to the cities to be sure that it's clean and pure to drink.

The regulatory environment creating incentives to insure that this happens is, by far, the best way to do it. Those incentives have to be supported.

I hope that our written testimony and observations have helped you today. I realize I'm the last guy here on the podium, and I'm here to answer any questions. Thank you very much.

Senator SMITH. Last, but not least, thank you very much.

I'd like to just say, Mr. Mason, that if cows could vote, we'd probably eat more chicken;——

[Laughter.]

Senator SMITH [continuing]. At least, I think so. Let me just—again, we'll take a few questions; and if anyone has a question for this panel, please, feel free to walk to the mike. Mr. Mason, what is the ultimate goal here?

My assumption is that we don't want to close down a farm or close down forestry operation and turn it into some industrial entity. And I think that's a reasonable assumption here.

If this rule were to be implemented, could that happen; and, why? What specifically is going to happen to encourage one off the land.

Mr. MASON. I know we're short on time, but I'll tell you a quick story.

A good buddy of mine in college, his grandfather lived in the State of Maryland, and this is back in about 1920, 1925, and the State came out and they said he's going to have to put a thermometer—you've got to remember, this is back in the days where you put the milk in a jug and you put it into a spring, and that's how you kept your milk cold—kept your milk cold—and the State came out and said, "You have to put a thermometer in that spring and find out how cold it is." And the old gentleman said that he knew that that was the first step; and sooner or later, if that spring is not cold enough, that they're going to make him refrigerate it, and he might just as well sell the cows now.

And there will be a certain percentage of farmers that, one more regulation is enough. When house lots are—I was just talking to a farmer on the seacoast and he just sold house lots for $70,000 a quarter acre. I mean, when you're looking at that, one more regulation, one more headache, is enough to say, "Enough's enough."

If we get into citizen litigation, as a farmer, if you're on paper worth a million dollars, and a lot of farmers are today because of

our land values, and there's a possibility that your son may get in a fight on a school bus and give somebody's other son a bloody nose, and now that person has a vendetta against you, that they pick up something in the TMDL or AFO-CAFO and sue you, you may lose your operation. That's enough to get a lot of fellows to start thinking it's time to get out. And I think citizen litigation is probably the biggest problem that we, as farmers, see in the AFO-CAFO.

Senator SMITH. Anyone else?

[No response.]

Senator SMITH. Ms. Girard, what, in your professional opinion, science exists today to implement a TMDL strategy or plans? As you indicated, you felt that even the EPA proposal was not strong enough.

Do we have the science to be able to implement a plan that effectively, I mean, and realistically, do we have that much science available to do that?

Ms. GIRARD. We're always gathering science. We're always finding new things. We're also impacting on our water quality. So, I don't use science as a benchmark to stop implementation.

If you go to the original Clean Water Act, it didn't require a standard that you have complete knowledge of the science in order to implement TMDLs. It said to maintain margin of safety; implement to the best professional judgment that you could. So, back in 1972, they were encouraging implementation with the information they had at the time. What you've seen in this process has been voluntary implementation in many States, New England, particularly, who have gone ahead and developed BMP's to try to stay ahead of these types of issues.

One of the biggest issues in this debate has been what TMDLs has represented for other States in the Nation, where they have not gone through voluntary implementation programs.

I am particularly concerned about waiting to, hopefully, develop what is considered adequate science that you may not be able to achieve in a year, 2 years, or 3 years. I don't want to see efforts to improve our water quality be sidetracked by having that scientific development hung up.

So, from that prospective, I would much prefer to see the standard be implemented. If necessary, when additional science is devised, reviewed, and accepted, then amend your standard at that point, but do not hold up the implementation of the regulatory process until this develops.

Senator SMITH. I'm sorry. I didn't see the gentleman standing here. Yes, sir?

Mr. KINNETH. My name is Robert Kinneth and I own a few acres a little north of here, and that's my concern, and that's why I'm here.

I thank you, Senator Smith, for holding the hearing and allowing us up here in the north country to have our say. I think it's important and I thank you.

A few years ago, I was part of a committee on the Hubbard Brook area. I was an RCD member of the northern four counties in New Hampshire at the time. I think there's much to be learned there. That review went on for several years. Some of the questions

were asked 15 years ago that we've been talking about today, of the people that were running the area; and, physically, you know, getting their hands dirty. I'm certain that there is much to be learned from that study. I'm sure that data is somewhere.

I urge you, Senator Smith, to look into that and use that for the decisions on this bill and this proposal, and the new rules and regulations.

The comment by the young lady to simply set down rules and regulations without understanding the impact of those by a fellow that's got a very sore back, because he's worked all of his life in trying to make a living, and a very meager living, cutting wood, and putting him under a permitting process that takes months, is going to drive him in poverty. If that's the process, then do it. But I think it's wrong. Thank you.

Senator SMITH. Thank you, sir.

Yes, sir?

Mr. KENCHT. Senator, my name is Stan Kencht, spelled K-e-n-c-h-t. I'm from Lancaster, NH. Just following up on your question, you asked Scott Mason concerning from a farmer's viewpoint what is the worst part of these regulations.

I would agree with what Scott said; that the citizen lawsuit, the potential for a citizen lawsuit is the scariest part of the regulation.

One of the other parts of the CAFO regulation, as I understand it, is once you're in violation of any pollution, then you come under the definition of a CAFO, regardless of the size of your operation. So, if you're like me, and you have 30 head of beef cattle and you're in violation of something, then, you're automatically categorized as a CAFO and subject to potential citizen's litigation.

I would just like to comment. You said that Mr. Fox would respond to comments or respond to questions that are part of the record. I just have a question.

I believe that in this public hearing process, the only thing that we, as citizens, have to take back with us is the credibility of what's spoken to us here. And during part of Mr. Fox's remarks, his comment was that he did not believe that the CAFO regulations would impact New Hampshire at all.

Now, Mr. Mason's comments, obviously, contradict that. I would just ask Mr. Fox to rectify his statement that they would not impact New Hampshire; and then, Mr. Mason, that they would. I would ask him to rectify that for the record?

Senator SMITH. He would respond to that and make sure we have your address before we leave, so we can get back to you.

Mr. KENCHT. Thank you.

Senator SMITH. Yes, ma'am?

Ms. TARKER. Edith Tarker. I spent a day on a bus looking around Coos County looking at various forest lots. One of your staff people was there. I got a little better understanding of some of the Federal funding that Mr. Mason was speaking of.

What is your view, Senator Smith, as to whether we can see an increase in the funding of EQIP and some of these other alphabetical programs which are designed to help tree farmers/loggers and the farms here, the dairy farms? There seem to be a number of them. And some of them got short-changed in order to get the Ice Storm money. It was a cost or a funding shift program. In other

words, we got a lot more money, but it was directed toward Ice Storm damage.

Now, apparently, there's need for money for building some of these manure storage facilities and other practices which would be helpful on woodlots.

Are we apt to be getting more money here in New Hampshire for those kinds of helps to tree farmers and to dairy farmers?

Senator SMITH. Well, first of all, let me say that I did for the first time—I didn't think I'd ever live to see it—but for the first time in a long time, 30 years or so, we're beginning to run some surpluses at the Federal Government level. I'm hoping that with the surpluses (a) we can give some money back to the taxpayers; (b) we can peg down and pay off the National Debt, which is about $3.5 trillion. We did make a downpayment of a couple hundred paltry billion on that this year; but, certainly, we ought to be able to look at programs like this, that I would call infrastructure. Infrastructure would be environmental enhancement, promoting good environment policies, rather than being at the end, the punitive end, the fine end, if you will. Rather, the Government should get into promoting these practices and grant dollars, in general, in those areas, I would be supportive of.

I think if you look over the past 30 years, the State of New Hampshire has been a donor State. Not in everything. We get more than we put into the Federal Highway Trust Fund, for example; but I believe, that we've been a donor State, in the sense that a lot of the States have these huge welfare and inner-city problems that New Hampshire doesn't have. We have them, but not as serious as others.

So, I think we have a good, valid reason to make requests for this kind. Whether they're revolving loan programs, grants, or any type of a process where we could get moneys to help. We do this with my bill, which increases from $150 to $750 million on the TMDL issue to promote good practices to have a pilot—several pilot programs around the country, and so forth. So, I think that's proactive.

And I think, respectfully, the area where I disagree with Mr. Fox and, perhaps, with Ms. Girard, as well, is that I think we all believe that we share those objectives, but I believe the best way long term to handle these environmental problems is to stop creating more of them. If we constantly have to hold a glass under the faucet and the faucet keeps running, we're going to run out of glasses pretty soon. I want to shut the faucet off and I think the best way to do that is to teach, and to help, and work with the landowners. They can teach us a few things, I'm sure, and to do the right thing and look to the next generation after the next election. It's very easy to say that we want to do something immediately to clean up the mess that we created that took 200 years to do it. But sometimes, we can't do that; and I think we have to be honest about it, and say, "Let's set good policy." If it takes grant money, and some of the types of programs that you suggested, I'd be all for it. I mean, I think we should get our share of it.

I think it ought to be based, frankly, on good performance on how well we are on the steward of the land. I don't think somebody who's doing a lousy job in stewarding the land should get it, but

I think that the States and landowners who do should get that help. And I think New Hampshire, frankly, is as good as any State in that regard.

So, unless either of the staff has comments specifically on these programs, I'm done.

At this point, if anyone has any question of any one of the panelists who are up here or any panelist who is still here, feel free to come up and we'll respond to any question that might be asked. Did you have a question?

Mr. SULLIVAN. A comment.

Senator SMITH. Yes, sir?

Mr. SULLIVAN. Well, thank you, Senator. I just have a quick comment. My name is Mark Sullivan and I live in Whitefield. I've heard a lot of interesting things here, and what troubles me more than anything else is that EPA has an unclear rule, no clear concept of what their long-range implications of the unclear rule are, and no plan to implement the unclear rule.

My ending comment is that, to me, this seems to be a glaring example that a draft is a horse designed by bureaucracy.

[Laughter.]

Senator SMITH. Well, I would agree with you, because one of the things that I have found in all of the environmental laws that I've worked with over the past 16 years that I've been in Congress, they were all good-intentioned, and many of them were very effective, including the Clean Water Act. But I think it's important that we do have clarity in these laws. If there's an individual out there somewhere who—let's just use the example of a farmer—if he is or she is a lousy farmer, who's really polluting the environment, has absolutely no concern for the land for whatever they're doing, then that person is violating the law and that person should be, in my view, brought up short for doing it.

But I don't think we should pass rules or implement rules that make everyone criminals; for the same reason we don't want to put everybody in jail because somebody commits a crime. And so, that's my only concern.

I think in the long run, it would be nonproductive, and I don't want to repeat myself, but I'm trying to look beyond the laws of the past which have been very effective. We don't want to walk away from those laws, but we can, in my view, down the road, stop more problems in the future a lot more quickly if we work with landowners, the private stewards, to see to it that we don't create more of these problems. I'm afraid that this rule, with the greatest respect to those who support it, it's going to have the exact opposite effect. I think it's going to drive people—not everybody. I mean, Champion lumber company is going to be around. I don't think we're going to drive them off the land, but we may drive off Tom Thomson or some other small woodlot owner or landowner who may not be able to do that, and that's my concern. And if we do that, in the long run, we're not benefiting the land; we're not getting the results that we want. So, I agree with you.

And now, just step up. Yes, ma'am?

Ms. DEROSE. My name is Bonnie Derose, D-e-r-o-s-e. Senator Smith, I really appreciate this opportunity. I'm not a farmer. I'm not a forester. I'm here as a U.S. citizen who conducts their daily

life, their daily public life in English and I expect the same of others, and I vote.

I have in my hand some literature which shows great success by EPA, clean water, clean air, and to that, I have to say, "If it ain't broke, don't fix it."

Part of what I think motivates people to design laws, such as this—there are too many damn laws, as you've dubbed it—is the success that the EPA has already had. This is going to affect the life expectancy of the EPA. Historically, in Washington, when something is successful, the budget gets cut. So, what's the EPA going to do? Let's get more regulations, so we can have a longer life; and those more regulations are going to cost the taxpayers. This is analogous to the psychologist and other ancillary people in public school systems who find more and more labels for dysfunctional children to be in Special Ed., another black hole.

There used to be a saying of people holding office, public office, whether it be city, State, county, or Federal, that they were public servants. The number of laws that are now, like this proposed law, punitive and damaging to the citizens, have made the citizens of the United States servants to the Federal Government, and that's not right.

There's been a lot of discussion today about where the funding for this law is going to come from; and the split of 60/40, maybe, it's 50/50, maybe, it's 30/70, it all adds up to 100 percent on the taxpayer. Whether they're paying their State to put forth the State's part of it or the Federal taxes to put forth the Federal part of it, it still adds up to 100 percent for the citizens of the United States.

To that, I would like to say to the people here in the audience, whether you're getting it or giving it, when somebody controls your money, they are controlling you. Thank you very much.

Senator SMITH. Thank you.

[Applause.]

Senator SMITH. We are going to continue to take the questions for those who wish to ask them. Let me just state, in case some people leave, a whole transcript of this hearing, including the remarks that all of you have made, will be available. It's going to take a little while, but you can get it by e-mail to www.senate.gov/epw/. Also, you could write to the Environment and Public Works Committee in Washington, DC and we'll provide you copies, but it's going to be a while before we have a hard copy of it, but it will be available if you'd like to have it.

Also, I want to thank Jeff Rose of my staff and Stacy Durgin, both of them who worked the environmental issues here in the State; and I know they've been up here on numerous occasions working with all of you on these issues, and I appreciate their help.

So, anyway, now, let's just take these questions and then we'll wrap up. Let me go over this side, I guess.

Mr. BALCH. My name is Si Balch, spelled S-i B-a-l-c-h. I'm chief forester at the Mead Paper Company here in New England. I would like to thank you for having the hearing. I think it's a great thing to do; so, thank you very much. I live in Wilton, ME.

I've got about 30 years' experience with forest operations here in the Northeast; plus, I've worked for a number of corporations that

have land across the country. I've been working in water quality, both at a company level and at a State level for, at least, 10 years. I'm on the Advisory Council of Water Qualities in the State of Maine. Mead owns about 600,000 acres, of which 100,000 is in New Hampshire. The rest is in Maine. We are also members of AF&PA, supporting SFI.

I'm afraid I don't have a lot of faith in the promises of the EPA at this point. I would like to say that I think that the TMDL part of the program has not been supported as well as it should have been over the years, and that lawsuits over the past few years have proven that.

And so, I would encourage the development of the TMDL program as originally envisioned. That does not mean that I'm encouraging it to include silviculture and other nonpoint sources. And I'm fascinated by this magic where a nonpoint source suddenly becomes a point source. We are seeing it in agriculture.

Now, we've heard a lot about silviculture. We heard from Mr. Fox today a classic divide and conquer. It doesn't apply to you in New Hampshire; so, don't worry about it. Forget it. It applies—it will apply across the country, and our colleagues in the rest of the country will bear the brunt of it.

Agriculture is fascinating, because, actually, there is a law which exempts agriculture from most of this; and, yet, EPA has magically said that feed lots suddenly are not agriculture. Guess what? Now, they're a point source. So, you're going to see this continual subdivision or definition to get where they want to go.

A couple of points. If TMDLs are not based on science, they will be indefensible, and they would be back in court; and then, your tax dollars and my tax dollars would have been wasted on a worthless product and will be further wasted defending them in court. And when the EPA goes to court to defend its own regulations, that's our tax dollars.

Your bill, 2417, does go quite a long way to fixing some of the problems, and I would like to endorse that. Very simply, nonpoint sources should not be implemented into the TMDL process. You need to retain the definition of most silvicultural operations as nonpoint sources. We heard Mr. Fox say that they would follow the intent. The very clear intent of Congress in the past has been the silvicultures and nonpoint source. Let's honor that.

I will not bore you with the whole list, but I am going to submit it in writing.

I would like to tell one short story of my experience. One of the recent pieces of legislation to the coastal zone management, which requires States to develop and enforce the BMP's, enforce the BMP's within the coastal zone.

Well, in the State of Maine, the coastal zone, for some reason, is approximately 100 miles from the coast. It's not a couple of miles along the coast. It's 100 miles inland. We studied it. The State studied it. We submitted a plan that said that forestry was not a significant contributor to pollution within the coastal zone.

The EPA came back and said, "Nice try, but you have to leave it in there."

So, the business of the State being able to create its own program, and say, "There, we got turned down flat by the EPA" So, I don't have a lot of faith in that process.

I'd be happy to answer any questions.

Senator SMITH. Thank you very much. Let me make a quick request. At the risk of offending anyone, they tell me that we were only supposed to have this school until a little after 4 o'clock. It's 5:20 p.m. We were supposed to give up the school here. So, every—anything that you have in writing, we can accept as a written record; and, if you could just summarize in a minute or two your comments, it would be appreciated so that I can get everybody since I promised it.

Yes, sir?

Mr. BONNEY. Hello. I'm David Bonney. I am a Maine licensed forester residing in Newry, ME. I have practiced forestry for 21 years in the States of Maine, New Hampshire, and New York. I am currently employed by Wagner Forest Management, which is headquartered in Lyme, NH. Wagner manages large acreages in New England, New York, and parts of Canada.

As a practicing forester, I strongly object to the EPA's proposed efforts to redefine forest management activities as a point source polluter.

If this action is allowed, the ability of landowners to responsibly manage their land will be adversely impacted. This ability to manage forestlands is crucial to the economy supported by the management of our forests.

Landowners currently follow the State and local laws, along with implementing Best Management Practices when conducting forest management activities. To require the landowners' practicing forestry to go through the delay and expense of receiving Federal permits, given the effective programs already in place, is completely unacceptable.

These proposed permit requirements threaten the forest landowners' already narrow profit margin. These requirements would also open the door for other laws and civil lawsuits.

Landowners faced with not having the opportunity to profitably manage their holdings may choose to sell to developers.

This permanent loss of forestland would impact the environment to an extent that no forestry activity would ever induce.

I urge that the determination of forest activities as a nonpoint source polluter not be reversed. Thank you.

Senator SMITH. Thank you very much, sir.

Yes, sir?

Mr. SPALDING. My name is Donald Spalding, again, from Whitefield. We've heard a lot today about what might happen under this proposed rule, but I would like to relate a case where it actually did happen in different but very similar circumstances.

It involved Ben Lacy, a small apple juice producer in rural western Virginia. He had a NPDES permit, similar to what is being proposed here, to discharge wash water from his operation into a local stream. He thus had to do quarterly testing of his effluent and file the Quarterly Monitoring Reports with the State.

One day, at a time his business was beset with disasters, staffers from the Virginia Department of Environmental Quality showed up

for a routine audit of his reports. Because of his troubles, he told them to come back another time. Instead, they returned with a platoon of FBI and police and seized all his records.

They found that over several years, he had reported a few incorrect numbers, mostly in advertently. The Virginia attorney general wouldn't prosecute, nor would the area Federal grand jury indict, but the intrepid Feds. shopped around until they found one grand jury that would.

As a result, he was taken to Federal court, convicted on eight counts of "making false statements," and was facing 24 years in jail and $2 million in fines. That is, until the judge in the case discovered that your government and mine had suborned testimony from the chief witness against him, a disgruntled former employee, and threw the case out. And at no time in any of this was there any question of illegal pollution or exceeding TMDLs. In fact, a local environmentalist group tried to testify on his behalf.

Senator SMITH. Thank you.

Yes, sir?

Mr. COHEN. My name is Nick Cohen and I'm from Plainfield, NH. I represent myself, as well as the Sierra Club and a number of other organizations working here in New Hampshire maintaining trails.

Since New Hampshire is better at implementing Best Management Practices, according to what we see as the condition of our waters on a national basis, the economic competitiveness of New Hampshire timber would actually benefit from more stringent Federal regulations, because that will equalize the expenses devoted to environmental protection by all timber producers throughout the Nation currently; because we, in effect, do a better job without spending more, and it puts us at a competitive disadvantage. So, we could certainly—I think we're looking at something that would improve our position.

The economic pressure of New Hampshire and worldwide forests will certainly increase dramatically in the future; especially, since the world is developing a great demand for timber worldwide. And it's important to have regulations in place now to provide additional protection for the environment, which might be very difficult to obtain in the future.

Also, I see as I walk over different areas of the State that not all New Hampshire private timber owners use good practices. I, by the way, do timber management on my own land. And occasionally, we come across areas which have been clear-cut. Very badly managed, as far as soil conservation is concerned. So, there may be some need for regulations in the future on that basis.

I've heard mentioned the 100-year planning basis for timber. I think you've got to start thinking in terms of thousands of millions of years; especially, if we're going to be living here that long, because it's going to be on that scale that we have to take care of this planet.

Then, on nonpoint pollution, which is the last thing I want to mention here. Eventually, nonpoint source pollution manifests point source pollution when it collects, you know, in a waterway, or something like that. So, it's all part of the same pollution problem. And I don't think that by changing it, the designation from

one to another, or arguing about it, that you can successfully exempt forestry or agriculture from the total picture. It's just more difficult to get a handle on, and it might be that it's easy to identify poor practice by finding a point where you can identify a point source pollution and associate it with a particular operation, as far as legislation's concerned.

So, I think in the future, you're going to find that it doesn't matter what type of pollution you're talking about. It's all going to come under the same kind of regulation. Thank you.

Senator SMITH. Thank you very much.

Yes, ma'am?

Ms. PACKER. Thank you, Senator. My name is Sara Packer. I'm a forester with Wagner Forest Management out of northern Vermont. I'm an active member of the Society of American Foresters and I serve on boards of both Vermont Sustainable Forestry Initiative and the Vermont Woodlands Association.

I share with many others in this room a strong commitment to the responsible management and protection of our natural resources, and I do not believe that an expanded Federal regulation is necessary to meet the goal of achieving fishable and swimmable waters.

Silvicultural activities have been exempt from a Federal permitting process since the original Clean Water Act and multiple State laws and programs, along with various voluntary initiatives and educational programs, have proven successful in addressing the protection of water quality on forest management operations.

Our ability to own and responsibly manage forestland is critical to the environmental and economic health of this region. Requiring landowners to go through the delay and expense of receiving a Federal discharge permit will, undoubtedly, threaten their ability to efficiently and profitably manage forestland, and many landowners, who have helped to maintain and protect our open space and working landscape, may choose to sell their land to developers.

It is clear, that the permanent loss of this forestland poses a far greater environmental threat than any forest management activity ever could. Thank you.

Senator SMITH. Thank you very much, ma'am.

Let me again repeat. If you can, to be as brief as possible, so we cannot get in trouble with the school here.

Yes, sir?

Mr. GORHAM. I'm Frank Benny Gorham. I'm a beneficiary of Broad Acres Trust, land of 500 acres; land that's been in the family for over 150 years, and I was in forestry 64 years before they even thought of—before the White National Forest was created. We are very concerned.

Mother Nature takes more precipitous actions than the cutting and harvesting of trees. Now, I'm not talking just about the Ice Storm.

Just last year, last fall, there was a horrendous southwind that damaged several hundred beautiful trees and blew them over and uprooted them. And everywhere there's streams, and it's going to take the dirt and everything from the uprooted trees and wash it down to someplace, who knows where? And there's probably going to be a point source pollution done by Mother Nature.

And the year before that, it was on the northern slope of Mt. Madison, the wind blew in the opposite direction; blew trees directly over all of the hiking trails that went across our land. We cleared those. And am I going to get permission to clear a tree that Mother Nature blew down? How long is that going to take? Those kinds of things are what concern us.

One of the things that we are doing is to have a conservation easement on the land abutting the National Forest that's in the family land; and, in fact, next Tuesday, the White—Society of Protection Management Forest people are coming with us. And I think that when you see the stewardship of the land that has been in the family this long, and it doesn't have to have any Federal protection in order to survive and to be equally good or better than our adjoining White Mountain National Forest.

And I thank you for giving me the opportunity. I wrote you a particular story on the stewardship of that land, and I hope you read it on the way back just for your entertainment. Thank you.

Senator SMITH. Thank you very much.

Yes, sir?

Mr. AKILLION. Hi, Senator Smith. I'm Rich Akillion from the New Hampshire Citizens for a Sound Economy. In the spirit of your 2-minute rule, I will submit our comments——

Senator SMITH. I appreciate that.

Mr. AKILLION [continuing]. And I appreciate the opportunity to submit them by Friday.

Three quick points. First is I, and our members, believe that EPA has overstepped its authority here. Our Congress makes laws; and EPA, they help promulgate rules. Their interpretation of treating some nonpoint sources as a point source, I believe, is their overstepping of their authority.

Second, the threat of lawsuits is very real to Mr. Mason, in his comments. I think that's a real-life story and I think to us as citizens, it could be challenged. I could be wrong, but I believe our States are open to lawsuits if they do not enforce TMDLs if they are implemented. That's a cost borne by all of us.

And finally, on the limits of sound science, I see sound science as updated and reliable information; and before we charge it to something, a new foray, if you will, I think the most reliable information, and the impact to us, and the cost associated are very important. I thank you for the opportunity to speak here in New Hampshire. Thank you.

Senator SMITH. Thank you, Mr. Akillion.

Yes, sir?

Mr. BOGEU. My name is Doug Bogeu. I'm with Clean Water Action; and I do want to state again for the record, my organization was not invited to participate in this hearing, and neither were many other environmental, public health, and public interest organizations throughout the State. And we know, Senator Smith, you have our address, because we attended your gathering a few weeks ago, and we appreciated that opportunity. But, you know, frankly, it was difficult to find out even that this hearing was happening; where it was happening. We only really found out this past week. And I would submit that while some of the people here deserve to have their concerns here, so, too, do the people that live down-

stream and people that are effected by the pollution that we're trying to address with this issue.

I would like to ask or request whether you would hold another hearing in some other location? You know, hopefully, in New Hampshire; but, you know, somewhere in New England where people are being directly affected by the pollution that this—these rules are meant to address. And really, it plays where a larger cross-section of the population can reasonably attend. Not everybody's willing to drive 2 or 3 hours on a Saturday to be here. So, I would like to make that request. I know it's difficult to set up these hearings, but we do feel this issue is so important that it does a greater hearing and more opportunity for the public to speak out on it. Not to the issue at hand. I mean this is basically about clean water. The fundamental issue here is protecting our water, our drinking water, our other water resources, and those that are needed for the environment.

And, you know, as Miss Girard tabulated earlier, there have been numerous deadlines that have been missed. This issue has been around for a long time.

Senator, you asked earlier, "What's the urgency?" Well, I say, "Well, for 28 years of inattention to this issue is the urgency." People are dying for clean water. And I don't mean that just, you know, rhetorically. People are dying because they are not getting safe drinking water because of contaminants that are in their water, and a good proportion of those contaminants are coming from nonpoint source pollution, not necessarily from silviculture or agriculture, even but from many different sources, and those do need to be addressed. And we cannot delay another 5 years, another 10 years and study, study, study. That's what we've been hearing for 30 years. OK, this was written into the original law and it needs to be implemented. You know, this is also not just a State law. This is not a New England law.

You know, yes, the problem may not be so bad and New England may be in much better shape in regard to these pollution problems than other regions; but, again, we should not be dictating to the rest of the country what they should be doing about their water problems. It needs to be addressed on the Federal level.

It's quite clear, the Federal Government has been unwilling to address it for 30 years now. And some States want to do more; some of them don't. But they all need to be held to the same standard. So, we do feel this really needs to go forward.

I would just like to say to the people that have come here today, I would hope that you, listening to all sorts of things you heard from all the different panelists and other commenters, that you would feel some resentment that you've had to take up a whole afternoon on a beautiful spring Saturday to address, basically, a nonissue; and nonissue is not the TMDL rules. It's not how we're going to address getting cleaner water.

The issue—the nonissue is that this is going to have a significant effect on your livelihood; and I hope that you've caught by now that there have been numerous pieces of misinformation that have been spread by the forest products industry and others. I picked up this flier, as many of you have probably seen it, and there's one lie after another; and I really just have to say that you've got to listen to

the facts. Don't just take their word for it. I know you don't trust the Government. We don't trust them, either. You know, we've got plenty of gripes with the EPA and other Federal and State agencies, but the fact is that this is not as bad as some of the people have tried to portray it as. And I hope that you're not willing to be manipulated and duped by all the special interests people, particularly, multinational corporate interests that want to see these Federal regulations sunk. That's what we've been dealing with for 30 years, and you've got to understand that there's a much bigger issue here, and there are lots of stakes. So, that's, really, just what I wanted to say, and thank you for your time.

Senator SMITH. Thank you.

Yes, sir?

Mr. BERTI. Thank you, Senator. My name is Robert Berti, B-e-r-t-i. I am a Selectman from the Town of Rumney. I'm a practicing forester, but I don't want to talk to the issue of forestry.

I've been a Selectman going on 18 years; and over that period of time, I've seen the eroding of control at the local level, from the State and from the Federal; and instead of government working from the bottom up, we're getting into a relationship of government from the top down. And I think that's a very dangerous precedent to be set.

I know it's sort of a boring reading, but I would encourage every Federal agency and person working in the Federal Government to read portions of the Federalists Papers, who were basically written by people who were the Framers of our Constitution. And very early on, they were concerned about a very strong Federal Government taking over from what is legally and rightfully State responsibilities.

And I would just suggest that the issue here isn't nonpoint or point pollution. It's really the encroachment of vast bureaucracies, and I'm not a conservative, but I do think that the Federal Government is encroaching ever so much on our daily lives in areas they don't have the right and the constitutional right to do that.

And Senator Smith very, very early on today made a point of the King's Pine, and the King's Spruce, and also, the King's Oak. I just hope we don't become where it's the EPA's Maples, and Birches, and Pines.

Senator SMITH. Thank you very much.

Yes, sir?

Mr. SAIRD. Thank you, Senator. My name is Bill Saird and I'm chairman of the First Policy Address Force for the Associated Industry of Vermont, and it's good to see you again.

Senator SMITH. Nice to see you.

Mr. SAIRD. In contrast to the earlier speaker, I want to clarify the record here that this has been an open hearing; and anybody who's attended has had the opportunity to speak.

Senator SMITH. Well, I'll just say to the gentleman who said that had two opportunities to speak.

Mr. SAIRD. That's true.

I would further add that it is a shame that we had to take this afternoon to take up a subject that shouldn't have come up at all. It really has been well established, I think on all sides, that this is a solution looking for a problem. But I would submit, it's a solu-

tion in the form of a sledgehammer trying to pound in a thumbnail. And in so doing, it's destroying the furniture that's being held together by that thumbnail.

The people who have created this environment, it is so evident by so many, are decent, hardworking, private property owners, Americans. And if this was so much in jeopardy, why are people so afraid that something's going to happen to it? Why are people so afraid? Why do people on one hand compliment all the wildlife, habitat that's been created, the recreational beauty and scenic beauty; and on the other hand, not trust the people who have done the job in creating it? I think, that is what I think is at issue today.

The point has been made earlier that implicit in this regulation is the assumption and the message that the people in the local governments and the State governments can't be trusted to take care of their own environments. And also admit to you that nobody cares more about the environment than the people who live in the local areas, who earn their living here, and who will provide their local government. And they certainly have more common sense, and more flexibility, and more capacity to manage that environment well than anybody from Washington.

Now, what do I mean when I say who can I trust from our Federal Government? Well, we have heard today the very careful use of language. You heard the EPA say, ''Well, we have no intention of regulating nonpoint sources,'' but they forgot to say that they're going to call parts of agriculture and parts of forestry point sources. That trend will increase.

Now, who should be distrusting or mistrusting whom? There's three examples that we have to go by in Vermont of where we can decide who deserves the trust and who doesn't.

Our National Forest had built into the original law the provision that any local Select Board had to approve an acquisition before that acquisition could go through by the National Forest. After 70 years, that was just thrown out the window by the National Forest.

When the Silvio Conte Refuge was being created, we were assured over and over again, verbally, just like we were assured verbally today, that that would not be a land acquisition program. And yet, last year, 28,000 acres were purchased by the Federal Government.

Now, the Wetland rules are an even better example, because that's an EPA-administered program. We were assured in Vermont that that would be State-run, State-governed, and the EPA would basically stay out of it. But what really happened after a period of time, when the State did not do what the EPA wanted, the EPA made it very clear that if they did not conform, if they did not bend to the will of the EPA, the EPA was going to take over the program. And that's what's going to happen in this program.

Now, they may try and back people up by saying nothing's going to happen for 5 years. But, eventually, the time will come where the EPA will govern forestry in our Nation if we allow this rule to go through.

Now, the wording is: You have nothing to worry about, as long as you've got an improved plan. You have nothing to worry about, as long as you have an effective plan. Well, who's going to decide

whether it's effective or approved? It's going to be the Federal Government.

And so, when those definitions change and they make it so that the State plan is not effective by their terms or not approved by their terms, then you will have to have Federal permits. And these are just some of the reasons why I think we need to oppose this rule.

Frankly, you've asked a couple of questions over and over again: Why is it that this rule is being proposed when nobody says it's necessary? It's because the command-and-control mentality can't stand the idea that a free person somewhere, someplace, is making a decision without Federal permits.

And why the rush? Why do you need it done so quickly? Because they want to get the rule in place before the Clinton/Gore administration comes to an end.

I hope you'll do everything in your power to stop this awful rule from being imposed, so that the people, who have created this beautiful place and worked so hard to do so, can remain strong, free, self-reliant, and independent. Thank you very much.

[Applause.]

Senator SMITH. Yes, sir?

Mr. BRUSICK. Thank you, Senator, for the opportunity. My name is Brendan Brusick, and I live in Columbia, NH on Simms Stream; and I'm one of the people that live downstream, and I'm here to tell you only the facts.

I live in the base of Simms Stream just before it enters the big Connecticut River. The watersheds have been heavily logged for hundreds of years. Some of this, in recent years, it's been done by some of the so-called bad actors. I live there; I swim there; I fish there; and I hunt there; and I drink the water in this watershed, and so does my family.

Simms Stream is beautiful. It's crystal clear and it's due to the work that the State agencies have done to enforce the laws and keep that water clear. We don't need any TMDL to tell us how to keep that water clean. Thank you.

Senator SMITH. Thank you very much.

[Applause.]

Senator SMITH. OK, last question.

Mr. THOMSON. Senator Smith, I have a question for Chuck Fox, but I'm going to mail that to him as long as the hearing will be open until next Friday; is that correct?

Senator SMITH. Yes, we'll keep it open for comments.

Mr. THOMSON. Just one personal comment I'd like to make for myself and our families, but also, for the national tree farmers. I'd like to thank you for having this field hearing and the good work that you do, and I thank you.

Senator SMITH. Let me also thank our sound man over there, Bob Molloy. Every microphone worked, and that doesn't happen very often in appearances around the country, Bob; so, thank you very much for your patience. And I know we went a lot longer than we were supposed to and I appreciate it.

And, Janet Grant, thank you. That's a tough job that you have to get all this stuff down. I don't know how you do it, but thank you.

Let me also say to the brave souls that have stayed to the end, thank you very much for your patience and we appreciate it.

As you know, the EPA has said that they would finalize the rule by June 30; and assuming that if they do that, unless some intervening action is taken one way or the other, or modified, that will happen, I would assume, on June 30.

There are some other proposals out there, other than the legislation that I've introduced, but we're going to be working on this thing all the way through until June 30 to see if we can come up with some other resolution, not necessarily my specific legislation, but just something that, perhaps, works a little better, and we'll try—I can't make commitments I can't keep, but we'll see what happens.

But let me also thank all of the panelists who were here today for being here. It was a wonderful opportunity for me to hear from everyone, and with a lot of different views, and I'm grateful.

As somebody said earlier, we ought to have more hearings out in the field, and I agree with that. We can get a lot more information from real people that way, I think.

So, thank you very much again; and, at this point, the hearing is adjourned.

[Applause.]

[Whereupon, at 5:43 p.m., the committee was adjourned, to reconvene at the call of the chair.]

[Additional statements submitted for the record follow:]

STATEMENT OF HON. BOB SMITH, U.S. SENATOR FROM THE STATE OF NEW HAMPSHIRE

Good Morning. It is a pleasure and very appropriate that we are here today in the beautiful White Mountains of New Hampshire to discuss the environment. The 780,000 acres of the White Mountains and the extensive private forests around it are home to hundreds of miles of pristine waters. In fact, water covers 115,000 acres in New Hampshire, everything from small ponds to Lake Winnipesaukee, which is twenty-two miles long and eight miles wide. Each year, over a million summer visitors, come to New Hampshire to enjoy our mountains, lakes and seashore scenery. The forests of pine, spruce and hard wood add beauty to the landscape and wealth to the land.

Much of this area has historical significance, such as the Connecticut River, were "white-water men" risked their lives to convey lumber logs from the northern region to the manufacturing centers. The 2,155-mile long Appalachian trail, which stretches along the Appalachian Mountain chain from Georgia to Maine, winds through the heart of the White Mountains and traverses many of New Hampshire's highest mountains. As a Senator of New Hampshire and Chairman of the Environment and Public Works Committee, it is my privilege to protect these resources not only for us here today but for generations to come.

The residents of New Hampshire can be proud of what our timber companies, tree farmers, and farmers are doing today to preserve our natural resources for future generations. They are good stewards of the land.

I could go on forever about the vast resources and people of New Hampshire, but that's not what all of you are here today to hear. The purpose of this hearing is to further examine the Environmental Protection Agency's proposed rule on Total Maximum Daily Loads (TMDLs).

Since EPA released this proposed rule last August, I have spent considerable time talking with New Hampshire stakeholders, Senators, and State and local officials across the country, as well as many of you who attended the recent University of New Hampshire environmental symposium, about the impacts this rule would have if it were finalized. A common question is always asked of me: Why is EPA pushing this very controversial rule through the process so quickly? Unfortunately, I do not have the answer to that question; and that makes my job very difficult. I hope that Assistant Administrator Chuck Fox, who will be testifying this afternoon, will be able to provide an answer.

EPA's obvious desire to rush to judgment on this rule is especially frustrating when you consider that Administrator Browner has admitted that EPA failed in drafting a clear rule; Mr. Fox himself has suggested that substantial changes to the rule will be necessary in a letter to me; and almost every industry has expressed strong concerns about this rule. Notwithstanding all of that, EPA is rushing to finalize this rule. It is clear to me that it would be far more appropriate for EPA to slow the process down and perhaps reissue a newly drafted proposed rule so to provide all stakeholders an opportunity to comment, not just those that are represented by lobbyists in Washington, D.C. EPA should listen to all of those concerns and take a "time out."

While I may not understand the thought process at EPA, I do know that the silviculture industry of this State should be commended for their stewardship and work to protect the environment. Even the EPA acknowledges this: Mr. Manfredonia of Region I EPA stated that "silviculture and forestry operations are not, to the best of his knowledge and data, an issue for water quality."

Yet we are faced with a proposed rulemaking that could have a dramatic impact on the people who depend on the land and water for their livelihoods, regulating them for the first time under the Federal permit program of the Clean Water Act. This rule would not only impact large industries, but it could also have a dramatic impact on small family forestry and agriculture operations, where the margins are so thin, the survival of these businesses could be in jeopardy. It would impact people like Tom Thomson, a small family tree farmer that was named the 1997 Outstanding Northeastern tree farmer of the year. Tom has fought through the adversity of the ice storm to continue a family business. We should be proud of his stewardship and conservation of open space and not allow Federal permitting of his land. What have people like Tom Thomson done to their land that would lead EPA to believe they ought to have a permit to cut down a tree?

The EPA claims the States will be implementing this program. But in New Hampshire we do not have delegated authority to issue permits. So we fall into that category EPA claims is a "rare" situation, with EPA responsible for issuing the permits in New Hampshire.

In order to address the many concerns I have heard on the implementation of the existing regulations and the concerns with the proposed rule, I have introduced along with Senator Crapo and 16 other co-sponsors, S. 2417 the "Water Pollution Program Enhancement Act of 2000."

The purpose of this legislation is to take care of three concerns that have been outlined in the hearings we have held over the last 2 months, as well as comments made at the New Hampshire environmental symposium a few weeks ago.

First, the States are in great need of increased funding to implement nonpoint source programs, conduct monitoring to develop scientifically based water quality programs, issue permits and list waters under existing requirements.

Second, there are a lot of unanswered questions about the costs and scientific basis underlying the implementation of TMDLS, as well as a host of alternative programs or mechanisms that exist at the State level that may be more effective to accomplish the same goals of the TMDL program. These questions need to be answered before we mandate more requirements on the States and private sector. This legislation directs the National Academy of Science (NAS) to answer these questions.

Third, we need to take a time out, analyze these unanswered questions, continue to learn from the existing TMDL regulatory program, and then reissue the proposed TMDL rulemaking, taking into account the NAS study.

The environment of this great State and the Country is very important to me, but so is sound science. I look forward to listening and learning from all of you today who have to work within this regulatory program for years to come. Thank you.

STATEMENT OF HARRY T. STEWART, P.E., DIRECTOR, WATER DIVISION, NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES

Mr. Chairman, members of the committee, I am Harry Stewart, Director of the Water Division, New Hampshire Department of Environmental Services.

Thank you for the opportunity to testify before the Senate Committee on Environment and Public Works on the United States Environmental Protection Agency's Proposed TMDL regulations.

The New Hampshire Department of Environmental Services (NHDES) and other State environmental agencies across the country were highly critical of the Environmental Protection Agency's proposed TMDL regulations dated August 23, 1999. The regulated community and the public were also highly critical, as demonstrated by

the approximately 30,000 comments received by EPA on the proposed rule. NHDES viewed these proposed regulations as being too burdensome on both the State environmental agencies and the regulated community, and as too prescriptive, removing the flexibility of States to tailor programs to State-specific priorities and needs. Specific comments were contained in our letter dated January 20, 2000 to EPA. We also supported, and participated in the development of, the extensive comments to EPA by the New England Interstate Water Pollution Control Commission (NEIWPCC) and the Association of State and Interstate Water Pollution Control Administrators (ASWIPCA).

Chuck Fox, Assistant Administrator for Water at EPA, should be commended for his efforts to be responsive to these concerns. In letters dated April 5, 2000 to key senators and Congressmen, including Senator Smith, and the ''Joint Statement of the Department of Agriculture and the Environmental Protection Agency Addressing Agricultural and Silvicultural Issues Within EPA Revisions to TMDL and NPDES Rules'' dated May 1, 2000, Assistant Administrator Fox has indicated that numerous changes in the proposed rule which will address a high percentage of the issues raised by States and other parties.

For example, the April 5, 2000 letter included a table, ''Key Elements of the Expected Final Regulation for Restoring America's Polluted Waters''. These proposed revisions go a long way to address the concerns of the States by providing greater flexibility to tailor TMDL approaches to State-specific needs. Specifically:

- Four years are provided for States to develop lists of polluted waters rather than 2 years. Although we would prefer, and the States recommended, a 5-year cycle, a 4-year cycle is a significant improvement and is reasonable. This means we can focus our limited resources on activities to improve water quality, rather than developing lists.
- States are provided more flexibility, such as allowing 15 years for TMDL development for impaired waters, than in the original proposal.
- ''Threatened-waters'' was dropped as a category. This was an ambiguous category which we believe would have increased the listed waters with no environmental or program benefit.
- A proposed public petition process was dropped, eliminating a procedure by which citizens could potentially have bypassed State processes and unnecessarily drain State resources to deal with these petitions.
- The requirement for pollution offsets was eliminated. This also would have been a very difficult program for the States to implement.

The Statement of May 1, 2000 from DOA and EPA in part states: ''In States that develop and maintain forestry BMP programs that are recognized by EPA as adequate (i.e., generally consistent win this guidance) will have no exposure to NPDES permit requirements. . . . The idea is that forest operators in States with approved programs will know what is expected of them, what BMPs are effective in reducing pollution and need to be implemented.'' This indicates a very positive step to address the forestry concerns and suggests an approach that is likely to work in New Hampshire. Under any reasonable criteria, New Hampshire has an ''adequate'' program in place which includes three critical elements:

- *Implementation of best management practices.* It is important to note that a manual has been developed by the New Hampshire Department of Resources and Economic Development (NHDRED), in cooperation with NHDES and the University of New Hampshire, entitled ''Best Management Practices for Erosion Control and Timber Harvesting Operations in New Hampshire'' dated February 2000. As other States seek to implement BMPs, this manual is likely to become a model document, at the national level, for concisely providing practical information on BMPs on timber harvesting to operators and the public.
- *Training and outreach.* NHDES, NHDRED-Division of Forests and Lands, and nonprofit organizations like the New Hampshire Timberland Owners Association and the Society for the Protection of New Hampshire Forests jointly provide training on an ongoing basis on BMP implementation and over environmental protection considerations.
- *Compliance and enforcement.* In New Hampshire, when water quality problems caused by forestry operations are identified, they are typically short term and are corrected through the joint efforts of NHDRED and NHDES. These efforts virtually always first include compliance assistance and, when necessary, enforcement wader State statutory authorities. In fact, we expect that site-specific water quality problems would virtually always be addressed under State programs long before they rise to the threshold for Federal involvement, such as long-term water quality impairment.

Although we are pleased that EPA has been very responsive to the concerns expressed by the States and other parties, we have not yet had an opportunity to

examine the actual wording of proposed revisions address these concerns. Consequently, we urge EPA to publish the actual language of proposed changes for public review as soon as possible, especially for the forestry provisions, to allow evaluation and comment on the changes prior to final promulgation. This approach is appropriate considering the magnitude of the TEAL comments and expected changes.

Finally, please note that, as in most other States, New Hampshire's TMDL program is significantly underfunded. Additional Federal funding to support State development of TMDLs is needed, irrespective of the results of the EPA rulemaking.

Additional funding is proposed in both Senate Bill 2411 and the President's proposed budget. The President's budget contains $45 million for Federal Fiscal Year 2001, which translates into just over $200,000 for New Hampshire to assist with TMDL development. We have several concerns with the proposed funding in the President's budget:

- This additional funding is a good start but is not adequate to sustain an effective long-term TMDL program in New Hampshire. NHDES has estimated that an additional $420,000 per year for staffing and analytical costs is necessary for New Hampshire to support the TMDL program. The President's proposed budget contains half of this amount.
- Due to the way a new EPA Formula for the Section 106 moneys work, if the appropriation were to increase by $5 million to $50 million, ALL of the extra funds would go to New Hampshire, Vermont, and a number of other smaller States—the larger States have already gotten their share. To illustrate, with an increase of $5 million, New Hampshire would receive about an additional $110,000, Vermont an additional $175,000 and Rhode Island an additional $320,000 for a 50 percent increase in 106 funds to these States. Due to the way EPA's new 106 formula works, at $45 million, the larger States will have already gotten increases to 50 percent and will receive no more additional funds until the smaller States have "caught up".

Under the President's fiscal year 2001 budget proposal, the State match requirements for the proposed new TMDL funding are too rigid to enable New Hampshire to access all of this money. Based on EPA draft guidance, these "strings" include:

(1) A 60/40 split between Federal and State costs for the "new" Section 106 money (that is, 3 "Federal" dollars for every 2 "State" dollars). This is an extraordinary match requirement that we believe should be reduced to a 90/10 split between Federal and State dollars.

(2) An extremely narrow definition of "State match", relative to traditional practices, is proposed. New Hampshire currently faces significant State budget shortfalls caused by problems with education funding. Consequently, the potential for "new" State money to expand the TMDL program is virtually nonexistent during this period. We need flexibility consistent with current practice.

These proposed requirements should be changed if the goal is to have these funds rapidly and effectively utilized by all States, not just those with surplus State funds available to meet rigid match requirements.

We urge you to provide additional funding for water quality analysis and TMDL development with minimum match requirements and maximum flexibility on how the Federal funds may be matched. This is the only way to ensure that the funds will be fully utilized by all States to make significant progress toward the goals of the Clean Water Act.

Thank you for the opportunity to testify on the proposed TMDL regulation. We look forward to working with Congress and the EPA to ensure that our nations' waters are protected and improved while ensuring that our forest products industry and other traditional activities can continue to flourish in an appropriate and responsible way.

STATEMENT OF PHILIP A. BRYCE, DIRECTOR, NEW HAMPSHIRE DIVISION OF FORESTS & LANDS

Thank you for the opportunity to testify regarding the Environmental Protection Agency's (EPA) proposed Total Maximum Daily Load (TMDL) rule and the National Pollutant Discharge Elimination (NPDES) Permit System.

The mission of my agency is to protect and promote the values provided by trees and forests. Forests and Lands is responsible by statute for "all matters pertaining to forestry, forest management, and forestlands within the jurisdiction of the State." This includes acquisition and management of State-owned forestlands, forest fire protection, insect and disease control, the State forest nursery, the natural heritage inventory program, natural resource education and forest policy.

The Division of Forests and Lands is also the primary State agency responsible for the enforcement of forestry laws, including, in cooperation with the NH Depart-

ment of Environmental Services, those protecting water quality. Law enforcement officers from my agency conduct onsite inspections of logging operations to ensure compliance with water quality and other timber harvesting laws.

The State also provides training in compliance with forestry laws and implementation of Best Management Practices through the Professional Logger Program. Recommended timber harvesting practices for controlling soil erosion have been around in New Hampshire for at least 20 years. Implementation of these practices has been a critical component in reducing the impacts of logging on water quality.

As a State forester, I am strongly opposed to the proposed rules on three major grounds:

1. The proposal is a major departure from the historical interpretation and implementation of the Clean Water Act, and is not supported by statutory authority.

2. The proposal ignores the relatively minor contribution made by forest management to water quality problems nationwide, and threatens to disrupt the effective approach taken by the State Foresters and our Federal partners to achieve these results.

3. The proposal will be extraordinarily difficult to implement in practice and will result in drastically higher costs for both States that must develop TMDL's and the landowners and operators who might become subject to NPDES permitting requirements.

As stated earlier this year in my comments to the EPA, the proposed rules will do little, if anything, to improve water quality in the State of New Hampshire. It is a poor allocation of collective public and private resources to protect the environment. It is our experience that those few individuals who have little regard for the law will ignore any new permitting process. For the rest, a permitting process will divert energy away from other efforts that have a proven track record of success in protecting the environment, particularly the implementation of BMP's.

New Hampshire has a long and proud tradition of protecting personal and property rights while working collaboratively to resolve public issues and problems. I have characterized this as a balanced and collective form of forestry leadership. The top down approach promulgated by EPA is a threat to maintaining that spirit of collaboration between the private and public sector that has worked so well here in New Hampshire to address natural resource challenges.

An outstanding example of that spirit is Good Forestry in the Granite State. Not only does it have a chapter on water quality, but it incorporates a complete copy of the State's BMP's recognizing even further the importance we place in New Hampshire on protecting our water resources.

As we work to address environmental protection and forest stewardship through constructive dialog, a broad spectrum of interests, from representatives of the forest products industry to the staunchest critics of that industry, have identified more than once, the need for additional education, monitoring, and enforcement of existing laws.

For example, the legislatively mandated New Hampshire Forest Resources Plan recommends that we develop and implement forest practices regulations under the following guidelines: scientific information shows a clear need; voluntary measures are in place; education and incentives have not changed behavior; and monitoring shows that current practices are not sustainable.

The Plan also recommends that the State "Provide consistent, swift and equitable enforcement of forestry laws" and that we "Secure funding for five additional (Forest) Ranger positions."

In addition, the final report of the Forest Liquidation Study Committee to the State's Forest Advisory Board concluded that, with respect to improving forest practices, we need increased efforts to educate individuals about sound forest management, better data gathering on the level and harvesting activity within the State, and enhanced enforcement of existing laws. What we really need are the resources to carry out these recommendations.

I recognize that the EPA has been working to address issues surrounding the proposed rules. There remains a great deal of uncertainty as to the degree to which the EPA is responding to these issues. Questions remain:

1. Do these rules lead to the improvement of water quality beyond the capability of existing State laws?

2. Is EPA considering forestry and silviculture as a non-point pollution source or not? This is the critical question.

3. Under what specific circumstances will EPA issue a clean water permit or require the States to do so?

4. What is the relationship between existing BMP's under the 319 program and BMP's recognized under the new rule. If the 319 BMP's are not acceptable, what are the new criteria?

5. Regardless of current policies or the intent of EPA, what is the actual impact on landowners and forestry activities if there is full enforcement of the proposed rules?

6. To what extent will additional regulation drive landowners to convert land to non forestry uses?

In summary, while we look forward to working with EPA to protect water quality, the proposed rule is misguided. Even with recent changes in policy, it creates ominous and uncertain Federal regulation over silviculture and forest management. I am concerned that it also opens the door for abuse by those who do not support active management and stewardship of our natural resources.

Our collective efforts on behalf of the public should focus not on additional permitting and a shift to Federal control, but on monitoring, education and additional support to the States to enforce existing laws.

Thank you for the opportunity to provide this testimony.

STATE OF NEW HAMPSHIRE,
DEPARTMENT OF RESOURCES AND ECONOMIC DEVELOPMENT,
Concord, NH, May 4, 2000.

Hon. BOB SMITH,
U.S. Senate,
Washington, DC.

DEAR SENATOR SMITH: I am writing to express my dismay about the proposed Environmental Protection Agency rule revision that would change forestry from a nonpoint source to a point source, thereby requiring a Federal permit to execute standard timber management practices.

My primary objection is that many States, including New Hampshire, already have programs in place to ensure protection of clean water. The Division of Forests and Lands, one of four divisions within the Department of Resources and Economic Development, is the State government agency responsible for the enforcement of forestry laws, including those laws protecting water quality. The division's law enforcement staff inspects logging operations in the State to ensure compliance with these laws. In addition, our forest rangers promote educational programs, such as those offered through certified logger programs, to encourage awareness of and compliance with environmental protection regulations.

I firmly believe that our efforts should be aimed at monitoring, education and, when necessary, enforcement of existing laws. These current practices are infinitely preferable to implementing additional Federal regulations. Realistically, the new permitting processes will be ignored by those individuals who have little or no regard for the law and will place an untrue burden on law-abiding woodland owners both in the Granite State and nationwide.

I regret that I am unable to attend your May 6 field hearing, but I hope you will take my concerns into consideration as the U.S. Senate's Environment and Public Works Committee reviews the proposed EPA rule change.

Thank you for your support.

Sincerely,

GEORGE M. BALD,
Commissioner.

STATEMENT OF J. CHARLES FOX, ASSISTANT ADMINISTRATOR FOR WATER, ENVIRONMENTAL PROTECTION AGENCY

INTRODUCTION

Good afternoon Mr. Chairman. I am Chuck Fox, Assistant Administrator for Water at the Environmental Protection Agency (EPA). I appreciate the opportunity to testify before this committee on the work we are doing—in cooperation with other Federal agencies, States, and local communities—to identify polluted waters around the country and restore their health.

My testimony to your committee in February described in some detail the key elements of the Clean Water Act program for restoring polluted waters—generally known as the "Total Maximum Daily Load" or TMDL program. It described the over 20,000 waterbodies identified by States as polluted in 1998. It also described our effort, begun almost 3 years ago, to work with a diverse Federal Advisory Committee to review the TMDL program and identify needed improvements in existing regulations. And, my earlier testimony described the changes to the current TMDL regulations that EPA proposed in August of last year.

Rather than review these topics again today, I would like to focus on work we have done since February with a range of interested parties to discuss the important issues raised in the proposed regulations.

As a result of these discussions, I am confident that we can develop a final regulation that addresses many of the suggestions we have heard while still providing for a strong, common-sense program—led by the States and local communities—to identify and restore the Nation's polluted waters.

I will also review some recent developments related to the TMDL program. For example, a Federal court in California recently confirmed the EPA's long-standing view that the Clean Water Act calls for polluted runoff from nonpoint sources to be accounted for in the identification of polluted waters and in the development of TMDLs. Finally, Mr. Chairman, I will describe the Administration's strong opposition to the legislation (S. 2417) you recently introduced with Senator Crapo calling for a delay of several years in finalizing revisions to the TMDL program regulations.

CONSULTATION WITH PARTIES INTERESTED IN TMDLS

Over the past several months, EPA has worked closely with many groups and organizations interested in the TMDL program and in the proposed revisions to the current TMDL regulations. We have also made a special effort to review the many public comments we received on the proposed regulations.

Consultation with States

As I indicated in my testimony in February, the Clean Water Act provides that States have the lead in the identifying polluted waters and developing TMDLs.

It is critical that States stay in this leadership role and that they are partners in developing and implementing the program for restoring polluted waters described in our final regulations.

In developing the proposed revisions to the TMDL regulations, we worked closely with State officials, including a group set up by the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) and the Environmental Council of the States (ECOS). In addition, four senior State officials were members of the Federal Advisory Committee on the TMDL program.

Consultation with the U.S. Department of Agriculture

For the past several years, EPA and the United States Department of Agriculture (USDA) have worked in close cooperation to design and implement programs to protect water quality.

EPA and USDA worked together in developing the Clean Water Action Plan several years ago, developed the EPA/USDA Animal Feeding Operation Strategy issued last year, and worked with other agencies to draft the Unified Federal Policy for management of water quality on a watershed basis proposed earlier this year.

When the proposed TMDL rule was published last August, concerns were raised in comments by the USDA. In response to these concerns, I met with Under Secretary for Natural Resources and the Environment, James Lyons, and we established a joint EPA/USDA workgroup to review concerns of USDA with the TMDL proposal.

The USDA/EPA workgroup has been meeting on a regular basis over the past 3 months and these meetings have involved several dozen staff from different parts of both agencies. These intensive discussions have helped both agencies think through how our programs can best be coordinated.

EPA and USDA recently released a Joint Statement describing areas of agreement on the TMDL rule. Mr. Chairman, I ask that a copy of the joint Statement be included in the record.

Some of the key elements of this Joint Statement describe changes EPA expects to include in the final TMDL rule on topics of interest to the USDA. For example, the Joint Statement outlines how EPA and USDA propose to address the problem of restoring polluted waters that are impaired as a result of forestry operations. The USDA/EPA forestry proposal is discussed in more detail later in my testimony.

In addition, the Joint Statement addresses the treatment of diffuse runoff in our August TMDL proposal. EPA remains committed to voluntary and financial incentive approaches to reduce runoff from diffuse sources of pollution where there is reasonable assurance that these controls will be implemented. The proposed rule would not require Clean Water Act permits for runoff from these sources.

The President's fiscal year 2001 Budget backs up this commitment to voluntary and incentive-based programs with proposals that State grants for polluted runoff programs be increased from $200 to $250 million and that funding for conservation assistance programs at the US Department of Agriculture be increased by $1.3 bil-

lion. The benefits that result from these and other assistance programs will be given due credit in the TMDL process.

Since the majority of polluted waters are polluted in whole or in part by runoff from diffuse sources, a management framework that does not address them cannot succeed in meeting our clean water goals. As I discuss in more detail later in this testimony, this view was recently endorsed by a Federal court in California.

Review of Comments on the Proposed Regulations

I want to assure the committee that EPA is fully, and carefully, reviewing the public comments on the proposed regulations.

The Agency received over 34,000 comments on the proposed TMDL regulation. The comments fall into three general groups:

- We received some 30,546 postcards addressing control of water pollution from forestry operations. Many of these comments are virtually identical.
- We received 2,747 comments from diverse individuals and organizations expressing a view on one or two elements of the proposal.
- We received 781 comments from groups or individuals expressing comments on multiple parts of the proposal.

The Administrator and I view each and every comment as important. In anticipation of extensive comment, EPA began working to organize and evaluate comments received even before the close of the comment period. Since the comment period closed, we have reassigned staff as needed to review and summarize comments.

This is an important effort begun over 3 years ago with the convening of a Federal Advisory Committee. EPA has made every effort to assure a full and careful review of public comments. If anything, the high level of interest in the regulation has given us an extra measure of determination to assure that the final TMDL rule is based on a careful consideration of the record.

EXPECTED CHANGES TO PROPOSED TMDL REGULATIONS

I want to outline our current thoughts on how to change the proposed revisions to the TMDL regulations and proceed with the important work of restoring America's polluted waters.

Delivering the Promise of the 1972 Clean Water Act

The final rule will provide a common-sense, cost-effective framework for making decisions on how to restore polluted waters. EPA expects that the final rule will:

- *Tell the Full Story.*—Provide for a comprehensive listing of all the Nation's polluted waters;
- *Meet Clean Water Goals.*—Identify pollution reduction needed to meet the clean water goals established by States in water quality standards;
- *Encourage Cost-Effective Clean-Up.*—Assure that all sources of pollution to a waterbody are considered in the development of plans to restore the waterbody;
- *Rely on Local Communities.*—Foster local level, community involvement in making decisions about how best to meet clean water goals;
- *Foster On-the-Ground Action.*—Call for an implementation plan that identifies specific pollution controls for the waterbody that will attain clean water goals;
- *Commit to Environmental Results.*—Require a "reasonable assurance" that the needed pollution reductions will be implemented; and
- *Assure a Strong Program Nationwide.*—EPA will establish lists of polluted waters and TMDLs where a State fails to do so.

Enhancing State Flexibility in Managing Polluted Waters

States will have the lead to identify and clean up polluted waters through the TMDL program. The final regulation will expand the flexibility that States have to tailor programs to the specific needs and conditions that they face. EPA expects that the final rule will:

- *Give States More Time.*—Allow States 4 years to develop lists of polluted waters, rather than 2 years as under current regulations;
- *Give States More Time.*—Allow States to develop TMDLs over a period of up to 15 years, rather the 8–13 year timeframe of the current program;
- *Tailor to Local Conditions.*—Tailor implementation plan requirements and add flexibility to account for different types of sources causing the water quality problem; and
- *Endorse Voluntary Programs.*—Give full credit to voluntary or incentive-based programs for reducing polluted runoff through diverse control measures, including best management practices (BMPs).

Streamlining the Regulatory Framework

In response to comments from many interested parties, the final rule will be streamlined and focused on what is needed for effective TMDL programs. EPA expects that the final rule will:

- *Drop Threatened Waters.*—Drop the requirement that polluted water lists include "threatened" waters expected to become polluted in the future;
- *Allow More Flexibility in Setting Priorities.*—Drop the proposed requirement that States give top priority to addressing polluted waters that are a source of drinking water or that support endangered species;
- *Drop Petition Process.*—Drop the proposal to provide a public petition process for review of lists of impaired waters or TMDL program implementation;
- *Drop Requirements for Offsets of New Pollution.*—Drop proposals to require offsets before new pollution can be discharged to polluted waters prior to the development of a TMDL; and
- *Phase-In Implementation.*—New requirements for polluted waters lists become effective in 2002 and new requirements for TMDLs will be phased in over an 18-month period.

USDA/EPA Forestry Approach

In finding a common view of the best approach to reducing forestry impacts on water quality, EPA and USDA agreed that a number of States are doing an outstanding job of managing forest operations and preventing water pollution. We want to recognize and rely on these strong State programs to both prevent water pollution and to fix those pollution problems that do occur.

Not all States, however, currently have strong forest management programs. Many of these States are working hard to upgrade programs over the next several years. These efforts need to be encouraged and supported.

Finally, some State forestry programs may not be adequate to prevent water pollution problems for the foreseeable future. In situations where States choose not to develop approvable programs within 5 years, EPA and USDA recognize the need to have a "safety net" for water quality. The safety net that we envision is to empower State environmental agencies to issue Clean Water Act permits for discharges of stormwater from forestry operations, in very limited circumstances.

Let me be clear that, under our approach, no Clean Water Act permits would be issued for at least 5 years from the date of the final TOOL rule. And, no permits would be issued in States that now have, or that develop, adequate forest water quality programs. The final rule will describe basic criteria of adequate programs, including appropriate best management practices identified in consultation wash USDA.

Where a State has not developed a strong forest water quality program after 5 years, forestry operations might be asked to have a permit, but only if:

- the forestry operation resulted in a "discharge" from a point source (diffuse runoff from a silviculture operation will not be subject to a permit under any circumstances);
- the operation contributes to a violation of a State water quality standard or is a significant contributor of pollutants to waters; and
- the State Clean Water Act permit authority determined that a permit, as opposed to a voluntary or incentive-based program, was needed to assure that pollution controls would be implemented.

EPA may also designate forestry operations as needing a permit, but our ability to do so is even more limited than that of the State. In addition to meeting the conditions mentioned above, the EPA would need to be establishing a TMDL where a State did not do so.

EPA agrees that, where a State finds that a permit is needed, best management practices, rather than numeric effluent limits, are appropriate as permit conditions.

In addition, because States have the discretion to issue permits, forest operators that have not been told by the permit authority that they need a permit will not be subject to government or citizen enforcement for failure to have a permit.

IMPORTANT RECENT DEVELOPMENTS RELATING TO TMDLS

I want to briefly review some recent, important developments related to the TMDL program.

Reducing Workload and Assuring Adequate Resources

State officials have expressed concern over the workload and costs of the TMDL program. EPA is making every effort to respond to this concern. Last month, EPA issued a regulation eliminating the requirement that States submit lists of polluted waters this year; new lists will not be due until 2002. The decision to eliminate the

2000 listing process has saved States and others hours of work and has allowed us all to concentrate on the important job of developing TMDLs for the over 20,000 waterbodies already identified as polluted.

States are also concerned about the costs of administering the TMDL program. The annual appropriation available to States to administer and directly implement TMDLs and the clean water program has steadily increased from $131 million in 1993 to a proposed $410 million in the Administration's proposed 2001 budget.

The President's fiscal year 2001 Budget increases State grant funding for TMDLs by $45 million in fiscal year 2001 alone. When States match this new funding, about $70 million in new funding will be available for implementing the TMDL program.

In addition, EPA has provided States with the discretion to use up to 20 percent of funding under section 319 to develop TMDLs and for related work. The President's request for 319 funding in fiscal year 2001 is $250 million and thus provides up to $50 million in additional TMDL funding.

And, EPA expects that the final rule will support more cost-effective development of TMDLs by specifically encouraging States to develop TMDLs for groups of polluted waterbodies on a watershed scale.

EPA has worked with States to develop detailed assessments of the costs of key elements of the clean water program. Based on this analysis, and in consultation with the Office of Management and Budget, EPA projects that the funding proposed in the President's budget would be sufficient for States to administer the TMDL program in 2001 under the final TMDL regulations expected to be promulgated this summer.

Garcia River Decision

A Federal court in California, reviewing a challenge to a TMDL developed for the Garcia River, concluded last month that the Clean Water Act authorizes EPA to establish TMDLs for waters "polluted only by logging and agricultural runoff and/or other nonpoint sources rather than by any municipal sewer and/or industrial point sources."

The court noted that the Supreme Court has consistently referred to the Clean Water Act as establishing a "comprehensive and all-compassing" program of water pollution regulation. The court found that the logic of section 303(d) required that listing and TMDLs were required for all impaired waters, and concluded that excluding nonpoint source impaired waters would have left a "chasm" in the statute. And, the judge found that Congress' passage of section 319 in 1987 was consistent with the view that section 303(d) covered nonpoint sources of pollution because TMDLs were needed for the planning required under Section 319.

This decision confirms EPA's long-standing interpretation of the Act. It also makes clear that the requirement to list waters polluted by diffuse or nonpoint sources, and develop TMDLs for these waters, is based on the Clean Water Act rather than the existing or proposed TMDL regulation.

GAO Report on Water Quality Monitoring

Also in March, the General Accounting Office released a report critical of data used by States and EPA to make water quality decisions.

EPA has responded to the report in detail, agreeing with some conclusions and disagreeing with others.

EPA agrees with the GAO conclusion that some States lack the data that they need to fully assess the water pollution problems in their State. In many States, the lack of an extensive, and expensive, monitoring network prevents the State from evaluating all waters on a regular basis. Given limited resources, however, knowledgeable State managers focus monitoring resources on the most likely problem areas.

The GAO report recognizes this approach and reports "State officials we interviewed said they feel confident that they have identified most of their serious water quality problems." The GAO report suggests that the polluted waters identified from this monitoring may not be all of the polluted waters in the State. It does not indicate that the polluted waters that are identified as polluted are improperly identified as polluted. In other words, the TMDL program may not be focused on enough waterspout it is not focused on the wrong waters. In addition, if a waterbody is listed as polluted by mistake, it can be removed from the list.

Some observers have incorrectly concluded that the report found that States do not have the data that they need to develop TMDLs. There are several problems with this conclusion.

First, GAO generally found that States do have the data they need to develop TMDLs for point sources.

Second, while most States now lack detailed data to develop a TMDL for waters polluted by nonpoint sources, the development of these site-specific data has not been a priority of State monitoring programs. EPA and States recognize and expect that, once the process of developing a TMDL is begun, sometimes, several years later, States will need to supplement the initial screening data used to identify the problem with more detailed assessments needed to develop a TMDL. The lack of these data today is not a reason to delay a TMDL.

Third, GAO concludes that the lack of detailed nonpoint source related data makes it "difficult to directly measure pollutant contributions from individual nonpoint sources and, therefore, assign specific loadings to sources in order to develop TMDLs." This would be a concern if EPA's existing or proposed TMDL regulations required that States have data to assign specific loadings to individual sources, but they do not. Rather, EPA's proposed regulation specifically provided that allocations to nonpoint sources may include "gross allotments" to "categories or subcategories of sources" where more detailed allocations are not possible.

Atlas of America's Polluted Waters

States submitted lists of polluted waters in 1998. Over 20,000 waterbodies across the country are identified as not meeting water quality standards. These waterbodies include over 300,000 river and shore miles and 5 million lake acres. The overwhelming majority of Americans—218 million—live within 10 miles of a polluted waterbody.

A key feature of the 1998 lists of polluted waters is that, for the first time, all States provided computer-based "geo—referencing" data that allow consistent mapping of these polluted waters. In order to better illustrate the extent and seriousness of water pollution problems around the country, EPA prepared, in April of this year, an atlas of State maps that identify the polluted waters in each State. The maps are color coded to indicate the type of pollutant causing the pollution problem. And, bar charts show the types of pollutants impairing stream/river/coastal miles and lake/estuary/wetland acres.

Mr. Chairman, I ask that a copy of the Atlas of America's Polluted Waters be included in the hearing record.

Economic Analysis

Several Members of Congress have suggested that EPA did not conduct an adequate assessment of the cost of the TMDL regulation. As you know, Mr. Chairman, cost assessments of proposed regulations are strictly governed by statute and by Executive Order.

In compliance with these requirements, EPA described the incremental costs of the proposed regulation. We did this work carefully and fully, in compliance with applicable guidelines. EPA is working with States and others to define the overall costs of administering the TMDL program, including both the base program costs and the incremental costs of the new regulations. EPA is committed to providing an estimate of these costs prior to promulgation of the final TMDL regulations.

Many commenters on the proposed revisions to the TMDL regulations indicated an interest in EPA's estimate of the overall costs of implementing the TMDL program and restoring the Nation's polluted waters.

It is important to note that several provisions of the Clean Water Act call for attainment of water quality standards adopted by States. Notably section 301(b)(1)(C) of the Act requires that all discharge permits include limits as necessary to meet water quality standards. The TMDL process does not drive the commitment to meet water quality standards. Rather, it provides a comprehensive framework for identifying problem areas and allocating pollution reductions necessary to fix problem among a wider range of pollution sources (i.e. not just point sources).

EPA recognizes that the TMDL process imposes some administrative costs for States, communities and pollution sources. We believe, however, that these administrative costs could be largely offset by the significant savings to be achieved over the next decade as a result of the TMDL process. By bringing all sources of pollution in a watershed together, the local community and the State can work together to evaluate various approaches to achieving needed pollution reductions. For example, the cost to remove a pound of a given pollutant may be high for some sources and low for others.

The TMDL process lays out these considerations and lets the local community decide how to meet its clean water goals. EPA expects many communities to opt for cost-effective approaches, many of which rely on low cost controls over nonpoint sources.

Under the final revisions to the TMDL rules to be published this summer, opportunities for shifting pollution control responsibility from high cost point source con-

trols to lower cost controls over nonpoint sources will be greatly enhanced. Under the new rules, States and EPA will be able to defend point source permits that alone will not result in attainment of water quality standards because the TMDL must provide a "reasonable assurance" of implementation of other needed pollution reductions.

Under the TMDL rules in effect today, "reasonable assurance" is not a necessary element of a TMDL and cost effective sharing of pollution reductions is much less likely. As I have testified, "reasonable assurance" of implementation can be established based on voluntary and incentive-based programs.

EPA is developing rough estimates of the costs of attaining clean water goals using the TMDL model and not using the TMDL model (i.e. relying on point source controls only to meet water quality standards) and will make this estimate available in conjunction with promulgation of the TMDL regulation.

OPPOSITION TO S. 2417

Mr. Chairman, the legislation you introduced with Senator Crapo, S. 2417, includes some important provisions expanding authorizations for State clean water grants. But the Administration must strongly oppose the bill because it would delay final TMDL regulations by at least 3 years, and perhaps much longer.

The bill would expand authorizations for several key State grant programs, including the clean water program management grants under section 106 of the Clean Water Act and the nonpoint pollution control grants under section 319 of the Act. The Administration believe that adequate State grant funding for clean water programs is critical to effective operation of the Nation's clean water program. We have proposed an increase of $150 million over the past 2 years in funding for State nonpoint control programs and an increase of $45 million in fiscal year 2001 for State water program grants. However, the Congressional Budget Resolution limits domestic discretionary spending such that it will be very difficult to meet the Administrations's proposed increases. Given the Congressional Budget Resolution, the funding levels proposed in the bill are unrealistic. One of the unintended consequences could be to divert funding from other valuable water quality efforts. The Administration stands ready to work with Congress to achieve our ambitious goals of substantially increased funding for important water quality work.

The section 106 grant authorization would increase to $250 million with $50 million of this amount reserved for implementation of TMDLs. The President's fiscal year 2001 budget provides an increase of $45 million in the section 106 grant that is reserved for TOOL development with an appropriate State match. This $45 million increase would bring the total amount of the section 106 grant to $160.5 million in fiscal year 2001.

The bill would authorize $500 million for the section 319 grant program, which is double the President's fiscal year 2001 request. Some $200 million of this amount would be reserved for grants to implement nonpoint pollution control projects. Further, the bill would significantly lower the current non-Federal matching requirement. The Administration recommends maintaining the current non-Federal match, which is a more appropriate rate of 60 percent Federal funds with the remaining project costs provided by non-Federal funds. For any given level of available Federal funding, the bill's proposal of a 90 percent Federal matching requirement would result in fewer projects funded, and fewer areas and people being served.

Provisions of S. 2147 call for a study of the scientific basis for the TMDL program. While there are technical issues associated with the development of TMDLs, many of the essential scientific bases for developing TMDLs and restoring polluted waters are already available. There is no need for a review of this science by the National Academy of Sciences. In addition, other objectives of the study, such as assessments of total costs of meeting water quality standards, are questions that the National Academy of Sciences is not best suited to answer.

Section 5 of the bill provides for the funding of five watershed management pilot projects. States and EPA already have extensive experience in the development and implementation of watershed management projects at several geographic scales. For example, the National Estuary Program has invested tens of millions of dollars in watershed management projects on over 28 estuaries around the country. Numerous other watershed management projects have been completed or are underway. It would be a mistake to divert $2 million to these five projects when this funding is badly needed to support broader State efforts to develop TMDLs.

Finally, section 6 of S. 2147 would prevent the finalization of TMDL regulations until the completion of the study by the National Academy of Sciences. The Administration is strongly opposed to this provision of the bill.

Enactment of this proposal could result in the effective shut-down of the TMDL program in many States as they and other parties defer work on TMDLs until the comprehensive studies mandated by Congress are completed. Sadly, Congress would be telling thousands of communities across the country that are eager to get to work restoring the over 20,000 polluted waters to stand down—to pack up their clean water plans and put them into the deep-freeze for the foreseeable future while a panel of scientists meets here in Washington, behind closed doors, for almost 2 years, to write a report.

Many States have strong public confidence in their TMDL programs and expect to work cooperatively with the public in listing polluted waters and developing TMDLs. State efforts to meet commitments to the public to run effective TMDL programs would be hampered because many affected pollution sources could cite the congressionally mandated national study as a reason to delay any action on TMDLs before release of the study and subsequent revision of the rules. Public confidence in the TMDL process could be seriously eroded.

Citizens may step-up efforts to seek court orders to complete lists of polluted waters and TMDLs. Without final regulations to guide EPA and State efforts to implement the TMDL program, courts could issue detailed judicial guidance for the TMDL program.

I hope, Mr. Chairman, that I can convince you and other Members of Congress that we do not need to postpone any longer these important improvements to the TMDL program. We have a solid legislative foundation in the Clean Water Act. We have a good TMDL program that will be even better with the revisions to the program regulations that we will finalize this summer. Most importantly, people all over the country want to get to work restoring polluted rivers, lakes, and coastal waters, and they want to start now.

CONCLUSION

The 1972 Clean Water Act set the ambitious—some thought impossible—national goal of "fishable and swimmable" waters for all Americans. At the turn of the new millennium, we are closer than ever to that goal. Today, we are able to list, and put on a map, each of the 20,000 polluted waters in the country. And, we have a process in place to define the specific steps to restore the health of these polluted waters and to meet our clean water goals within the foreseeable future.

It is critical that we, as a Nation, rededicate ourselves to attaining the Clean Water Act goals that have inspired us for the past 25 years. The final revisions to the TMDL regulations will draw on the core authorities of the Clean Water Act, and refine and strengthen the existing program for identifying and restoring polluted waters.

Mr. Chairman, I consistently hear from critics of the TMDL program that it is more of the old, top-down, command-and-control, one-size-fits-all approach to environmental protection. In fact, the TMDL program offers a vision of a dramatically new approach to clean water programs.

This new approach focuses attention on pollution sources in proven problem areas, rather than all sources. It is managed by the States rather than EPA. It is designed to attain the water quality goals that the States set, and to use measures that are tailored to fit each specific waterbody, rather than imposing a nationally applicable requirement. And, it identifies needed pollution reductions based on input from the grassroots, waterbody level, rather than with a single, national, regulatory answer. In sum, we think we are on the right track to restoring the Nation's polluted waters.

The final revisions to the existing TMDL regulations will support and improve the existing TMDL program and they will be responsive to many of the comments we have heard from interested parties.

Thank you, for this opportunity to testify on EPA's efforts, in cooperation with States and other Federal agencies such as the Department of Agriculture, to restore the Nation's polluted waters. I will be happy to answer any questions.

JOINT STATEMENT OF THE DEPARTMENT OF AGRICULTURE AND THE ENVIRONMENTAL PROTECTION AGENCY

Abstract: The Environmental Protection Agency (EPA) has proposed revisions to existing regulations for administering the Total Maximum Daily Load (TMDL) provisions of the Clean Water Act (CWA). The Department of Agriculture (USDA) identified a range of issues with respect to the proposed TMDL rule. EPA and USDA convened a process to review and discuss these issues with the goal of resolving the issues prior to final issuance of the regulations. This paper, which has been pre-

pared jointly by EPA and USDA, describes the agreement between the two agencies concerning development of final TMDL regulations.

INTRODUCTION

Under the TMDL program, States provide a comprehensive listing of all the Nation's polluted waters. The States then develop "pollution budgets," or TMDLs, for waters impaired by nonpoint and point sources of pollution. Pollution reductions called for by a TMDL budget are designed to meet certain safe levels of pollutants that allow beneficial uses, such as swimming or fishing, established in water quality standards adopted by States.

Congress established the TMDL program in the CWA of 1972. EPA's early work to implement the Act focused on establishing effluent limitations through National Pollutant Discharge Elimination System (NPDES) permits for point sources like factories and wastewater treatment plants. Lawsuits filed against the EPA in the late 1980's and 1990's, however, have compelled the development of TMDLs on specific schedules and for all impaired waters, including waters impaired by nonpoint sources of pollution (e.g. agriculture and forestry).

To improve implementation of the TMDL program, EPA convened a Federal Advisory Committee and proposed amendments to existing TMDL and NPDES regulations in the Federal Register on August 23, 1999.

EPA/USDA AREAS OF AGREEMENT

In response to concerns with the proposed TMDL rules at USDA, Under Secretary Jim Lyons of USDA and EPA Assistant Administrator Chuck Fox decided to form an interagency workgroup to review key issues. Working through the winter, this group reached agreement on the issues of interest to USDA and EPA has agreed to reflect these agreements in its final TMDL rule.

State and Local Governments Should Have the Lead

The EPA and USDA agree that State governments and local citizens should take the lead in developing pollution budgets for impaired waterways. To enhance flexibility in State programs, the following revisions are expected to be included in the final TMDL rule:

(1) eliminate the requirement that States give top priority to development of TMDLs for certain types of impaired waters;

(2) eliminate the requirement that States identify "threatened" waters;

(3) lengthen the time period for States to develop periodic lists of impaired waters from 2 years to 4 years;

(4) grant States up to 15 years to develop TMDLs for their impaired waters;

(5) do not impose a deadline for attainment of water quality goals; and

(6) drop the proposal to require new discharges to polluted waters to obtain "offsets" for new pollution.

Reducing Agricultural Impacts on Water Quality

Two general forms of agricultural runoff, "return flows from irrigated agriculture" and "agricultural stormwater discharges," are statutorily exempt from NPDES permit requirements and treatment as point sources. However, USDA and the agricultural community had concerns that the EPA proposal moved away from traditional notions of what is a nonpoint source of pollution and strategies for reducing impacts through voluntary efforts and Best Management Practices (BMPs). EPA and USDA agree that voluntary and incentive-based approaches are the best way to address nonpoint source pollution. Water quality improvements that farmers make through Federal conservation programs, or on their own initiative, will be given due credit in the development of TMDLs. If a farmer will invest in voluntary conservation practices to improve water quality the "pollution budget" will recognize those investments in developing a strategy for future cleanup. Under the EPA proposal, States have the flexibility to allocate pollution load reductions between nonpoint and point sources as they consider appropriate and are not required to allocate pollution reductions to specific categories (e.g. agriculture) in proportion to pollution contributions.

Controlling Water Quality Impacts of Forestry Operations

USDA raised concerns with EPA's proposal to allow States, and in some cases EPA, to issue a Clean Water Act permit where needed to correct a water pollution problem caused by discharge of stormwater from forestry operations.

USDA and EPA have developed a modified approach that grants States flexibility in designing their TMDL program. Under this approach, no NPDES permits will be required for point sources of polluted stormwater from forestry operations for 5

years from publication of the final rule. During that time, EPA will work with the USDA and the public to develop guidance for States to follow in designing and adopting forestry BMP programs for the protection of water quality.

In States that develop and maintain forestry BMP programs that are recognized by EPA as adequate (i.e. generally consistent with this guidance) forest operations will have no exposure to NPDES permit requirements. States will be encouraged to grant forest operators that are implementing BMPs in good faith an exemption from any directly enforceable State water quality standards. Since existing Federal law requires forest operations on National Forest System lands to be conducted consistent with water quality requirements, operations conducted on these lands will be exempt from NPDES authority.

The idea is that forest operators in States with approved programs will know what is expected of them, what BMPs are effective in reducing pollution and need to be implemented. If for some reason the implementation of the core set of BMPs results in a pollution problem then the State must commit to refining or better tailoring the BMPs as necessary to attain water quality goals.

Only if a State does not have an approved forestry BMP program after 5 years, will the State or EPA have the discretion to issue NPDES permits in limited cases where the operation results in a discharge that causes water pollution problems. Any NPDES permits that are issued by EPA will call for implementation of BMPs, as opposed to attainment of numerical effluent limitations; EPA expects that State NPDES permit authorities will follow this approach. States will not be required to issue NPDES permits to forest operations discharging polluted stormwater; it will be a matter of their discretion. Dischargers that are not required to get a permit will not be subject to citizen or government enforcement action under the Clean Water Act.

TMDL Program Funding

States have identified a need for increased funding to support more complete assessment of the condition of waters and development of TMDLs for polluted waters. Adequate funding of the TMDL program is key to its implementation. The EPA is currently developing estimates of the overall cost of the TMDL program and the analysis will be available when the final rule is published. The President's fiscal year 2001 budget increases funding for State administration of the TMDL program by $45 million. The budget also increases funding for State programs to reduce polluted runoff by $50 million. USDA agricultural conservation programs are dramatically enhanced by the fiscal year 2001 budget. The Environmental Quality Incentives Program (EQIP) would be increased from $200 million to $325 million. The Conservation Reserve Program (CRP) would be expanded to 40 million acres. Under current authority additional CRP continuous sign up incentives totaling $100 million in fiscal year 2000 and $125 million in each of fiscal years 2001 and 2002 will be available. Finally, under the President's budget 250,000 acres would enroll annually in the Wetlands Reserve Program (WRP), which will reach its statutory 975,000 acre cumulative cap in fiscal year 2001. This kind of Federal budget response is necessary to provide State and local partners the tools to successfully build their TMDL programs.

CONCLUSION

The final TMDL regulations will provide an improved framework for restoring our polluted waters. Much work remains to be done to meet clean water goals. The EPA and USDA will continue to work with State and private partners in improving the communication and outreach essential for successfully implementing the TMDL program.

DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Boston, MA, April 27, 2000.

Hon. MICHAEL D. CRAPO,
U.S. Senate,
Washington, DC.

DEAR SENATOR CRAPO: The Commonwealth of Massachusetts supports your efforts through Senate 2417 to increase funding for States to implement the Federal Clean Water Act, and particularly, the new TMDL rules under the Act. As you know, Secretary Bob Durand has supported the need for this funding. I wanted to raise several more specific issues related to your efforts.

According to a recent resource allocation model, the Massachusetts Department of Environmental Protection would need to increase staffing levels by an order of

magnitude in order to keep pace with the analytical elements of the TMDL rule. Nationwide, the financial gap for clean water programs (excluding infrastructure) is at least $1.3 billion. We appreciate your leadership in recognizing and addressing this funding shortfall.

We also support the inclusion of the provisions relating to State functional equivalency, watershed approaches, pollution trading, and non-regulatory tools for solving water quality problems. The Commonwealth embraces these concepts and has developed a nationally recognized program that is backed by strong State statutes and regulations. We believe that by recognizing the effectiveness of strong State programs, your bill will promote creative and cost-effective ways of improving water quality. To signal your commitment to State functional equivalency, watershed-based pollution trading, and other innovations, Senate 2417 could explicitly require that the final rules contain provisions to encourage such innovations.

While we support the funding and State flexibility provisions of the bill, we do not support the proposed 13-month delay in the issuance of the new TMDL rule. The U.S. EPA, as stated in a letter to Congressman Shuster dated April 5, has indicated a willingness to modify the TMDL regulations to address many of the concerns expressed by the States. We believe that EPA should be given the opportunity to implement the final TMDL rules. The proposed study by the National Academy of Science (or another appropriate group) could be used to review the States' experiences under the new rule and make recommendations for any necessary modifications.

Please do not hesitate to contact me or Arleen O'Donnell of my staff at (617) 292–5975 for any additional information or assistance. Thank you for your leadership on this very important issue.

Sincerely,

LAUREN A. LISS,
Commissioner.

FUNCTIONAL EQUIVALENCY—MASSACHUSETTS APPROACH

FUNCTIONAL EQUIVALENCY BASIC CONCEPT

"Functional equivalency" is a term used to describe one or more State programs which will achieve the same outcome, standard of performance, or level of protection as a Federal requirement. In the context of TMDL's, the Federal regulations would establish the baseline program, and then allow States to propose functionally equivalent programs. EPA would establish approval criteria and procedures, including public notice and comment.

SCOPE OF FUNCTIONAL EQUIVALENCY

Functional equivalency could be constrained or open-ended. For example, EPA could allow State substitutions based on equivalency for each individual component of the Federal TMDL program, such as 303(d) listing methodology, TMDL development, and implementation plans. A less prescriptive approach might allow equivalent State program for any or all of these three parts for the TMDL program. The most flexible approach would be to allow States to propose their own TMDL programs which will provide the same results overall as the Federal baseline program. Massachusetts supports flexibility, based on the premise that States can achieve better results by integrating TMDLs within their own existing watershed programs than by setting up a partially duplicative, separate and competing TMDL program.

TYPES OF FUNCTIONAL EQUIVALENCY

There are two basic ways to achieve the same or better results (i.e., functional equivalency) that may be used in combination. First, requirements may be equivalent because they are different but as or more stringent that the baseline requirement. A State TMDL program could be functionally equivalent by providing for some more and some less stringent substitutions for baseline program elements, provided that the overall program is as protective or preferably more protective. Second, requirements could be more or less broad in scope than the baseline program, provided that the overall program results are the same or better than the baseline program. While flexibility could extend to equivalency based on breadth in scope as was proposed for Phase 2 alternative stormwater programs, in the context of TMDLs, comparable or greater stringency of requirements is likely to yield more consensus on the comparison necessary for a finding of functional equivalency.

Functional equivalency could also be determine by compliance with another similar program. For example, States with an approved CZMARA Section 6217 program implemented statewide (not just within the more limited coastal zone) should be allowed to substitute those implementation plans for the nonpoint source component of their TMDL implementation plans. A consistent definition for "reasonable assurance" should be identified for both programs to allow comparability. Additionally, States with comprehensive environmental regulations from which loading reductions can be projected should be given appropriate credit for equivalency.

Functional equivalency could also be based on flexibility in TMDL schedules. States such as Massachusetts with well-established watershed planning and management efforts underway would benefit from selectively postponing the TMDL analysis for certain parameters in the near term, instead relying on 305(b) and other assessment data to move directly to implementation using State law authorities for permitting, compliance, and enforcement. If the effort does not achieve or show progress toward results within an acceptable timeframe (e.g., 5 years), only then would the State need to invest the resources to produce an "official" TMDL. Where implementation of a watershed plan or comprehensive coastal management plan (CCMP) serves the same purpose as a TMDL implementation plan, the 5-year renewal would evaluate progress and trigger the need for more vigorous action as warranted (e.g., moving from generic loading assumptions to more analytical reduction allocations).

ELIGIBILITY FOR FUNCTIONAL EQUIVALENCY

To address concerns about too much latitude in functional equivalency leading to failures by States; to make progress toward water quality goals, alternative State programs could be limited to States with explicit State law authority over nonpoint sources. EPA might also limit eligibility for equivalent programs to States with disparate pollution sources other than large-scale agricultural or silvicultural runoff that are simply not amenable to NPDES permitting; such a limitation would be appropriate because these States are most in need of flexibility due to the complexity of both their TMDL analyses and implementation plans.

A STATE TMDL STRATEGY AS THE BASIS FOR FUNCTIONAL EQUIVALENCY

A State TMDL Strategy could provide the basis for a functionally equivalent program. Massachusetts developed its TMDL Strategy in 1998. Together with the existing implementation of the Watershed Approach already underway, the Strategy earned the highest grade for any State in the National Wildlife Federation study of TMDL programs. The Strategy sets out a schedule for development of TMDLs by 2012, beginning with a pilot program and concentrating on pollutants with established protocols. The 1998 list identified 908 segments of impaired waters, resulting in the need to perform 1454 TMDLs (Massachusetts has not tackled the TMDL problem through limiting its 303(d) list). TMDLs would be a component of the Watershed Management Plans for each of the State's 27 basins. The Strategy relies on a variety of regulatory programs for implementation to address water quality problems, including the State Clean Waters Act, the Wetlands Protection Act, a comprehensive stormwater program, the Water Management Act (withdrawals/flows), new source approvals for water supplies, a comprehensive program for septic systems, and linkage of water quality problems of SRP funding decisions. The watershed approach includes extensive stakeholder involvement which will provide a forum for negotiating load allocations.

RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,
Providence, RI, May 3, 2000.

Hon. MICHAEL D. CRAPO,
U.S. Senate,
Washington, DC.

DEAR SENATOR CRAPO: I am writing to commend you for introducing legislation to increase authorizations for grants to States to carry out important clean water programs (S. 2417). I also, however, urge you to delete section 6 of the bill that would delay the issuance of final regulations for the "Total Maximum Daily Load" or TMDL program for several years pending completion of a study by the National Academy of Sciences.

The primary provision of S. 2417 would recognize the significant needs that States have for increased funding for management of clean water programs and for providing financial assistance for projects to reduce water pollution. The authorizations provided in the bill for funding under Clean Water Act section 106 (State program

management) and 319 (nonpoint pollution control programs and projects) would dramatically increase Rhode Island's ability to meet the Nation's clean water goals.

Section 6 of the bill would delay the issuance of final regulations to guide efforts to identify and restore impaired waters around the country through the TMDL program and call for a study of several related issues by the National Academy of Sciences. I recommend that this provision of the bill be deleted for several reasons.

- *EPA is listening to State Concerns.*—Rhode Island has worked closely with the EPA over the past several months to explain concerns with the TMDL regulations the Agency proposed last August. I believe that EPA is listening to State concerns and based on the letter issued by the EPA Assistant Administrator for Water, Chuck Fox is likely to address many of the most significant concerns in the final TMDL regulations.
- *Court Challenges Will Continue.*—In many States, courts have stepped in to set specific schedules and other requirements for development of TMDLs. The development of national TMDL regulations that address many of the issues raised in suits is critical to successfully persuading judges that States and EPA have a coherent national program for restoring impaired waters. For example, judges have directed that States develop TMDLs on 7-year schedules, rather than the 15-year period provided in the proposed TMDL regulations. Without clear national regulations, States will face continued court challenges and continued judicial intervention.
- *Increase Administrative Complexity of the TMDL Program.*—A delay in issuance of final TMDL regulations would make an already difficult program more complex and uncertain. For example, States need to be planning now to develop lists of impaired waters by April of 2002. The proposed delay of 18 months in issuance of TMDL rules could result in new listing requirements shortly before the lists are due. In addition, many States are now actively building TMDL programs. States are not likely to agree to every element of the final TMDL rules EPA is working on, but the costs of having to restructure programs several years from now to meet new regulations may well be greater than the cost of imperfect rules published this summer.
- *Public Misunderstanding.*—It is clear that most Americans support the Clean Water Act and want to see polluted waters cleaned up as soon as possible. Many States are now making good progress in working with the public to build confidence in State TMDL programs. The proposed delay in finalizing TMDL regulations will be described as an effort to delay the important work of restoring polluted waters. This could reduce public support of State TMDL programs and set back State efforts to involve the public in this important work.
- *Science is Not the Issue.*—The job of restoring impaired waters poses a range of technical issues. At the same time, the critical scientific bases for developing TMDLs are well established and there is no fundamental scientific uncertainty preventing the development of TMDLs. While States and EPA are discussing many policy issues related to the TMDL program, the National Academy of Sciences is not likely to be able to significantly contribute to this discussion.

Many States have had difficult and trying experiences with the TMDL program over the past several years. Recently, however, States have made some good progress in building TMDL programs that have both sound science and strong public support. The proposed changes recently addressing our concerns. Although some States still have issues that need to be worked out, I believe that it is time to move forward with an updated TMDL program and EPA action to finalize TMDL regulations this year.

I look forward to working with you on this important issue.

Sincerely,

JAN H. REINSMA,
Director.

STATEMENT OF HON. OLYMPIA J. SNOWE, U.S. SENATOR FROM THE STATE OF MAINE

Thank you, Mr. Chairman. I appreciate you holding this hearing today, and honoring my request to have a field hearing near my State of Maine, offering a forum for my constituents to voice their concerns about the Environmental Protection Agency's proposed rule on TMDL.

I also want to thank you, Mr. Chairman, for following through on my request to hear testimony today from Maine Conservation Commissioner, Ronald B. Lavaglio, who is representing the State of Maine. He will raise questions as to just how these EPA regulatory changes would improve, in a timely and meaningful basis, the future of water monitoring in Maine under TMDL. The proposed rule could also im-

pact permitting under the National Pollution Discharge Elimination System (NPDES). As a matter of fact, last November, the State requested that EPA grant it the statewide authority to handle the NDPES permitting process, and a decision is expected by May 16.

First of all, I would like reiterate my strong support for clean water. Maine is unique because of its outstanding rivers, streams and lakes that wind for over 32,000 miles throughout the State along with 17 gorges, 61 waterfalls, 31 white water rapids and nearly 6,000 lakes—all part of the six major watersheds in the State.

I am proud to say that my State of Maine has been at the forefront of the EPA's TMDL program since it was established under Section 303(d) of the Clean Water Act. Given Maine's dedication to this program, and the State's long history of assuring excellent water quality for our residents, the proposed rule raises concerns about whether or not EPA is heading down a bureaucratic road that supersedes the State's responsibilities to adhere to its Clean Water Act responsibilities.

As you know, TMDL is a calculation of the maximum amount of pollutant that a body of water can receive and still meet water quality standards. Water quality standards are set by State agencies using a formula that identifies the use for each body of water—such as drinking water supply, recreation, and fishing—and the allowable amount of a single pollutant for each body of water. The calculation must include a margin of safety to ensure that the waterbody can be used for its designated purpose and must also account for seasonable weather variations.

Under the Clean Water Act, States are currently tasked with identifying "non-point" sources of pollution, which come from multiple sources rather than one fixed entry point. The Environmental Protection Agency regulates "point source" pollution for the Federal Government. These pollutants are discharged from clearly known sources, such as visible drainage pipes, ditches, and tunnels. The recently proposed EPA rule would—for the first time—enable the EPA to regulate non-point sources of pollution for bodies of water affected by agriculture and forest activities.

The proposed rule has generated a great deal of concern within the State's forestry and agriculture industries from whom you will hear today, as well as within the Maine Department of Environmental Protection and the Department of Conservation. Earlier this year, the State brought to my attention its concerns that the current science and available data behind the TMDL process for non-point source pollutants may not be able to support the program as prescribed in the August 23, 1999, proposed rule. The true impact of these non-point sources—including rain runoff that originates from fields and timberland—is often hard to determine with any amount of scientific certainty.

Since silvaculture, or forestry, has not been identified as a major pollutant source for water bodies listed on Maine's non-source monitoring list, I join Maine officials in questioning how the costs associated with this proposed rule could impact Maine's economy, forest management, and regulatory overhead costs for forest operations.

In an effort to address these concerns, the U.S. Department of Agriculture and the EPA formed an interagency workgroup to review key issues. USDA had asked the EPA to clarify when discharges from silvaculture activities would be required to have a Clean Water Act permit, and how such permits should be structured.

In addition, the USDA asked EPA to provide a comprehensive cost estimate and funding proposal for its TMDL initiative, and EPA is developing estimates of the overall cost. This information, however, will not be available until the final rule is published, according to EPA, and this raises economic concerns. Even though the Administration has requested increased funding for TMDL programs for Fiscal Year 2001, this does not ensure that the States will actually realize increased funding to carry out a more complete assessment of the conditions of waters and a development for TMDLs for polluted waters once the appropriations process is completed.

An additional concern raised by the National Milk Producers Federation is that the proposed rule will disrupt a number of conservation and environmental programs established under the Freedom to Farm Bill of 1996. The American Farm Bureau Federation has stated that, while point sources can be shut off with a simple turn of the handle, there is no way for farmers to shut off the vagaries of weather, and predicting and controlling runoff from storm events is difficult. EPA's command and control approach is not possible in a perfect world, the Farm Bureau says, because rain would still fall.

The State's environmental and conservation agencies have also made the point that, by reaching beyond its TMDL monitoring authority, the EPA will not have the resources to review Maine's TMDL submissions on a timely and meaningful basis. The State fears that this will add to the complexity of the TMDL program without providing real solutions to non-point source pollutants.

It is important that all of these concerns be addressed before any proposed rule change is finalized, and I have written Carol Browner, the EPA Administrator, to share the questions and concerns raised by Maine's conservation and environmental regulators and its agricultural and forest products industries. I also joined 24 other Senators in a letter to EPA that raised similar concerns, requesting that the proposed rule be withdrawn because it of its enforcement based regulation, which is counterproductive to current methods that have proven to be effective, especially through State voluntary initiatives. My colleagues and I emphasized that we all place great importance on the need to continue to clean up our nation's lakes and rivers, and that we must work together to achieve these goals.

The USDA and EPA issued a joint statement on May 1, 2000, that they believe addresses the silvaculture and agriculture concerns that have been raised about the proposed rule and that these revisions in the Agreement may be included in the final TMDL rule. The industries involved, however, are not showing that same confidence. This hearing will provide an important forum for State officials, the industries, and other organizations who will be affected by the revisions to share their reactions and will allow this committee to learn whether their concerns have been addressed. Because of the far reaching impacts any final rule would have, I request that the committee urge the EPA to take the time to make sure that the rule gives the States the flexibility they need to build on State water protection efforts in a cost effective manner by using appropriate scientific and technical information that will actually lead to the reduction of pollution from both point and non-point sources.

Mr. Chairman, I will continue to work with you and our colleagues in the Senate and with the EPA to ensure that the interests of my State and yours are represented on this issue in order to ensure continued improvements for the protection of our nations' rivers and streams.

I thank the Chair.

STATE OF NEW HAMPSHIRE,
OFFICE OF THE GOVERNOR,
Concord, NH, May 5, 2000.

Senator BOB SMITH, *Chairman,*
Committee on Environment and Public Works,
U.S. Senate,
Washington, DC.

DEAR CHAIRMAN SMITH: Thank you and the members of the Committee on Environment and Public Works for taking the time to conduct a hearing in Whitefield, New Hampshire on the proposed Total Maximum Daily Load (TMDL) rule and the National Pollution Discharge Elimination System (NPDES) permit process. I appreciate the opportunity that you have provided to New Hampshire residents to present their concerns on the TMDL rule to both the committee members and EPA officials.

As Governor, I have been a strong advocate for both the forest products industry, which has expressed significant concerns with the proposed TMDL rule, and the environment. We must continue to strike the right balance for New Hampshire between the needs of this important traditional industry and environmental protection if we are to maintain our strong economy and quality of life.

The original proposed TMDL regulations were highly criticized by the New Hampshire Department of Environmental Services, the New Hampshire Department of Resources and Economic Development, and New Hampshire businesses. The proposed regulations were too burdensome on both DES and the regulated community, particularly the forest products industry. The proposed rules were also too prescriptive, removing the flexibility of States to tailor programs to State-specific priorities and needs.

New Hampshire has been successful in developing partnerships between State government and business that improve both the economy and the environment. It is critical that Federal regulations provide us the flexibility to develop innovative solutions and programs that are tailored to meet the needs of New Hampshire.

Forestry is a critical component of New Hampshire's heritage, and our economy, especially in the North Country. Our long history of forest stewardship is reflected in the many tree farms that are found across New Hampshire. We must maintain this working landscape by supporting working forests, not discouraging them. New Hampshire already has programs in place to prevent and resolve environmental problems potentially caused by forestry operations. This program includes three critical elements:

• Implementation of best management practices. It is important to note that a best management practices manual for timber harvesting operations was published in February 2000 by the Division of Forests and Lands of the New Hampshire Department of Resources and Economic Development (DRED), in cooperation with DES, the University of New Hampshire, Federal agencies including USDA and EPA, and the New Hampshire Timberland Owners Association.

• Training and outreach through partnerships of State and Federal agencies and nonprofit organizations including the New Hampshire Timberland Owners Association and the Society for the Protection of New Hampshire Forests.

• Technical assistance, compliance and enforcement by DES and DRED.

Under any reasonable criteria, our existing programs are effective. There should never be a need for Federal NPDES permits for forestry operations not already covered by existing requirements because these problems will be addressed at the State level.

EPA has recently proposed, in conceptual form, a number of changes in the proposed rule, which move in the right direction. Chuck Fox, the Assistant Administrator for Water, should be commended for his efforts to be responsive to public comments. However, the many who have shown such deep concern and who would be affected by these new rules deserve the opportunity to review and evaluate the details of EPA's proposed changes. I urge EPA to publish the actual language of proposed changes for forestry for public review as soon as possible to allow evaluation and comment on the changes by all interested parties prior to final promulgation. This is only appropriate considering the magnitude of the comments received about the TMDL rules as originally proposed, and the significance of expected changes.

As in most other States, New Hampshire's TMDL program is significantly underfunded. Additional Federal funding to support State development to TMDL's is needed, regardless of the results of the EPA rulemaking. The President's budget contains $45 million for Federal fiscal year 2001, which translates into just over $200,000 for New Hampshire to assist with TMDL development. This is a good start, but is not adequate to sustain New Hampshire's TMDL program. I request that you consider adding at least another $5 million to the President's budget proposal. At the $50 million level, small States like New Hampshire will receive a 50 percent increase in section 106 funding, equivalent to what large States are already receiving at the $45 million funding level under EPA's new formula for distribution of section 106 funds.

The President's proposed budget also includes rigid conditions for the State match for the "new" Section 106 moneys which New Hampshire and many other small States will not be able to meet. Consequently, I would also request that you change these provisions and ensure that any additional funding for the TMDL program includes maximum flexibility for matching these Federal funds. This is the only way to ensure that the Federal funds allocated for New Hampshire will be fully utilized to make significant progress toward the goals of the Clean Water Act.

I look forward to working with you to ensure that New Hampshire's waters are protected and improved while ensuring that our forest products industry and other traditional activities can continue to flourish.

Very truly yours,

Jeanne Shaheen.

STATEMENT OF HON. CHARLES F. BASS, REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW HAMPSHIRE

Chairman Smith and members of the committee, I would like to express my gratitude to you for holding this hearing today on the Environmental Protection Agency's (EPA) proposed rules regarding Total Maximum Daily Loads (TMDL) from silviculture operations and for affording me the opportunity to submit my statement for the record. I have serious concerns about the EPA's proposal to reclassify silviculture from a "non-point source" activity to a "point source" activity under the Clean Water Act (CWA).

The EPA's proposal would mandate regulation of all silviculture activities as point sources of pollution under the National Pollutant Discharge Elimination System (NPDES), opening up all private landowners to NPDES permit regulations. Specifically, this regulation would include previously exempt categories, such as nursery operations runoff, site preparation, reforestation activities, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, and road building and maintenance.

I am concerned that removing the exemption on these activities may unnecessarily impose heavy-handed Federal regulation on forestry activities. The

silviculture industry has a long history of seeking common-sense solutions to achieve effective, sustainable land management. In a 1996 EPA report to Congress, forestry activities were identified as the smallest source of nonpoint source pollution, contributing approximately 3 percent to 9 percent of nonpoint source pollution to our nation's waters. Due to the relatively small impact of this industry, I believe that landowners should be encouraged to work directly with States and local governments to find answers to pollution problems. New Hampshire's forest landowners, through the use of Best Management Practices, the New Hampshire Professional Logger Program, the Sustainable Forestry Initiative, and Tree Farm Program, have contributed considerable resources and effort to protection of water quality.

Furthermore, in the original rulemaking process following enactment of the CWA, the EPA recognized that Congress's original intent was to designate forestry activities as a nonpoint source of pollution. Therefore, this proposed rule would represent a departure from 30 years of regulatory practice. This change would subject landowners to citizen suits for permitted activities, not to mention potential fines, and necessitate Federal permits for most forest management activities, which would be subject to unnecessary and potentially costly delays. The burden of these rules could force landowners to forfeit their stewardship of the land in favor of giving into the ever-present pressures of development, which we can all agree is not in the best interest of the environment.

Although we all share the common goals of categorically improving the quality of our nation's streams and rivers, we must not impose an excessive Federal regulatory burden that could cripple the silviculture industry. Instead, I would encourage continued cooperation between the Federal Government and the States to provide the necessary incentives to landowners to maintain healthy forests.

In closing, I want to again thank Chairman Smith and the committee for holding this extremely important hearing. I hope that the testimony presented today by myself and others will convince the EPA to reconsider this proposed rule.

STATEMENT OF RONALD LOVAGLIO, COMMISSIONER, MAINE DEPARTMENT OF CONSERVATION

Senator Smith, members of the Committee on Environment and Public Works, distinguished guests, I am Ron Lovaglio, speaking on behalf of the State of Maine. I serve as Maine's Commissioner of the Department of Conservation, but today am representing all of Maine's natural resource agencies, as well as the Administration.

In January of this year, Maine's Commissioner of Environmental Protection and I submitted joint comments on EPA's proposed TMDL/NPDES rules. At the same time State Forester Thomas Doak submitted comments, as did Maine's Department of Agriculture. Our concerns were substantial:

- Resources to implement EPA's proposal are inadequate. TMDL development and implementation as proposed, within the given timetable, would require at least a doubling of State resources. We consider EPA's own oversight capability of this process inadequate.
- Inclusion of "threatened" waters is unnecessary and burdensome, especially in light of the public review process that EPA proposed. The definition EPA provides leaves open virtually any water body, and the adjacent landowners, to entanglement in this complex and potentially costly process, in a divisive and potentially litigious public forum.
- The proposal will not advance us any faster toward achievement of clean water goals. Application of TMDLs and NPDES permits to nonpoint sources such as forestry would be highly impractical, costly, and burdensome to private landowners, businesses, and the State agencies. No new, on-the-ground measures for achieving better protection of waters from pollution are proposed. Resources for this regulatory program would be better spent on improving technical assistance and education.
- EPA's new authority under the proposal would be too broad and inflexible. At the same time, protocols for the exercise of that authority are vague. As an example, applying NPDES permits to silviculture is left to the States, but with oversight unpredictably exercised by EPA.
- Forests typically provide the cleanest water of all land uses. Increased regulations, or even the perception of such an increase, act as a disincentive to manage land as forest, and as an incentive to convert land to other uses with higher water quality impacts.

EPA received tens of thousands of comments on its proposal. In the months since the end of the comment period in January, EPA has somewhat confusingly restated its position.

• In "Achieving Cleaner Waters", released in March, EPA acknowledged that forests are essential to maintaining clean water for wildlife and for human use in many parts of the country. However, EPA provided no further insight into how costly TMDLs and the threat of NPDES permits would enhance State efforts to apply a combination of voluntary and regulatory approaches to the forestry water quality problems that do occur. Instead, EPA lamely justified its sweeping change in how forestry is addressed as "backstopping the States".

• EPA Assistant Administrator Charles Fox's April letter to the Transportation Committee included a list of "Key Elements of the Expected Final Regulation." The letter indicates some new resources available for TMDL implementation and for voluntary and incentive-based polluted run-off programs. The "Key Elements" included more time for polluted waters lists and TMDL development, and appeared to reaffirm EPA's commitment to voluntary approaches with respect to nonpoint pollution sources. In fact, EPA dropped major components of their original proposal, including threatened waters, offsets for new pollution, the public petition process, and the potential for Federal permits to be applied to forestry operations. However, the letter supplied few details about how the remaining program would address nonpoint sources, and pointedly made reference to a Federal lawsuit in California which in EPA's words affirms "the statutory basis for including these sources in the TMDL process". In that case the court did not rule on the manner in which California implemented EPA's TMDL, however. In effect, implementation of TMDLs for nonpoint sources remains a black box lacking substantive guidance by EPA, testing by the States, or interpretation by the courts. Indeed, the court suggested that the plaintiffs could seek redress by appealing California's restrictions, while simultaneously acknowledging that easing or failing to implement restrictions might lead to loss of funding to California from EPA.

• Earlier this week EPA and USDA issued a joint statement which reiterated some of the same modifications to the original EPA proposal, including threatened waters, offsets, and timelines for development of TMDLs. Removing the public petition component, as articulated in April, is not mentioned in this most recent document. In addition, under the joint proposal, no NPDES permits for forestry would be required, but only for 5 years. Thereafter, forestry would be exempt from NPDES permits, but only if States were implementing a forestry Best Management Practices Program approved by EPA. So-called "guidance" for such State programs would be developed by EPA within the same timeframe. The letter also references increases in conservation funding, but identifies no new resources for developing and implementing BMP programs. This proposal, in our view, would effectively leave EPA with direct oversight over State efforts.

Maine has little confidence that EPA's efforts to finalize a rule by the end of June will result in a practical mechanism to apply the best analytic tools and the best remedies to the issue of clean water. Further, we are concerned with a seemingly reluctance on EPA's part to recognize that State, rather than Federal approaches, particularly in the area of nonpoint pollution sources, have proven most successful in recent years. At the same time Federal resources have not matched the need for water quality monitoring, and voluntary and incentive-based pollution prevention.

Maine's water quality efforts, administered through several agencies, combines water quality laws, incentives to landowners, and best management practices. While not perfect, we have made impressive progress, in partnership with numerous stakeholders.

In our view, Senate Bill 2417 presents a much preferred alternative. The bill recognizes that the single most effective way to improve water quality and reduce nonpoint pollution is to increase funding to State programs that reach landowners directly, and improve practices on the ground. The bill supports innovative State approaches that develop and build on watershed management efforts. Finally, S. 2417 provides critical resources both for monitoring to develop the water quality data needed to make informed decisions, and to develop a better understanding of how and where TMDLs can be a useful tool—and where they may not be.

Thank you for the opportunity to comment today.

MAINE DEPARTMENT OF AGRICULTURE,
FOOD & RURAL RESOURCES,
Augusta, ME, May 5, 2000.

Hon. ROBERT SMITH,
Committee on the Environment and Public Works,
Washington, DC.

Dear SENATOR SMITH: After reviewing the Proposed Revisions to the Water Quality Planning and Management Regulation, 40 CFR Part 130, the Maine Department of Agriculture, Food and Rural Resources offers the following comments:

1. *Identifying threatened or impaired waters on the basis of "Evaluated Data"* [continuing]. This is the issue of greatest concern to our department, for a number of reasons. First, is the fact that it is not based upon hard facts but deductive reasoning or assumptions. It requires one to reach out on the basis of such factors as "Historical Adjacent Land Uses or "Location of Sources" to make a determination that a waterbody is being impaired or threatened. Therefore, if a farm is located next to a waterbody that appears to have symptoms of water quality problems, it is likely to be considered as the or a source. That is akin to being convicted before being proven guilty. Second, is the minimum elements that are required, once a TMDL is developed for a waterbody, including the requirements for:

a. *Load Allocation.*—A load allocation is to be assigned to all sources and if possible, to specific sources, based upon "reasonably accurate estimates". If supporting data is not present to make a definite determination that water quality is impaired or threatened, it stands to reason that the source or sources can not have been identified either or how much of a load is being contributed by those sources. Assumptions must be made again, as to the suspected sources which without data or documentation is kind of like "Guilt-by-Association". In other words, because an activity is a possible source, it therefore is a source and must reduce its guestimated contributing pollutant load. This can be an unfair burden to be placed upon farmers.

b. *Margin of Safety.*—Requiring a margin of safety for a TMDL that was developed upon the basis of Evaluated Data amounts to adding insult to injury for the suspected, potential sources, such as farmers. Farmers will be required to implement even greater measures in order to achieve reductions in assumed pollutant load levels.

c. *An Allowance for Future Growth.*—This seems like another unfair burden to place upon known or suspected sources of a pollutant(s) as it is based upon best guesses that may or may not be realized. Farmers should not be penalized for activities beyond their control and which might never happen.

d. *Implementation Plan.*—This is perhaps the most troublesome element of a TMDL developed upon the basis of Evaluated Data. It requires a description of the management measures and/or actions which will be implemented to achieve the load allocations and a demonstration that those measures or actions are expected to achieve the required pollutant loads. This is required for a waterbody that may not have data to positively determine it has a pollutant(s) problem or where the sources are or how much each potential source contributes. Other elements of an implementation plan that are of concern to this department include the need for milestones. These are measurable incremental milestones to determine whether or not progress is being made to reach water quality standards. A monitoring plan must be developed to obtain the data necessary to make such determinations, even though no background data may be present. It makes sense for water bodies that have good data and a point source(s) but not for Evaluated Data and for non-point sources of pollution. If you do not have good background data or know for sure where the pollutant(s) are coming from, these would be, at best, shots-in-the-dark. And, if the milestones were not being met, along a predetermined time line, the proposed regulations would require enforceable actions to see that they were met.

2. *Another concern by this department is that of non-point sources as compared to point sources.*—Point sources are known entities contributing known quantities of a pollutant or pollutants. Non-point sources are generally assumed sources which may or may not contribute unknown quantities of a pollutant or pollutants. The problem of regulating non-point sources is compounded when coupled with waterbodies considered threatened or impaired upon the basis of evaluated data. How is it possible to assign pollutant(s) loads to potential non-point sources which may or may not be contributing to a water quality problem? And then to require enforcement to make sure assumed corrective actions or measures are being implemented to achieve arbitrarily chosen milestones along an arbitrarily chosen time line?

3. *Unfunded Mandates Reform Act.*—On page 46043 of the draft, you State "In addition, since today's proposal does not impose any requirements on the private

sector, the private sector will incur no costs. Thus, today's proposal is not subject to the requirements of section 202 and 205 of UMRA". We disagree with this statement in that it will be the private sector, including farmers, that will have to implement measures to reduce (in most cases assumed) pollutant loads. It is by no means clear that all of the measures required to be implemented by the suspected pollutant source will be fully funded. Then there is the issue of maintenance of the measures and the potential impact that some of the measures may have on a farming operation, particularly if those measures go beyond standard agricultural Best Management Practices. These costs could be substantial to a farming operation.

In summary, the Maine Department of Agriculture, Food and Rural Resources is concerned about the impact that the proposed regulations will have on farmers and recommends that you re-consider some of your proposed requirements. We are particularly concerned with the proposal to require TMDL's for waterbodies assumed to be threatened or impaired on the basis of "Evaluated Data" and when the sources of suspected pollutants are non-point. It is our recommendation that TMDL's only be required for those waters which have strong supporting data; whether the sources of pollutants is point or non-point. We do however feel that the implementation plan for such TMDL's should be adjusted to reflect the source of pollutant. If it is from a point source or sources, the implementation plan proposed is appropriate. If however, the source or sources are non-point, where an unknown amount of load is coming from a number of suspected sources, more flexibility should be allowed for the implementation plan requirements. For waters which are assumed to be threatened or impaired from non-point sources on the basis of evaluated data, we recommend an entirely voluntary program which focuses on education and information. Data gathering should take place on these waters during this time so that an accurate determination of water quality becomes available for future decision-making. This would be a much more defendable approach and one which would not unfairly burden a potential pollutant source (farmers) in the watershed of a waterbody in which a water quality problem is assumed.

Thank you for your consideration of our comments and concerns. We would be glad to discuss any of the issues raised.

Sincerely,

PETER N. MOSHER,
Director, Office of Agricultural, Natural and Rural Resources.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,
January 19, 2000.

Ms. CAROL BROWNER, *Administrator,*
Environmental Protection Agency,
Washington, DC.

DEAR MS. BROWNER: The Environmental Protection Agency's proposed changes to the TMDL and NPDES programs are a source of concern to our agencies, our customers in the broad communities we serve, and the citizens of Maine. As Commissioners of two of Maine's major natural resource agencies, we submit the following comments regarding the Proposed Revisions to the Water Quality Planning and Management Regulation: Proposed Rule, 40 CFR Part 130. Our comments address specific issues important to Maine. In addition, the Maine Department of Environmental Protection (MEDEP) has communicated other issues jointly with other New England States in the consensus comments submitted by the New England Interstate Water Pollution Control Commission, dated December 9, 1999.

STAFF RESOURCES WILL NOT BE SUFFICIENT

While we commend EPA's effort to expand the scope of and accelerate the schedule for the TMDL process, we, like many other States, are concerned about the resources available to do the job. We expect that the effort as proposed would require, at a minimum,.double the staff resources currently available for Maine's TMDL work. We also question whether US EPA will have the staff available to review the States' TMDL submissions on a timely and meaningful basis.

Maine has been at the forefront in using TMDLs as a key aspect of our regulatory process. We have been moving forward with the TMDL process as quickly as any other State. Maine recently completed a TMDL for the Salmon Falls River, which forms a portion of the boundary between Maine and New Hampshire. Getting approval of the TMDL was not easy. Maine DEP submitted the TMDL in May 1999, and it was approved after revision in November 1999.

Maine is also concerned that the current science and available data behind the TMDL process, particularly in the case of non-point source pollutants, may not be ready to support the program as prescribed in the proposed rule. We like the idea of developing a market-based system for trading offsets to reduce pollution loads, and we hope that practical methods to do so will be developed in the coming years.

Maine also submits that the States should have more latitude in setting its own criteria and priorities for TMDL development, based not only on the nature and severity of impairment, but also on how quickly a water body might be restored to attainment. We believe we should direct our resources to provide a balance between the difficult and the achievable cases. Added requirements to the TMDL process and the NPDES program without significant additional resources will detract from the State's overall ability to address water quality issues.

THE PROPOSED RULES MAY NOT ADD REAL LEVERAGE IN ADDRESSING NON-POINT SOURCE POLLUTION

Regarding non-point source issues, particularly for silviculture and agriculture, we question whether the proposed rule will really advance us any faster toward our clean water goals. Maine is working hard within both the agriculture and forestry communities to develop and implement Best Management Practices (BMPs). In recent years, Maine has passed both a Forest Practices Act and a Nutrient Management Law. MDEP includes non-point source pollution in our TMDL process to the maximum extent possible within the constraints of available data and science. And we already have enforcement authority for specific instances of discharges into the State's waters.

EPA's treatment of and requirements for "reasonable assurance" for non-point sources is open-ended and nonspecific, but includes most of the very same mechanisms that the State already implements under its 319 program and through its water quality laws. At the same time, protocols by which NPDES permits would be applied to non-point sources are left to the States to develop with Federal oversight and opportunities for public challenge. The proposed definition of "threatened waterbodies" in the TMDL leaves open the possibility that NPDES permit issues may be raised before a TMDL can be completed for a watersheds, thus spawning procedural debate that could actually delay implementation of efforts to reduce pollution. Maine is concerned that the proposed TMDL process may turn out to be a circuitous, costly, and contentious route to get us to where we are today: quantifying non-point source loads when data and resources are available, prescribing BMPs for non-point sources, providing technical and financial assistance when possible, and taking enforcement action when appropriate.

WHY THE NEED TO REMOVE THE CATEGORICAL EXCLUSION FOR SILVICULTURE

While water pollution from silviculture may be a major cause of impaired waters in other regions, silviculture has not been identified as a major source for water bodies on Maine's 303(d) list. Instances of water pollution from logging operations do occur, and nonpoint source pollution issues are taken very seriously in Maine. Effective State water quality laws and programs encourage use of Best Management Practices. In August, Maine delivered its "Nonpoint Source Control Program: Program Upgrade and 15-Year Strategy", including a substantial forestry component, in accordance with its mandate under the Clean Water Act Section 319 and CZARA Section 6217. EPA's own review described Maine's nonpoint source program as "exemplary . . . one of the best in the nation".

While EPA's representation of the change in silviculture's status is that of a "backstop" that will come into force only in very rare instances, the proposed rules for treating forestry operations as point sources are vague; they provide broad authority without clear guidelines for the exercise of that authority. As stated above, we suggest that providing the authority for NPDES permitting of forestry activities, even as a backstop, will politicize the entire TMDL process, from the 303(d) listing and the reasons for impairment, to the TMDL itself, to the implementation plan. The proposed rules for requiring an NPDES permits would require extensive analysis, and could cause administrative delays and contentious implementation. The State's efforts to implement the provisions of the proposed rules (or defend its application of them) could divert scarce resources away from direct, effective mechanisms including enforcement of pollution laws, monitoring and training in use of Best Management Practices (BMPs). Finally, the proposed process could provide an inappropriate and inefficient forum for debate or litigation of State forestry and water quality policy.

EPA's estimates of additional costs and burdens to the State due to the proposed changes may dramatically underestimate the landowners and State's actual costs of

administering the program, especially given the importance and widespread nature of forest management in Maine's economy. The costs to Maine's economy and to forest management are even more uncertain. In the worst case, the proposed rules could increase regulatory overhead for many responsible forest operators without a substantial change in actual practice.

Taken as a whole, the proposed rules magnify the complexity of an already underfunded water quality assessment, planning and permitting system. We hope you will consider our comments and concerns.

Thank you for this opportunity to provide comments on this important matter.

Sincerely,

MARTHA G. KIRKPATRICK, *Commissioner, Maine Department of Environmental Protection.*

RONALD LOVAGLIO, *Commissioner, Maine Department of Conservation.*

STATE OF MAINE, DEPARTMENT OF CONSERVATION,
Augusta, ME, January 18, 2000.

Ms. CAROL BROWNER, ADMINISTRATOR,
Environmental Protection Agency,
Washington, DC.

MS. BROWNER: The Environmental Protection Agency's proposed changes to the TMDL and NPDES programs are a source of great concern to the Maine Forest Service, the broad communities we serve, and ultimately to the citizens of Maine. We are writing to register the Maine Forest Service's strong opposition to the changes as proposed.

The proposed rules increase requirements of the TMDL and NPDES programs, and substantially increase the burden to State agencies, without a commensurate benefit to water quality. Of greatest concern is extending these programs to nonpoint sources, particularly with the proposed removal of the categorical exclusion of silviculture from the definition of "point source". This single change would severely hamper forestry practice and collaborative development of forest policy in Maine.

EPA's representation of the change in silviculture's status is that of a "backstop" that will come into force only in very rare instances. The proposed rules, taken in their entirety, are vague in their implementation; provide broad authority without clear guidelines for the exercise of that authority; and finally, effectively impose on States a new mechanism for Federal oversight and public participation (including litigation) in forest policy and regulation based on hypothetical water quality impacts.

WHY THE NEED FOR ADDITIONAL FEDERAL REGULATION?

The highest quality water in Maine and nationwide comes from forested watersheds, and millions of dollars are spent in other States to restore forest cover in impaired watersheds. Maine's own "enforceable authorities" relating to nonpoint source pollution, including that from forestry, were deemed adequate by a recent EPA study. Simply stated, the "gap in regulatory coverage" that EPA seeks to close by removing the categorical exclusion of silviculture is largely theoretical, or at best a regional issue. From the Maine Forest Service's perspective, EPA's proposal is unnecessary and does not ensure significant, real changes in "on the ground" forestry practices to protect water quality.

Instances of water pollution from logging operations do occur, and nonpoint source pollution issues are taken very seriously in Maine. Effective State water quality laws and programs encourage use of Best Management Practices. In August, Maine delivered its "Nonpoint Source Control Program: Program Upgrade and 15-Year Strategy", including a substantial forestry component, in accordance with its mandate under the Clean Water Act Section 319 and CZARA Section 6217. EPA's own review described Maine's nonpoint source program as "exemplary . . . one of the best in the nation".

WILL EPA'S CHANGES HELP?

EPA's proposed rules ignore the nature of nonpoint pollution sources and Best Management Practices. Protocols for treating forestry operations as point sources are vague, but likely would require extensive analysis, administrative delays, con-

tentious implementation plans (potentially mandating specific BMPs), and burdensome permits. The State's efforts to implement the provisions of the proposed rules (or defend its application of them) will divert scarce resources away from direct, effective mechanisms including enforcement of pollution laws, and monitoring and training in use of Best Management Practices (BMPs).

The proposed rules include numerous requirements for States to "enhance" implementation of the TMDL/NPDES programs, including new requirements for preparation of 303(d) lists of impaired or threatened waters, submission to EPA of a methodology for listing and requirements for setting priorities; and required elements of a TMDL and implementation plans. These requirements alone will place a substantial burden on the State. EPA's treatment of and requirements for "reasonable assurance" for nonpoint sources includes most of the very same mechanisms that the State already implements under its 319 program and through its water quality laws; in effect, preparation of a particular watershed TMDL will likely be a longer, more circuitous, more costly, and potentially contentious route to many of the same measures already being directed toward nonpoint sources.

EPA's analysis indicating small economic impacts to small entities is predicated on the simple assumption that few silvicultural operations will be designated point sources. However, EPA and the analysts who prepared the study agree that the frequency of such designation is "highly uncertain." The uncertainty of economic impacts further underscore that the rules would increase regulatory overhead without substantial change in actual practice.

WHEN WOULD THE PROPOSED RULES APPLY, AND WHAT WOULD THEY CONTRIBUTE?

EPA contends that it will require silvicultural sources to obtain a NPDES permit only in "limited" circumstances. Our concern and responsibility is for a consistent, progressive policy addressing forestry water quality issues for the long term. There are numerous avenues for the proposed rules to become a future battleground for contentious forestry issues, even before any specific TMDLs identify forestry as a significant pollutant source in a given watershed. The proposed definition of "threatened waterbodies" in the TMDL rules establishes grounds for including waterbodies or watersheds currently meeting water quality standards, and with the opportunity for citizen petitions to establish a TMDL, leaves open virtually any waterbody to examination. NPDES permit applications and attached conditions are open to public challenge and subject to "discretion" and interpretations of EPA regional administrators. Any application of EPA permits to forestry will likely invoke review and consultation under provisions of National Marine Fisheries Service's new designations of Essential Fish Habitat, and the Endangered Species Act. With proposed listing of Atlantic salmon as endangered in Maine, NPDES permit issues may well be raised before a TMDL can be completed on any of the watersheds, spawning needless debate and detracting from current conservation efforts.

Taken as a whole, these regulatory mechanisms make the prospects for "limited" application of NPDES permits seem remote, and magnify the complexity of an already confusing Federal permitting system. EPA characterizes the likelihood of exercising its authority under the silviculture provision as "unpredictable." Not recognizing that there will be future attempts to debate or litigate State forestry and water quality policy via the proposed rules suggests a lack of long-term vision beyond the first years of the proposed rules' implementation.

Finally, EPA's assertion that new or significantly expanding dischargers might be granted NPDES permits by obtaining offsets in pollutant from nonpoint sources such as silviculture is highly impractical, and sends the wrong message to forestry operators who are already being required virtually to eliminate any discharges through use of Best Management Practices. Based on current Maine law which prohibits unlicensed discharges of pollutants from any source, forestry will likely not be eligible for offsets as proposed by EPA.

Maine is seeking delegation to administer EPA's NPDES program. Maine has what EPA has characterized an "exemplary" nonpoint source program and silvicultural policies. The proposed rules will add pressure, including court actions, both to EPA and the State, to expand our 303(d) list, as well as to address silviculture as a point source and require individual NPDES permits if the categorical exemption is removed. EPA's estimates of additional costs and burdens to the State due to the proposed changes may dramatically underestimate the landowners and State's actual costs of administering the program. The unknown costs and increased burdens

of the proposed rule is clearly not warranted by current impacts of silviculture to water quality.

Sincerely,

THOMAS C. DOAK,
Director, Maine Forest Service.

STATEMENT OF RONALD POLTAK, EXECUTIVE DIRECTOR, NEW ENGLAND INTERSTATE WATER POLLUTION CONTROL COMMISSION

Mr. Chairman, members of the committee and subcommittee, my name is Ronald Poltak, Executive Director of the New England Interstate Water Pollution Control Commission. The Commission is a federally sanctioned interstate agency charged with water pollution management responsibilities working with the six New England States and New York.

I appear before you this afternoon on behalf of the Commission, which supports the intent of the TMDL process which is before you today. As interstate agencies like ours are set up to manage on a watershed basis, we believe the EPA should encourage States to use interstate commissions to maintain consistency across the State lines in the development of TMDLs.

I also speak on behalf of other interstate commissions and the Interstate Council on Water Policy (ICWP), and the role they have played or can play in forwarding the goal of clean water under the Clears Water Act, specifically through the TMDL process.

1. I see the following as key interstate roles on shared waterbodies:
- Monitoring and assessing water quality;
- Establishing uniform or consistent uses and criteria to protect them;
- Establishing wastewater control requirements;
- Reviewing and approving projects; and
- Developing the 305(b) water quality assessment reports.

2. In accomplishing these roles, it should be noted that the interstate commissions:
- Are well established and have developed strong working relationships and trust among Federal, State, and local entities. Our Commission was established in 1947 and has a long established relationship, not only with the State but EPA as well. We work with the States in protecting all surface and ground water and have direct responsibility for coordination on interstate basins In our area of jurisdiction.
- Provide consistency and equity among two or more States, and in some basins between EPA Regions;
- Can establish a process to define appropriate goals and program elements of TMDL development programs;
- Develop and adopt water quality standards; and
- Worked (and continues to work) with the States and dischargers in implementing the TMDL program.

3. The role of EPA on interstate waters:
- Section 130.36 of the proposed rule lists circumstances in which EPA may establish TMDLs for interstate waters.

On waters having interstate basin commissions, EPA should encourage the States to work through the interstate commissions in the establishment of TMDLs because:
- The commissions can help secure agreement on management approaches and maintain consistency across State lines;
- We are the member States and Federal Government; and
- We have a working relationship, trust and operational plans.

FLEXIBILITY AND THE STATE ROLE IN IMPLEMENTING THE PROGRAM MUST BE STRENGTHENED

In order for the TMDL program to be effective, flexibility and consistency with existing statutory authority is critical and must be provided in the final TMDL regulations. The final rulemaking needs to adequately reflect the partnership established with the States under the 1972 Clean Water Act. It is important to note that the Federal Water Pollution Control Act (section 101(b) gave States "the primary responsibility and rights . . . to prevent, eliminate, and reduce pollution") As proposed, the regulations do not reflect this leadership role for States outlined by Congress. States and interstate organizations must be afforded greater flexibility and resources to support their important role in implementing this critical program.

If the TMDL program, in fact, utilizes a watershed approach to reduce pollution, then State and interstate organizations need to have primary role in implementing this program. Since those entities are better suited to that role than the Federal

Government, it is critical that sufficient flexibility be granted to States and interstate organizations, in order to account for and address local site-specific factors which deviate from the national perspective.

CURRENT FUNDING IS INADEQUATE TO CARRY OUT THE PROGRAM

NEIWPCC is very concerned about the lack of sufficient funding to support the far-reaching efforts required in the proposed rule. Resources are already strained at the State, interstate and local levels by the onset of new water quality regulations, with the most recent being the NPDES Phase 2 stormwater program.

NEIWPCC supports the conclusions reached by other State organizations that funding for Section 106 and 319 program assistance must triple to carry out the proposed TMDL effort. If this program is to be a national priority, then adequate funding must be provided at the Federal level for its implementation. There also needs to be a strong recognition of the important role that interstate river basin organizations will assume In this program and EPA should direct adequate funding to such organizations so they may carry out this role.

Mr. Chairman and members—here is my bottom line message. Don't forget the benefits of interstate basin commissions. Most major rivers have them. We have the support of our member States because we make their jobs easier. In fact, it was one of my member States who told me about this hearing and recommended I testify. We support the TMDL process, it promotes a watershed approach. The concerns are related to how it should be administered. Interstate Basin Commissions have the organizational structure and technical capabilities to be a big help in process. Don't forget us.

STATEMENT OF THE NATIONAL ASSOCIATION OF CONSERVATION DISTRICTS

America's conservation districts fully support the Clean Water Act's goal to restore and maintain the quality of the nation's waters. Conservation districts recognize and accept their responsibility to work with agricultural producers and other private landowners and operators in stemming runoff that contributes to water quality problems.

The Environmental Protection Agency published proposed Total Maximum Daily Load Program (TMDL) regulations in the Federal Register on August 23, 1999. The proposed revisions will have a direct impact on State water quality programs, conservation district programs and landowners nationwide. Addressing impaired waterbodies identified under section 303(d) of the Clean Water Act will be a driving factor in the day-to-day business of allocating workload resources and making land management decisions that will have a direct economic impact on producers and other landowners.

We believe EPA has exceeded its statutory reach by proposing the listing of nonpoint source-only impaired and threatened waters. Further, the Clean Water Act provides no authority for EPA to enforce implementation of any part of a TMDL other than the National Pollution Discharge Elimination System (NPDES) permit program.

The history of the Clean Water Act provides ample evidence that Congress intended to treat point and nonpoint sources of pollution differently. It is clear from the structure and language of the Clean Water Act that section 303(d) was intended to provide a tool for calculating water quality-based effluent limitations for point source discharges. The language in section 303(d) contains no reference to nonpoint sources, nor to runoff, nor to section 319C the portion of the Clean Water Act designed specifically to address nonpoint sources of pollution. Instead, section 303(d) refers repeatedly to "effluent limitations" and to the requirements of section 301, which is entitled "Effluent Limitations." The way in which it is written repeated references to section 301 and no reference to 319 demonstrates clearly that Congress intended section 303(d) to deal exclusively with point source discharges.

By allowing EPA to list, develop TMDLs and require implementation plans for nonpoint source-impaired waters, the proposed regulations constitute a big leap in the direction of Federal land-use regulation. Conservation districts strongly oppose Federal land-use regulation particularly under the guise of TMDL regulation.

Under the TMDL program, compliance with section 303(d) is not achieved until water quality standards are attained. In the case of a TMDL for nonpoint sources of pollution, if, for example, agricultural best management practices failed to result in completely meeting water quality standards in a watershed, agriculture may have to be eliminated in that watershed? Further, EPA proposes to regulate agricultural and silvicultural practices such as harvesting, site preparation, thinning, prescribed burning, land application and more by requiring landowners to obtain discharge per-

mits for these activities. Once again, this amounts to a foray into Federal land-use regulation. Such activities were exempted under prior regulations, as they are under the Clean Water Act's Section 404 program, and should remain so under the TMDL program.

EPA's proposal also would require that, in addition to impaired waters, States list "threatened" waters. Again, section 303(d) does not provide authority for EPA to impose this mandate. It also directs that TMDLs must contain a reserve capacity for anticipated future loading, seasonal variation and margin of safety. It is not clear how this "reserve capacity" would be calculated or what "margin of safety" means.

EPA's proposal also would require improving the water quality of an impaired stream to a standard more stringent than applicable drinking water maximum contaminant levels (MCLs) or aquatic habitat water quality criteria. This is not only unreasonable, but probably unattainable in any practicable manner. MCLs for treated tap water are not appropriate for use on source waters under the TMDL program. Congress enacted Clean Water Act Section 319 with the specific purpose of assisting States in developing nonpoint source pollution control programs. That program encourages States, with appropriate Federal financial assistance, to reduce nonpoint sources of pollution "to the maximum extent practicable." While in cases in which a landowner refuses to address a proven water quality problem under a voluntary framework, a regulatory mechanism may be needed, it should be left up to States to determine the type and level of regulation they deem appropriate. The Federal role is most appropriate in providing funding resources and technical assistance to meet national water quality goals through State actions.

Conservation districts oppose expanding the Clean Water Act TMDL program to address water quality impairments resulting solely from nonpoint sources of pollution. Districts also oppose requiring States to list threatened waters under the TMDL program. State conservation agencies and conservation districts, with assistance from initiatives such as Section 319 and NRCS's conservation technical assistance program, should have the lead in addressing nonpoint source pollution issues, primarily through voluntary, incentive-based programs.

NEW HAMPSHIRE ASSOCIATION OF CONSERVATION DISTRICTS,
Concord, NH, January 20, 2000.

Comment Clerk: TMDL Rule, Water Docket (W–98–31)
USEPA,
Washington DC.

At a recent meeting the NH Association of Conservation Districts (NHACD) Water Quality and Urban Conservation Committee decided they concur with the TMDL response submitted by the National Association of Conservation Districts, but would like to add a few comments of their own.

NHACD is a nonprofit, non-governmental association of the 10 Conservation Districts in NH. The Conservation Districts are subdivisions of State government organized along county lines. We are dedicated to the conservation and sustainable beneficial use of our natural resources. We focus on protecting and enhancing soil quality and water quality, but also recognize the economic component of sustainability.

We have worked with New Hampshire's agricultural and forestry operations since 1946 on a voluntary basis in partnership with the Natural Resources Conservation Service (formerly the Soil Conservation Service), and other State and Federal partners. We are providing increasing assistance to towns in their land use decisions and regulations. We are non-regulatory and work by providing education, technical assistance and financial incentives. Funding assistance includes USDA programs such as the Environmental Quality Incentive Program (EQIP), EPA programs like 319 and Unified Watershed (both for NPS pollution management) grants, and FEMA-NH Office of Emergency Management programs like Flood Hazard Mitigation.

We have been very effective, successfully reducing erosion, sedimentation and other nonpoint source pollution from agricultural and forestry practices, and now from development activities. New Hampshire's 303(d) list shows that our major NPS problems come primarily from land disturbance due to development, runoff from urban areas and combined sewer overflows.

We continue to promote best management practices in agriculture, forestry, and local land use regulations. The major impediment now to more effective NPS pollution management is that effective measures to address certain practices, such as manure storage facilities and streambank stabilization, often exceed available financial resources.

We are concerned that reorganizing the proposed regulatory structure of our present program to treat agricultural and sylvicultural practices like point sources, will be counterproductive to an effective program and impede the economic sustainability of animal agriculture and small woodlot (less than 1,000 acres) management in New Hampshire. Billions of dollars and 27 years have been devoted to alleviating point sources. Effective management of NPS will require further commitment of time and financial resources than are presently offered to be effective.

There is a question as to whether EPA has the legal authority to use TMDLs for NPS pollution sources, however we fear that such regulation would be counterproductive and would impede the present successful efforts.

We look forward to working with you on a program that is more voluntary and incentive driven.

Sincerely,

JOHN HODSDON,
NHACD Water Quality and Urban Conservation Committee Chairman and Belknap County Conservation District Chairman.

STATEMENT OF ERIC KINGSLEY, EXECUTIVE DIRECTOR, NEW HAMPSHIRE TIMBERLAND OWNERS ASSOCIATION

Mr. Chairman and members of the committee: Thank you for the opportunity to discuss the Environmental Protection Agency proposed rules on Total Maximum Daily Loads. As the Executive Director of the New Hampshire Timberland Owners Association, I represent over 1,500 landowners, loggers, foresters and wood-using industries in the Granite State. Our members own and responsibly manage well over a million acres of productive forestland. New Hampshire has a healthy forest with a good balance of species, ecosystems, and age classes. We grow considerably more timber than we harvest. Forest industries in the State contribute roughly $39 billion—11 percent of the gross State product—to our economy annually. All open space related business—including tourism and agriculture—comprise one quarter of the State economy. New Hampshire is the second most heavily forested State in the nation, with roughly 84 percent of the State covered by hardwood, white pine and spruce-fir forests. Of this forestland, 20 percent is under Federal or other government ownership—primarily the White Mountain National Forest, 10 percent is owned by forest industry, and the remainder, 70 percent, is under the stewardship of non-industrial forest landowners.

WATER QUALITY AND FORESTRY

New Hampshire's commercial forestry community has long contributed to the State's efforts to protect water quality, and we make every effort to assure that our activities do not unnecessarily contribute to impairments of streams, rivers and lakes. In recent years, efforts on the part of landowners, loggers, foresters and forest industry have significantly increased awareness of steps that can be taken to improve water quality during a forestry operation. While this listing is far from comprehensive, efforts in this regard include:

1. *Tree Farm*.—As part of a nationally recognized program, there are over 1,650 Tree Farmers managing almost one million acres of New Hampshire's forestland. As participants in this voluntary program, landowners commit to managing by a set of forestry standards with four goals: forest products, wildlife habitat, recreational opportunities and water quality. Landowners participating in this program develop forest management plans that address these areas. If landowners fail to follow their management plan, they can be (and are) decertified for failure to live up to the program's standards.

2. *Professional Loggers Program*.—The NH Timberland Owners Association, in cooperation with the University of New Hampshire's Thompson School of Applied Sciences and UNH Cooperative Extension, runs a voluntary certification program for the State's professional logging community. The goal of the program is to provide professional development opportunities for timber harvesters, make them safer and more aware of environmental concerns. To become certified through this program, loggers must complete coursework in safe felling, first aid, fundamentals of foresting, and timber harvesting law. A major component of the timber harvesting law class focuses on water quality, and is conducted by instructors from the NH Department of Environmental Services. Through this program, the "on-the-ground" work force in the forest industry is aware of, and is better able to implement, actions to protect water quality during a timber harvest. To date, over 650 loggers have become certified through the Professional Loggers Program, and another 400 have begun the certification process.

3. *Best Management Practices.*—The State of New Hampshire has in place Best Management Practices for Erosion Control on Timber Harvesting Operations in New Hampshire. These BMPs provide a framework for cooperation between forest industry, landowners and the government to protect the State's water resources. The Best Management Practices provide information for landowners, loggers and foresters on reducing or eliminating sedimentation from truck haul roads, skid trails, and log landings. Further, they explain erosion control devices, steam crossings, and the law as it applies to timber harvesting. The overriding goal of the BMPs is to "keep sediment out of the streams".

4. *Landowner Workshops.*—In cooperation with the Natural Resource Conservation Service, the NH Timberland Owners Association has conducted workshops on Best Management Practices for Timber Harvesting and Forest Road Building for landowners and municipal officials. These workshops, which include significant field components (such as wetland identification, soil characteristics, and road construction), provide an opportunity for learning and collaborative problem solving, and deliver a greater depth of understanding of the issues for all parties.

5. *Sustainable Forestry Initiative.*—As part of a national program sponsored by the American Forest and Paper Association, several of New Hampshire's largest private landowners and forest products manufacturers have made a commitment to practice sustainable forestry on their own land and encourage sustainable forest management on land that they purchase wood from. One of the standards that participants in this program commit to is protecting "water quality in streams, lakes and other water bodies by implementing riparian protection measures based on soil type, terrain, vegetation, and other applicable factors." In New Hampshire, participants in the SFI have established a process for investigating and correcting activities that members of the public believe are inconsistent with the practice of sustainable forestry.

Clearly, New Hampshire's forestry community has made, and continues to make, a commitment to protect water quality. The numerous programs, and the work of thousands of landowners, demonstrate our commitment to maintaining the quality of the State's streams, lakes and rivers.

Unfortunately, the Environmental Protection Agency has recently proposed strict new rules that may undermine these efforts. As part of rules proposed last August, the EPA may reclassify some forestry activities from "non-point source" activities to "point source" pollution activities, placing forestry under an entirely new regulatory regime. The EPA proposal has the potential to treat forestry activities, including those that contribute significantly to wildlife habitat, the same way as factory discharge is treated. Prior to beginning a timber harvest, landowners could be required to receive a National Pollutant Discharge Elimination System (NPDES) permit, a process that may well take over a year. This would also open landowners up to costly nuisance lawsuits by those that oppose timber harvesting.

New Hampshire's private landowners, who have a history of contributing to the State's water quality, are threatened by this bureaucratic, top-down proposal. In a letter to the EPA, the NH Department of Environmental Services stated that "additional Federal regulation of these activities would only add an unnecessary regulatory burden to the forest industry without any clear environmental benefit." While it is difficult to understand the benefit of this proposal to New Hampshire, it is easy to grasp the downside.

One of the problems with the EPA proposal is that it is made in isolation without connecting to the larger environmental and economic system. New Hampshire is a rapidly developing State, and forest landowners—particularly those in the southern tier of the State are constantly under economic pressure to convert forestland to other uses. We permanently lose over 20,000 acres of working land each year to development. Managing forestland for economic return is a marginal business, and requites a long-term commitment on the part of a landowner. Actual imposed costs or landowner expectations of future costs will be capitalized into land values. The subsequent reduction of forest land values relative to other land uses (typically development) will increase the pressure to convert to these other land uses. The EPA's proposal fails to recognize that, given the choice between bureaucratic red tape and development, many landowners may be forced to develop their land. By failing to work with landowners and forest industry, the EPA may well engage the "law of unintended consequences", contributing to the rapid loss of forest land and the many public benefits it provides. In effect, the EPA's proposal to no longer exempt silviculture will ultimately lead to decreased water quality.

This is particularly true of small, non-industrial landowners, upon which this proposed regulation would fall quite heavily. Non-industrial private landowners, many of them who harvest infrequently and have responsibly managed their holdings for generations, own almost 70 percent of New Hampshire's forestland. Many of these

landowners, estimated by the USDA. Forest Service's recently released Forest Inventory and Analysis to number 84,000 in New Hampshire alone, do not have the technical expertise necessary to comply with complicated Federal requirements. While the impacts of the EPA's TMDL proposal is of enormous concern to our entire industry, it is these landowners that will feel its impacts fastest and hardest.

I urge you to use your influence as Chairman to help the EPA recognize the positive, proactive steps that the forest industry and forest landowners have taken to protect water quality. Instead of pursuing their Washington-based, top-down approach, the EPA would accomplish more by working with citizens and industry to support and expand upon existing activities to protect our water resources. By encouraging collaborative approaches, rather than the confrontational actions proposed by the EPA, the Environment and Public Works Committee can take a leadership role in developing solutions that work.

STATEMENT OF CHARLES R. NIEBLING, SENIOR DIRECTOR, POLICY AND LAND MANAGEMENT, SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS

Thank you Mr. Chairman, members of the committee. I am Charles Niebling, Senior Director for Policy and Land Management with the Society for the Protection of New Hampshire Forests. Founded in 1901, the Forest Society is a non-profit conservation organization dedicated to the wise use of New Hampshire's natural resources, and their complete protection in places of special environmental or scenic quality. In addition to our role as a land trust and conservation advocate, we also own and sustainably manage 33,000 acres of productive woodlands in 123 reservations across the State. We not only preach good forestry and conservation, but we practice it as well.

I greatly appreciate the opportunity to appear before the Senate Committee on Environment and Public Works to testify on behalf of our 9,500 members on the U.S. Environmental Protection Agency's proposed TMDL and NPDES rules. I am here today to offer our general support for new directions addressing agricultural and silvicultural issues set forth in the May 1, 2000 joint statement issued by the U.S. Department of Agriculture (USDA) and EPA, but to also express views about further changes that need to be made.

Throughout our 99-year history, the Forest Society has championed the importance of water quality as a core part of its land conservation and forest management work. Our earliest campaign, the creation of the White Mountain National Forest, was fought and won not simply because trees were being stripped from New Hampshire's mountains. The determining issue was that disrupted water flows caused by clear cutting near the headwaters of the Merrimack River were damaging textile mills as far south as Massachusetts.

Since then, an undercurrent of water protection has run through Society programs. In the early 1960's, we spearheaded a coalition called the New Hampshire Better Water Committee, that succeeded in passing the nation's second State level dredge and fill law to regulate wetlands impacting activities. A few years later the coalition pushed through the first legislation in the Nation requiring statewide review of septic systems.

Later in the 1960's and 1970's, we championed the establishment of local conservation commissions, and sought legislation giving them authority to review wetlands permits issued in their communities. In the 1980's and 1990's, we helped found and housed the NH Rivers Council, and lobbied for passage of the Rivers Management and Protection Program, and the Shoreland Protection Act. Through our educational efforts, we have also worked hard to promote the use of best management practices in forestry for over three decades.

And earlier this year, after a 2-year legislative effort undertaken in close cooperation with the NH Department of Environmental Services, we saw through to passage the Water Supply Land Protection Program. This legislation funds a State-matching grants program to municipalities to enable permanent land conservation around public water supply wellheads or surface water reservoirs. It is one of the first such program specific to public water supplies in the country.

When we submitted our comments on the proposed TMDL rule in January, we indicated that we opposed the proposed rule because we did not support the reclassification of forestry operations from the nonpoint source category to the point source category. We also opposed the removal of authority for monitoring TMDL's from the State to the Federal level. We argued that placing too heavy a regulatory burden on private landowners, especially in a State like NH where development pressure on our forests is very great, might predispose land to development. From a long-term nonpoint source water quality or forest sustainability standpoint, Mr. Chair-

man, the worst forestry operation will always be better than the best parking lot or residential subdivision.

Thus we were encouraged this week when we received a copy of the joint statement issued by USDA and EPA, announcing modest changes in the proposed rule. It would seem that EPA is listening to the people of NH and thousands of others around the country, who believed that the original draft rule simply went too far.

We want to particularly commend EPA and USDA for formally recognizing the following points in their joint statement:

- That State governments and local citizens should take the lead in developing pollution budgets for impaired waterways;
- That voluntary and incentive-based approaches are the best way to address nonpoint source pollution;
- That EPA will work with States that may need help in developing forestry BMP programs for a period of 5 years before they start issuing NPDES permits; and
- That only if a State does not have an approved forestry BMP program after 5 years, will the State or EPA have the discretion to issue NPDES permits.

Unfortunately from out standpoint, the joint agreement does not go far enough. Our greatest concern is that the final rule will continue to define forestry activities as a point source category, controverting 25 years of Clean Air Act statutory interpretation. We are also concerned that EPA wants to have the authority to approve State BMP programs based on as yet undefined criteria.

Until and unless the rule is modified to affirm forestry activities in the nonpoint source category, the Forest Society cannot support it. We are encouraged by the movement EPA has shown in recent weeks. Regardless of whether EPA makes further modifications, we hope that they will re-notice the draft rule for further public comment.

The Clean Air Act will go down in history as one of our nation's most successful environmental laws. The improvements to New Hampshire made through regulation of point source pollution are extraordinary and well-documented.

Now we face the far more complex challenge of reducing nonpoint source pollution. The Forest Society believes that New Hampshire's approach of aggressive promotion and education of voluntary forestry BMP's has worked relatively well, and can continue to work.

Are there problems with some forestry operations? Absolutely. We do not believe more burdensome regulations will necessarily solve the problem.

Mr. Chairman, we support the Water Pollution Enhancements Act of 2000 because we believe it targets Federal assistance and support where it will have the greatest positive impact. Three specific needs in New Hampshire that could be addressed through provisions of this act are:

- 1. Improved compliance education of forestry BMPs;
- 2. Support for a stronger enforcement capability within the Water Resources Division of our Department of Environmental Services and the Division of Forests and Lands within our Department of Resources and Economic Development; and
- 3. Support for BMP compliance monitoring on active forest harvesting operations.

Thank you for the opportunity to testify on this important issue.

STATEMENT OF JOEL SWANTON, MANAGER, FOREST POLICY CHAMPION INTERNATIONAL FOREST RESOURCES, NORTHEAST REGION, BUCKSPORT, ME

Senator Smith and Senator Crapo, my name is Joel Swanton. I am a resident of Holden, Maine and represent Champion International as manager of Forest Policy in the Northeast region. Champion is an integrated forest products company with forestland, lumber, and paper manufacturing facilities throughout the United States, Canada, and Brazil.

Here in the northeast we are responsible for sustainable forest management of over 1 million acres of forestland, part of a land ownership of 5 million acres of forestland in the U.S. We, and the communities we live in, depend directly on the health and productivity of our forests for our livelihood. One of the core values and responsibilities of forestland ownership is water quality. We take our responsibility for water quality seriously. Our ownership in New Hampshire, 170,000 acres just north of here, includes the headwaters for the Connecticut and Androscoggin Rivers. Both are important bodies of water in this region.

We appreciate your invitation to testify before the committee on our concern about the impact of the EPA's proposed TMDL and NPDES rules on our operations and regarding our support for your legislation, S. 2417.

EPA's proposed changes to the regulatory treatment of silviculture under these new rules are not justified either in terms of need or in terms of improved environmental benefits. In our region, silviculture is not a significant threat to water quality. Successful voluntary and regulatory initiatives are already in place here to ensure that silviculture activities are undertaken with measures that protect water quality. These programs would be jeopardized by EPA's proposed rule changes. And while we appreciate Mr. Fox's efforts to improve the proposed rule, EPA's recent joint announcement with USDA on changes to the treatment of forestry operations falls quite short of what we view as improvements.

Champion's forest management activities in the northeast region include harvesting, forest management road construction, and other silvicultural activities to improve the health and productivity of our forests (planting, thinning of young stands, herbicide treatments to control competing vegetation, etc.). All of these activities have planning and monitoring components that address water quality.

Prior to beginning any activity on our lands, our foresters develop plans incorporating State regulations, our riparian guidelines and any applicable Best Management Practices (BMPs). We consider the silvicultural prescription, the timing or season of the operation, the type of soil and potential for erosion and the type of equipment or operation. In Maine, we abide by State regulations which govern the amount of wood we can remove in a streamside management zone. Best Management Practices developed with the State govern, for example, how we build roads, how we build culverts, and how a logger can drive a skidder through the woods during harvest so that it does not create a channel that might cause soil erosion into a stream. All of these factors are assessed with a focus on preventing a negative impact on water quality.

Once activity begins, we monitor and inspect operations on a regular basis. Should a water quality issue arise, we are able to address it quickly. Should weather conditions change, such as the early spring thaw we had this year, we can move or modify our operations quickly to assure water quality is not compromised. Ongoing monitoring of our property by State natural resources agencies and informal monitoring by members of the public also assures that if a water quality concern arises, we are aware of it.

We also conduct a broader annual water quality BMP audit of our operations in this region, often involving outside natural resource professionals. These audits are designed to provide an extra layer of review and identify areas for improvement in our operations.

In addition to what is required by law, Champion and the forest industry have a voluntary national program in place that addresses water quality—the Sustainable Forestry Initiative (SFI[sm]). The SFI is a comprehensive set of standards that includes measures that integrate the growing and harvesting of trees with the protection of wildlife, plants, soil, air, and water quality. Under SFI, Champion must meet or exceed all established BMPs and State water quality regulations under the Clean Water Act.

SFI requires that we establish riparian protection measures for all streams and lakes. Champion has addressed this through the implementation of a landscape classification system called Forest Patterns[sm]. One component of Forest Patterns is the designation of restricted management or special value areas where the first priorities for our management activities are the protection of water quality, wildlife habitat, or recreation. Here we have implemented riparian management guidelines that in most cases exceed the existing State standards. Champion was the first company in the U.S. to commit to third party verification of our performance under the SFI standards. This formal third party audit reviews both the systems we have in place to protect water quality as well as our performance on the ground. Champion has engaged PricewaterhouseCoopers to conduct these audits. Our operations in the northeast will be reviewed this October for the fourth time since 1996.

Champion also supports efforts to encourage other landowners to protect water quality. Our procurement foresters require that loggers and landowners that sell wood to our mills comply with State water quality regulations and BMPs. Our foresters audit these operations for performance and work with contractors to take corrective action if needed.

Under our commitment to SFI, we also sponsor and support training for loggers and landowners that addresses water quality BMPs and regulations. In Maine and New Hampshire, we participate in an SFI process for the public to raise concerns about forest practices that appear to be inconsistent with SFI principles. By calling 1–888-SFI-GOAL, people can identify a site-specific area of concern, such as water quality, and be assured of followup on that operation by a forester that will focus on education and change in behavior, if necessary.

EPA nationally and regionally recognizes that silvicultural and forest management activities are not a significant source of water quality impairment. I believe due in great part to the efforts I have just described. At a March 21, 2000 meeting with members of the New Hampshire forestry community, EPA's New England Region Associate Director of Surface Water stated that "silviculture in New England is not a threat to surface water."

Here are some statistics to illustrate:

- Silviculture is at or near the lowest "leading source" of pollution or impairment for rivers and streams shown in summary charts in each of EPA's section 305(b) reports from 1988 through 1994. In the 1996 report, EPA dropped silviculture from the chart as one of the seven leading sources of impairment to rivers and streams.
- The total number of river and stream miles impaired due to silviculture declined 20 percent between 1994 and 1996.
- The number of river and stream miles classed as "major impairment" due to silviculture dropped 83 percent from 1988 to 1996.
- Silviculture is not even included in the summary charts of leading sources of impairment to lakes, reservoirs, estuaries or ocean shoreline waters according to EPA's 305(b) reports.
- None of the 305(b) reports list silviculture as a public health or aquatic life concern nor a source of groundwater impairment.

We think this network of regulatory and voluntary oversight works well and the statistics tell us that we are right. From our vantage point, EPA's proposed rule and the recent revisions that EPA announced with USDA are just plain unnecessary. Worse, they could well cost us the gains we have made by jeopardizing the State programs and drastically increasing our exposure to citizen lawsuits.

As you have heard many times these last months, under the EPA's new rule landowners could be required to obtain Federal clean water permits for forestry operations, including harvesting, road construction, and other silvicultural activities if they take place near an impaired waterway. Inclusion of silvicultural activities as point source discharges subject to TMDLs in impaired waterways could pit forest landowners and sparsely populated rural communities against heavily populated municipalities when determining TMDLs. The cost, time delay and red-tape involved with such a permit would make many activities cost prohibitive and we think could actually encourage landowners to convert their land to non-forestry uses with a greater potential for negative impact on water quality.

A Federal permit process would invite intervention and lawsuits by special interest groups to challenge private forestry practices. Large, private forestland ownerships in the northeast region have been targeted by national and regional preservation groups for conversion to public ownership and elimination of the timber harvesting and management that sustains our economy. Since 1995, numerous legislative and public policy initiatives to ban or restrict forest management practices have been initiated in attempts to make private ownership of these lands economically un-viable. This rule would provide a valuable tool for that agenda.

Consider simply the impact on our operations just from the NPDES permit process: Last winter, we had heavy snow in one of our winter operation areas near Pittsburgh, New Hampshire. We decided that we needed to move our harvesting crew to other areas with lower snow depth for the safety and productivity of those harvesting contracts. How long would it have taken us to get a new permit under EPA's proposed rule? Another example: This year we had an early spring thaw. We always shut down our operations during this time—or "mud season" as we call it here, because the soil gets saturated with snowmelt. These conditions can create ruts which can channel snowmelt into streams causing siltation. Prior to the onset of mud season, we move our operations to environmentally safe areas and then shut down. This year, the timing was different—the thaw came early. The flexibility to respond to weather changes to minimize risk could be lost under this permit proposal.

One final example. If and when the market changes for a particular tree, we need to quickly make decisions about how to respond. Last summer, the regional market for hardwood pulpwood had so much supply that the price was depressed. We needed to decide quickly whether we should leave our hardwood pulpwood stands slated for harvest in place, or harvest at a loss, or shut down or move. Again, would we have that kind of flexibility if we were faced with getting an NPDES permit? I can only wonder about trying to get a NPDES permit to deal with an event that required an immediate emergency response like a fire or a pest infestation.

Proposed revisions to the rule announced by EPA in consultation with USDA this week still do not address these concerns:

- Most importantly and I say with great emphasis: The revised proposal still calls for changing the designation of silvicultural activities from non-point source cat-

egory to point source. We would still be subjected to a Federal NPDES permit. There is no justification for this.

- The revised approach is even more expansive than the proposed rule. EPA and USDA now claim authority to review and approve entire State forestry programs as opposed to reviewing each individual TMDL submitted by the State. Through a public process to develop national forestry practices guidance, EPA and USDA now intend to federally dictate the development, implementation and enforcement of virtually every forest management activity conducted on all private forest lands in the country. In other words, if State forestry program requirements for activities such as tree planting, harvesting, prescribed burning, pest and fire control, surface drainage, road construction and maintenance, thinning, cultural treatment, site preparation and nursery operations are inconsistent with Federal standards, EPA will impose Federal NPDES permits.
- Through this Federal oversight, EPA and USDA have for the first time provided environmental non-governmental organizations the ability to dictate how forest management operations should be conducted on private forest lands throughout the country. This could include decisions about what species of tree to plant, what type of forest management operation is conducted, the width of a streamside management zone or if harvesting should even be allowed.
- EPA and USDA do not specify what precise criteria will qualify a State for having "reasonable assurances" that the State will regulate forestry activities. This is a blank check for EPA to approve State programs based on undefined criteria.
- The revised approach may trigger Endangered Species Act consultation with USF&W and NMFS when reviewing State forestry programs for approval (not a current requirement). This jeopardizes the existing programs and creates great uncertainty for forest landowners and States as to whether State forestry programs are acceptable or not.

While we appreciate the attempt by EPA and USDA to address our concerns, we do not believe that they address the fundamental test. The real test for whether this proposed rule and the recent changes are needed at all lies with this question: Will this result in any improved ability of EPA, the States, or landowners to prevent or correct water quality problems from forestry operations? The answer is no.

We do not believe this rule should be finalized.

Senator Smith and Senator Crapo, we support your efforts to address water quality issues in a more meaningful and productive way than EPA's proposed rules. Your legislation to improve State funding and data quality makes sense and we think speaks to some of the real issues here. We also support legislation introduced by Senators Lincoln and Landrieu to codify the existing non-point regulatory status of silviculture and we hope you will consider them as an important part of this debate when you hold hearings on your bill.

Thank you, again, for the opportunity to testify.

STATEMENT OF TOM BUOB, EXTENSION EDUCATOR, UNH COOPERATIVE EXTENSION

I have spoken to many farmers in the Connecticut River watershed about nutrient management and the effects of the regulatory guidelines from EPA. Their major concerns seem to be that too much regulation will not address the nonpoint source pollution issues, and it will result in increased costs for agricultural production. Regulation is (can be) somewhat complex resulting in confusion, frustration, and undue paranoia.

I realize that many people do not give much credence to Voluntary methods (stewardship) of reducing nonpoint source pollution. However, as an extension educator in the crop and soil (nutrient) management area for more than 20 years, I do not believe that more regulation will be as effective as efforts based on educational programs (research, demonstration, adoption) in protecting or improving the environment. Farmers are interested in protecting the environment because they and their families live where they work and are usually the first ones to be affected. The farmers are already doing many things correctly and have been very interested in improving management techniques if they will make a difference.

The USDA agencies (UNH Cooperative Extension, NRCS, FSA), county conservation districts and local conservation groups have been working together to minimize the impact of agriculture on the environment. Through on farm research, demonstration and educational efforts, farmers have reduced nutrient loading and the risk of nonpoint pollution.

A recent effort (CSREES Water Quality Grant) is focusing on expanding this project throughout the NH portion of the Connecticut River Watershed.

As an educator in the crop and nutrient management area, I do not believe that more regulation will be as effective as an educational program (research, demonstration, adoption) in protecting or improving the environment. Farmers are interested in protecting the environment because they and their families (since they live where they work) are usually the first ones to be affected. The farmers that we have worked with are already doing many things correctly and have been very interested in improving management techniques if they will make a difference.

Thank You.

STATEMENT OF NANCY L. GIRARD, ON BEHALF OF THE CONSERVATION LAW FOUNDATION

Good afternoon, for the record I am Nancy L. Girard, and I am the Vice President and Director of Conservation Law Foundation's New Hampshire Advocacy Center. Thank you for this opportunity to testify before the committee to address the Environmental Protection Agency's (EPA) proposed revisions to regulations implementing the Clean Water Act's "Total Maximum Daily Load", "National Pollutant Discharge Elimination System", and "Water Quality Standards" programs. As the committee is well aware, EPA proposed substantial rule revisions to these programs on August 23, 1999. 64 Fed. Reg. 46012–46055 and 46058–46089. Like numerous interested parties, Conservation Law Foundation (CLF) filed comments with EPA to address concerns with the proposed revisions. In our comments, CLF strongly opposed the proposed revisions and requested that EPA withdraw them and reconsider its approach.

DESCRIPTION OF CONSERVATION LAW FOUNDATION

By way of background, let me describe CLF. The Conservation Law Foundation ("CLF") works to solve the environmental problems that threaten the people, natural resources, and communities of New England. CLF maintains an advocacy staff including over 25 lawyers and scientists. CLF's advocates use law, economics, and science to design and implement strategies that conserve natural resources, protect public health, and promote vital communities in our region. Founded in 1966, CLF is a non-profit, member-supported organization with over 10,000 members. CLF maintains advocacy center offices in Maine, New Hampshire, Vermont, and Massachusetts. CLF advocates focus on issues of national, regional or statewide significance that affect these States as well as Connecticut, Rhode Island, and New York. We firmly believe that EPA's proposed regulatory revisions will significantly affect efforts throughout New England, and nationally, to correct major water pollution problems and clean-up watersheds.

WATER POLLUTION IN NEW ENGLAND

New England, like many other regions, continues to have significant water pollution problems. Each of the New England States has identified waters that fail to meet State water quality standards. These pollution problems include: nutrient pollution that imperils recreational use and aquatic habitat in our lakes, ponds and coastal areas, sedimentation that harms important fisheries, disruption of natural river flows, and toxic pollution and pathogens that threaten public health. EPA and the States must enhance their efforts to document and correct these critical pollution problems.

SUPPORT FOR TMDL PROGRAM

As an important component of the approach to clean-up New England's polluted waters, CLF strongly supports the Clean Water Act's TMDL provisions set forth at 33 U.S.C. § 1313(d). Over a quarter-century ago, Congress enacted the 1972 Clean Water Act, which established detailed provisions, designed to ensure prompt clean-up of the nation's waters. Indeed, water-quality-based effluent limitations were to be achieved over twenty-two years ago (by July 1, 1977), § 301(b)(1)(C), water quality suitable for fish, wildlife, and recreation was to be attained over 16 years ago (by July 1, 1983), § 101(a)(2), and discharges were to be eliminated over 14 years ago (by 1985). § 101(a)(1).

Central to achievement of these timelines, § 303(d) of the 1972 Act mandated the total maximum daily load (TMDL) program, which is designed to ensure prompt identification of impaired and threatened waters, and the setting of maximum daily pollutant loads for those waters. Under the timeline intended by Congress, pollutants suitable for load calculation were to be identified by October 1973, States were to identify impaired waters and submit TMDLs for those waters by April 1974, EPA

was to approve or disapprove that identification and those TMDLs by May 1974 and (in the event of disapproval) was to establish TMDLs by June 1974. Thus, TMDLs (whether EPA-approved or EPA-established) for all impaired waters were to be in place twenty-five years ago.

This clear congressional intent remained unfulfilled, and remains unfulfilled to this day. The cause is not far to seek: the States and EPA have massively failed to comply with their statutory obligations. *Alaska Center for the Environment* v. *Reilly*, 796 F. Supp. 1374, 1379 (W.D. Wash. 1992), aff'd, 20 F.3d 981 (9th Cir. 1994) ("The only 'consistently held interpretation' that the EPA has demonstrated with respect to the CWA's TMDL requirements has been to ignore them."). Only recently, in response to numerous lawsuits filed across the Nation challenging the inaction of EPA and the States, have initial steps been taken to implement the TMDL provisions of the CWA. Only with significant additional funding and effort devoted to implementation will the TMDL provisions of the CWA achieve their initial purpose and promise. The proposed regulatory provisions will simply confuse and undermine implementation efforts.

OPPOSITION TO REGULATORY REVISIONS

The TMDL requirement is one of the cornerstones of the CWA. In order to assure that remaining water pollution problems are effectively addressed, it is critically important that the TMDL program not be undermined or weakened. Instead, the program should be strengthened and fully implemented. The first major step taken in actually implementing these long-ignored provisions of the CWA should not be to substantially revise existing regulatory requirements.

CLF's Comments to EPA raised several important substantive issues including that the rule revisions would:

- unlawfully delay development of TMDLs;
- unlawfully abdicate EPA's responsibility to develop TMDL's when States fail to;
- undermine public participation in TMDL development;
- unlawfully add factors for determining whether agricultural and silvicultural activities fall within the CWA's definition of point source discharge of a pollutant;
- create an inadequate and unlawful "offset" or "trading" program that would allow polluting discharges to continue without meeting water quality standards; and,
- exempt existing discharges from compliance with water quality standards even if they expand their discharge up to 20 percent.

Each of these concerns address facial violations of specific statutory requirements of the Clean Water Act. Unless each of them is addressed, and EPA's approach substantially revised, the proposed regulatory revisions would cause endless legal challenges and interminable delay in correcting critical water pollution problems.

NEED FOR MORE PUBLIC COMMENT ON THE RULES

Due to the complexity of the proposed regulatory revisions, their broad scope, and their fundamental flaws, EPA should revisit its approach and provide an additional opportunity for public comment. Indeed, each of the provisions of the proposed revisions could warrant an independent rulemaking. As a result, CLF has requested, and continues to hope for an EPA withdrawal of the proposed revisions with a fresh look at needed improvements in the TMDL program.

CLF is very concerned with recent written and oral EPA statements to Members of Congress, including Senator Smith, highlighting potentially major changes to the initial rule proposal without providing any detail or specificity regarding possible changes. Given the likely major revisions that will occur in a final rule, CLF believes that the rule revisions should be noticed for additional public review and comment. Without an additional opportunity for public comment, we are concerned that all interested parties will be deprived of an opportunity to meaningfully to express their views.

CONCLUSION

In conclusion, CLF continues to oppose EPA's proposed regulatory revisions. Without substantial changes, the proposed revisions will violate specific requirements of the Clean Water Act, cause major confusion and unnecessary controversy, and massively delay clean-up of polluted waters. The TMDL program should be implemented not weakened. Adoption of the proposed revisions without substantial changes would represent a major setback for efforts to clean-up polluted waters across the nation.

STATEMENT OF SCOTT R. MASON, COOS COUNTY FARM BUREAU PRESIDENT, NORTHWINDS FARM

I would like to thank you for providing this opportunity to speak on the EPA proposed TMDL and AFO-CAFO rules. I am Coos County Farm Bureau President, a vice president for NHFB, Chair of the AFO-CAFO committee, Chairman of AFBF Dairy Committee, a member of Coos County Conservation District, member of the State Technical Committee for NRCS and serve on a by-state committee developing certification standards for Nutrient Management Planners. I am also a commercial farmer milking 150 registered Jerseys.

I would also like to thank Senators Smith and Crapo for introducing Senate Bill 2417. This bill shows some common sense. EPA is trying to treat the nonpoint pollution problem the same way they have dealt with the point source pollution problem. It is my understanding that Congress saw a difference in the way the two should be dealt with when the Clean Water Act was written. If the EPA is allowed to proceed with TMDL and AFO-CAFO as proposed, American Agriculture will be greatly reduced. The bill points out that there is a lack of funding to deal with nonpoint problems, both at the State level and the landowner level. EPA is unwilling to look at the progress Agriculture has made through true voluntary programs. EPA's idea of voluntary program is you will voluntarily conform or we will fine you into voluntary compliance. Natural Resources Conservation Services have a long tradition of true voluntary conservation programs. As with any government program though, there have been many programs that time has proven to be just plain wrong. For example, SCS encouraged farmers to plant Multiflora Rose as a living fence. The farmers who did have left their children with a noxious weed that will completely engulf an open field. Then, of course, SCS used to give away Super Phosphate to increase the phosphorus in the manure farmers spread on their fields. Now we are told that it is the farmers' fault that there is too much phosphorus built up in our fields. Most of us can still remember all the wetlands that were drained with SCS technical expertise.

I bring these examples up not to pick on NRCS but to illustrate that Government does not always know what is best. I do not believe that EPA will cure Agriculture's problems through TMDL and AFO-CAFO. Just look at the EPA regulations on town dumps—burn it, bury it, haul it and seal it?

There is a major difference between Agriculture and Industry. Ag pollution is not profitable to the farmer. Any farmer that is a livestock/crop farmer needs his or her nutrients in the field to grow the crop. Manure may be a by-product of livestock, but it is also an input for crop farming whereas in industry pollution is a cost to get rid of as cheaply as possible. If you come to my farm, test the water, and find nutrients that have come from my farm then I'm losing money. That is also true with pesticides. At $40 per gallon, I want the spray to be in the field working. This is why nonpoint Ag pollution control can and should be handled differently than industrial pollution.

In order to make good policy decisions concerning the relationship with Forestry, Agriculture, and the environment you must also look at the traditional cost share programs of NRCS. Funding is the major problem with trying to improve water quality today. This administration has replaced funding of government programs that actually clean up the environment and reduce possible contamination with programs that educate the general public and create more government bureaucracies. The current EQIP funding for New Hampshire is less than half of what the old ACP program was. However, the Connecticut River is listed as a Historic river and Silvio Conte is building learning centers. Not only has funding levels gone down but bureaucracy has gone up. It is a 2-year process for money to be made available to the farmer through EQIP. Money is made available by priority water shed, within which watershed projects are rated, for environmental impact. It is possible for a better quality project not to be funded because it is outside of a priority watershed. Most farms in NH are not eligible for funding because they are outside of the priority watershed. Or the money available for their watershed is not sufficient to do the project. There are only two watersheds in NH currently receiving enough money to build a manure storage system for a family sized dairy farm. A farmer can only apply once every 5 years for cost share money. That means that he must apply for funding of all the projects he needs to complete with in the next 5 years at the time he applies. In order to comply with both AFO-CAFO and TMDL requirements some farms would need almost the entire EQIP funding for the State of New Hampshire. However, another rule would cap the cost share at $50,000 per farmer per contract. Remember you do not actually have to be polluting to be held liable in citizen litigation, all they need to prove is that you are not in compliance.

We have seen a growth in EPA/DES funding of farm projects. However, to qualify for funding, the watershed must be identified as a problem area and the individual farm must be identified as a problem. DES has assured farmers that they will not penalize farmers for participating in these programs, however I question whether the farmer is creating a public record of environmental misdeeds that could be later used against him in a citizen litigation. This has been done in Washington State in at least one of the citizen litigation suits out there.

Many people question why the government should help farmers in saving soil and reduce nutrient run off. I would like to share with you a brochure from NRCS. This top photo is a picture of my farm. It depicts a major streambank blow out. That occurred 2 years ago during a 100-year flood. . . . The two NRCS field people told me that I'd never be able to get the permits to fix the problem, and if I could there would be no cost share money, and it would probably exceed $100,000. I am no engineer but I think that my bank eroded because of a sand bar that has developed across the river. In the old days a farmer would go down into the river and remove the sand bar that has developed with his loader. Regulation no longer allows for that so I lost 2 acres of field 20 feet deep. I think that sediment is more than the sediment created by cleaning out the sand bar. Government regulation has taken a $1000 job and turned it into $100,000. Furthermore, the flood damage that we experience up here is increased by flood control that protects cities down south.

I'd like to take a few minuets and talk about my experience on the SBREFA panel that reviewed the current proposed changes to the AFO-CAFO regulations. Most of the farmers are aware that the EPA currently classifies all farms over 1000 animal units as a CAFO. EPA is currently in the process of reducing the minimum size of a CAFO to 300 animal units. They also would like to change the definition to include replacement heifers on a dairy farm. If this Change occurs in the regulation then all dairies above 150 cows will be classified as CAFOs. What this does is subject the family farmer to citizen litigation. Congress allowed citizen litigation with point pollution sources. I am guessing that it was because Congress felt that a private citizen needed more power to defend him or herself from corporate America. But to now allow "citizens", maybe more aptly put as multimillion or billion dollar environmental organizations with well paid attorneys, to sue family farmers seems a bit unfair. Most Farmers will choose to either sell out or settle out of court. Farmers do not have the money to fight these cases. The legal fees alone can run into the hundreds of thousands of dollars. EPA is also looking at mandatory 100 foot set backs from water for spreading manure, yet they allow me to spread sludge to within 10 meters of the river. I think this difference between these two set backs have more to do with cows not voting than good quality science.

The SBREFA panel is charged with giving small business input into the regulation process prior to the final stages. I would charge that EPA might have lived up to the law by hosting the panel, however I do not believe that they have abided by the intent of the law. The entire process was held via telephone conference. They held a pre-session with over 70 people on line. This session was held during and after a hurricane. Some farmers in North Carolina were out putting their farms back together. I was called out by the railroad to help clear tracks. I know that the Government is important, however if they really want small farmers' input then they have to be willing to reschedule a telephone conference due to a hurricane. At this point they asked for written input. Then they selected the panel. I received an incomplete package of information New Years Eve. The next telephone conference was scheduled for January 5. Please remember that New Year's day fell on Saturday and the EPA was closed Monday so this gave us one business day to review the incomplete package. If I remember right, we had 2 hours and 40 minuets to discuss AFO-CAFO for dairy and beef farmers. They had just four dairy farmers to represent the dairy industry. They also gave us an additional hour later. I have met several panel members since and we all agree that we did not get enough time to discuss issues and that the EPA instructions to us were confusing.

I'd like to share some of my comments with this committee. . . .

In conclusion, I feel that the EPA is over responding with their TMDL and AFO-CAFO regulation. Non-point pollution can and should be handled better at the State level. Currently there are economic forces at work driving the dairy industry in two directions (1) smaller part time farmers and (2) larger and larger farms. I feel that the cost to comply per cow will be greatest on the mid-size family farms if these changes come about. Farmers such as myself will either get bigger, get smaller, or go out of business. In the Northeast that means more farmland will be made available for development. Privately, most DES and EPA officials I have spoken to feel that farms are less of a problem than sprawl for the environment. Congress must also look at the NRCS EQIP program. The application procedure needs to be simplified and the funding level needs to be restored. EPA cost share money needs to

be given to NRCS to distribute to farmers and landowners. NRCS had a perfect vehicle to get this money out to the right landowners. We need to empower State technical committees to develop funding procedures that make sense to the individual States. More research needs to be done to make sure that the proposed regulations will actually have the desired effect. I would encourage this committee to call a halt to the EPA trying to expand the Federal Government's roll in non-point pollution.

NORTHWINDS FARM,
N. Stratford, NH, May 12, 2000.

Dear SIRS: After participating in this panel discussion, I have come to the conclusion that EPA has done everything they can do to minimize any kind of comprehensive review of their proposed regulatory changes by this small business entity group. They have minimized available discussion time by conducting all meetings over a telephone conference call system. They have used most of the telephone time to lay out their position. There has been less than 3 hours of testimony time.

EPA is currently phasing in regulations to help control run off from large farms. These regulations become active this year. EPA never explained why they feel that their current regulations are not sufficient. They also glossed over the fact that the majority of farms are already under some type of State AFO-CAFO nutrient management regulation. Many of these State plans meet or exceed EPA proposed standards. Most of these State regulations are too new to evaluate their effectiveness. Congress specifically left nonpoint pollution up to the States in the Clean Water Act. Nutrient run-off from farms is very different from industrial pollution. To maximize profits industries must get rid of their waste as cheaply as possible. Manure has great value to a farmer. Any run off will have to be replaced with commercial fertilizer. Therefore, voluntary conservation works. EPA should work with USDA NRCS and make money available for voluntary conservation. They could greatly improve the efficiency of their money if they would work with the NRCS State Technical committee in each State. Better decisions could be made with coordination of State and Federal moneys. This will help to target resources into watersheds that need it most. It will also allow for the agricultural industry, State and Federal agencies, and voluntary conservationist to work together.

I spoke with my State NRCS office and asked Gerald Lang Technology Leader for a historical prospective of cost for building manure storage systems. He broke the cost down as follows:

- Earthen storage pit with liner (clay or polymer): $1.75 per AU per day of storage;
- Cast in place concrete (circular): $2.65 per AU per day of storage;
- Cast in place (rectangular): $3.50 per AU per day;
- Pre-fab concrete (Rectangular) approx. $3.00 per AU per day.

In most of New Hampshire, you should be building storage for 280 days. So if you were to require a 300 animal unit to have storage then these farmers would have to spend from $147,000 to $294,000. These complete systems include all the "stuff" that I think EPA may have left out of their building cost estimates. EPA never shared the actual specs for the building estimates they did. A concrete lined hole does you little good if you have no way to get manure into it, keep animals out of it, deal with sand or other solids, control surface water drainage etc.

Also EPA thinks most 300-plus animal unit farms have adequate storage. Some States have developed cost share programs for their farmers to build pits. If EPA only surveyed those States then their numbers may be off. I think that almost ⅔ of the farms in my county from 300 AU to 1,000 AU will have to build or expand storage facilities. This number will probably increase under the current economic conditions that farmers are facing unless the President makes EQIP funding a priority. The smaller the farm the more likely they are to be short of storage. New Hampshire allows for field stacking, which if properly done can be environmentally sound, and helps the farmer to reduce the costs associated with manure spreading. Spring is my busy time of year. The opportunity cost of tractor time and labor time is very high. If I can haul and stack manure during the winter in or nearer my fields then I can afford to spread that manure over more land, thus helping to reduce run off. There are some very simple effective ways to reduce the risk of run off from field stacking. EPA needs to be very careful about over regulating field stacking because that will lead to poorer management of manure. Your regulations could change manure from an asset to a liability. EPA does not have field staff enough to enforce their will on every 300 animal unit farm in America. You will increase the environmental benefit of your regulations if they work with the economic forces involved with agriculture instead of against them.

Under President Clinton actual funding for cost share programs to help farmers build manure management structures has been cut by almost ⅔. Furthermore, the local county technical assistance by NRCS has been reduced because of Vice President Gore's USDA restructuring program. Not only has local staff been reduced, but also their job requirements have been increased. In my county alone almost 300 man-hours were spent on unfunded EQIP proposals. The USDA requires exact estimates of the project cost before funding levels are determined. The other side of this is the farmer has now wasted his time and become less likely to reapply in future years. It is now almost a 2-year project for a county NRCS staff to get money onto the farm. If the government wants to reduce farm run off then they need to reduce red tape associated with their programs.

During the discussion and reading the material, several things have been brought to light that I would like to address. I do not understand why EPA would want to lift the 20 5-year rain event exclusion. If this is lifted then every farm will have to have a permit. No one can say that he or she will never discharge during a greater then 25-year storm event. How do I predict a 500-year rain event? This change would add tremendous cost to construction and to compliance. EPA has also suggested a 100-foot buffer for spreading manure next to water bodies. They show no cost to the small farmer for this. Somewhere between 30–50 percent of my tillage is within 100 feet of water bodies. This alone would bankrupt me. Furthermore, all the farms in my county would have the same problem, as would most of the farmers in the State. I asked why EPA has set a 10-meter buffer for sludge spreading and want a 100-foot buffer for manure. I did not get a real answer, nor has anyone gotten back to me with the science behind this statement. I think it has more to do with the political power associated with each organic by product than science. The truth is that actual onsite conditions have more to do with width of the buffer zone, and it is impossible for a Washington, DC-based regulation to take into account what is a sufficient buffer. It takes an onsite evaluation.

Nutrient management plans need to be written by the farm owner. I spoke with a certified crop consultant that is very familiar with my farm. He said that the actual cost of producing a plan for my farm would be about $5,000. It would also cost me $1,000 plus to maintain this plan. My farm would be over 300 AU if you count dairy cows at 1.4 AU and heifers also. This is a very large expense when farm net incomes are dropping below the poverty line in many cases. If you allow the farmer to become certified to write his plan then he can save some of this money.

I would like to thank EPA and SBA for this chance to input on some of the problems I see with the proposed regulations. I would be more then willing to answer any questions you might have. I do feel however that to get better information from a SBREFA Small Entity Committee we should be allowed more than 3 hours of time for us to ask questions of EPA and for them to answer these questions.

Sincerely,

SCOTT R. MASON.

STATEMENT OF DAVID PARIS, WATER SUPPLY ADMINISTRATOR, MANCHESTER WATER TREATMENT PLANT, AMERICAN WATER WORKS ASSOCIATION

INTRODUCTION

Good morning Mr. Chairman. I am David Paris, Water Supply Administrator of the Manchester Water Treatment Plant, Manchester, New Hampshire. The Manchester Water Treatment Plant provides drinking water to 128,000 people in Manchester and the surrounding communities of Derry, Londonderry, Grassmere, Goffstown, Bedford and Auburn, NH. I serve on the American Water Works Association (AWWA) Water Utility Council and am here today on behalf of AWWA. AWWA appreciates the opportunity to present its view on the proposed rulemaking regarding Total Maximum Daily Loads.

Founded in 1881, AWWA is the world's largest and oldest scientific and educational association representing drinking water supply professionals. The association's 56,000-plus members are comprised of administrators, utility operators, professional engineers, contractors, manufacturers, scientists, professors and health professionals. The association's membership includes over 4,000 utilities that provide over 80 percent of the nation's drinking water. AWWA and its members are dedicated to providing safe, reliable drinking water to the American people.

AWWA utility members are regulated under the Safe Drinking Water Act (SDWA) and other statutes. AWWA believes few environmental activities are more important to the health of this country than assuring the protection of water supply sources, and the treatment, distribution and consumption of a safe and healthful adequate

supply of drinking water. We strongly support effective clean water pollution prevention programs.

AWWA supports the Total Maximum Daily Load (TMDL) concept with the inclusion of effective nonpoint source controls. AWWA has several concerns about implementation of the TMDL proposal as published in the *Federal Register* on August 23, 1999. AWWA's concern stems from our member's responsibility to protect the American public through the provision of safe and affordable drinking water. AWWA agrees with a number of stakeholders that the TMDL proposal as proposed in the August 23, 1999, *Federal Register* is flawed, and AWWA does not currently endorse any specific TMDL rule proposal.

AWWA is disappointed by recent indications from U.S. EPA that the final TMDL rule will not address critical components contained in the August 23, 1999, proposal. It now appears that U.S. EPA will be removing key provisions:

- Identification of drinking water supplies as high priority watersheds for TMDL development, and
- Management of nonpoint pollution within the TMDL process.

DRINKING WATER SUPPLIES AS HIGH PRIORITY WATERSHEDS

Much of the current TMDL debate focuses on the Clean Water Act efforts to control point sources of pollutants so that receiving waters are ''fishable and swimmable.'' While important goals, the Clean Water Act is also a critical component of protecting drinking water supplies. Public water systems serve 271.3 million Americans. More than 161.7 million American drinking water consumers rely on drinking water drawn from surface water supplies. Few of these drinking water systems have access to protected, pristine supplies and as a consequence must invest in treatment to remove contaminants introduced by point and nonpoint sources of pollution.

Taking reasonable measures to identify and manage pollutant loading on a watershed basis is important to ensuring that drinking water can be provided with reasonable treatment, and therefore, at a reasonable price. Local consumer expectations and regulatory pressures have set high expectations for the safety of America's drinking water. The job of ensuring that safe, affordable water can be provided to the nation's citizens begins with reducing the pollutants entering the water treatment plant's source of supply. Protecting the 161.7 million Americans whose drinking water is drawn from surface water supplies is clearly one of the highest and best uses to which Clean Water Act resources should be applied.

NONPOINT SOURCE POLLUTION

AWWA believes it is critically important that all levels of government address nonpoint source pollution seriously and aggressively.

Numerous studies have shown that nonpoint sources of pollution are the largest and most significant sources of water pollution in most of the nation's impaired rivers and lakes. If the TMDL process does not address nonpoint pollution, it will simply be a paper tiger of little value in improving water quality.

As a matter of law, nonpoint pollution is clearly within the U.S. EPA's purview under the Clean Water Act. Citing the comprehensive approach envisioned under the Clean Water Act, a Federal district judge ruled March 30 that plans to clean up impaired waters can apply to a river polluted solely by nonpoint sources, in this case sediment runoff (*Pronsolino* v. *EPA*, N.D. Cal., No. C99–1828, 3/30/00). ''TMDLs had to be set at levels that would 'implement' the applicable water quality standards,'' U.S. District Court Judge William Alsup wrote. ''It would have been impossible to do so without taking any nonpoint sources into account as well as any point sources.'' The court suggested that the TMDL process could be used to ''help States evaluate and develop land-management practices to mitigate nonpoint-source pollution.''

REALITIES OF IMPLEMENTING TMDLS

Implementation of the Clean Water Act is a delegated responsibility. That is, individual States take responsibility for developing and implementing programs that achieve the Clean Water Act's goals. The States have overwhelmingly stated that they do not have the resources to implement the August 1999, TMDL proposal. AWWA's members understand that Federal requirements in the proposed TMDL rule would challenge States financially and technically. The Water Pollution Program Enhancement Act of 2000 (S. 2417), introduced by Senators Crapo and Smith, recognizes that challenge and authorizes needed financial resources for several programs related to implementation of TMDLs. AWWA supports additional funds for administration, monitoring, Section 319 grants, and remediation of nonpoint sources of waterbody impairment. Once authorized it will be critical to ensure that the au-

thorized funds are appropriated in each fiscal year; this second hurdle in the budget process has historically been a challenge for the programs affected by S. 2417.

S. 2417 also recommends the initiation of a National Academy of Sciences (NAS) study on key TMDL technical implementation issues. AWWA believes strongly that Federal policies and regulations should be based on sound science and supports involving independent scientific input on technical issues surrounding TMDL implementation. We would caution that the NAS study process and regulatory processes can be quite slow. AWWA strongly urges that S. 2417 be amended to provide strong assurance that the NAS study will be completed and that the rulemaking can proceed in a reasonable period of time. We believe it critical that a final TMDL regulation which includes an effective nonpoint source pollution component based on the current proposal, comments received during the formal comment period, and the NAS report be completed as soon as possible.

Under no circumstances should the NAS study process delay promulgation of the final rule beyond 24 months from enactment into law. Drinking water utilities across America are facing pathogen, nitrate, and other pollutant loadings that could be addressed through nonpoint source controls. Timely action to incorporate nonpoint source management within the nation's TMDL process is critical to protecting the nation's health from acute and chronic contaminants being introduced to the nation's surface and groundwater drinking water supplies by nonpoint source pollution.

This concludes the AWWA statement on the proposed rulemaking regarding Total Maximum Daily Loads. I would be pleased to answer any questions or provide additional material for the committee.

RESPONSES TO THE MAY 1, 2000 JOINT STATEMENT OF DEPARTMENT OF AGRICULTURE AND ENVIRONMENTAL PROTECTION AGENCY ON REVISIONS TO THE AUGUST 1999 TMDL AND NPDES PROPOSED RULES

The following is a set of questions and answers that respond to the joint USDA/EPA statement outlining revisions to the August 22, 1999 total maximum daily load (TMDL) and national pollutant discharge elimination system (NPDES) permit regulations. The questions are based on the USDA/EPA policy statements contained in the document.

Question 1. Is the USDA/EPA policy consistent with almost 30 years of Clean Water Act statutory interpretation, Federal regulation and court decisions that forest management activities are a "nonpoint" source category subject to State regulation under Section 208 and 319 of the Act?

Response. No. Nowhere in the policy statement does EPA/USDA even mention that they int to do exactly what EPA originally proposed in August 1999. The EPA will remove the designation of such forestry activities as nursery operations, site preparation, reforestation, thinning, cultural treatment, prescribed burning, pest and fire control, harvesting, surface drainage and road construction and maintenance as a nonpoint source category. Instead, it will redesignate them as potential point source discharges of pollution on a case by case basis, thereby ultimately subjecting the activities to Federal Clean Water Act discharge permits.

Under the Clean Water Act, forest management operations have never been considered discharges subject to point source permits. Forestry operations have always been considered to have diffuse nonpoint source runoff. Congress in 1972 and, EPA in 1976, determined that there are no discharges from forestry operations that require a permit. In fact, EPA reaffirmed Congressional intent that forestry operations be designated as a nonpoint source category.

Question 2. By granting a 5-year waiver from Federal NPDES permit requirements for forestry activities, does this provide for a more "flexible" State TMDL program?

Response. No. States now have the authority to regulate forestry operations as nonpoint sources. The suggested revision keeps this authority in place for 5 years. The only increase in flexibility occurs from the absence of any Federal permit requirements during this period. At the end of the 5-year period, flexibility will definitely decrease as EPA will presumably insert Federal requirements into what has heretofore been an area of State jurisdiction.

The removal of the nonpoint source designation exposes forestry activities to litigation over their status. Recognizing the authority to require NPDES permits, but not exercising that authority, has been ruled improper in the past by the Federal courts. The 5-year moratorium would very likely be subjected to a similar challenge.

If there is a 5-year moratorium, why delete the designation of forestry as a nonpoint source category immediately? If permits will not be imposed for 5 years,

why remove the designation and subject forest landowners to citizen suits. The new permitting requirements will jeopardize hundreds of billions of dollars in forest land ownership and investment. This revised approach provides no measurable improvements to water quality today and this uncertainty will place 9 million forest landowners around the country at legal risk. It will likely lead to the conversion of forest land to suburban sprawl and development.

Question 3. EPA proposes to work with USDA and the public to develop guidance for States to follow in designing and adopting forestry BMP programs for the protection of water quality. What implications will this likely have?

Response. Under the Section 319 of the Clean Water Act, EPA reviews State nonpoint source program for approval including State forestry programs. The forestry community continues to work with States and EPA to address State programs through a collaborative effort at the State level.

This revised approach is more expansive than the proposed rule. EPA/USDA now claim authority to review and approve entire State forestry programs as opposed to reviewing each individual TMDL submitted by the State. There is no statutory basis or case law to allow the EPA to say that a forestry activity is or is not a point source discharge subject to Federal permits based on the proven effectiveness of a State forest management program.

Through a public process to develop national forestry practices guidance, EPA/USDA now intend to federally dictate the development, implementation and enforcement of virtually every forest management activity conducted on all private forest lands in the country. In other words, if State forestry programs such as tree planting, harvesting, prescribed burning, pest and fire control, surface drainage, road construction and maintenance, thinning, cultural treatment, site preparation and nursery operations are inconsistent with Federal standards, EPA will impose Federal NPDES permits.

Through this Federal oversight, EPA/USDA have for the first time provided environmental non-governmental organizations the ability to dictate how forest management operations should be conducted on private forest lands throughout the country. This could include the species of tree to plant, what type of forest management operation is conducted, the width of a streamside management zone or if harvesting should even be allowed.

Question 4. EPA claims that forest operators in States with approved programs will know what is expected of them, what BMPs are effective in reducing pollution and need to be implemented. The Agency indicates the willingness to provide "credit" for voluntary programs. What is the forestry community response.

Response. EPA does not specify what precise forest management criteria will qualify a State for having "reasonable assurances" that a TMDL will be implemented. EPA wants the discretion to approve State forestry programs based on undefined criteria. This is a blank check. In fact, the revised approach is likely to trigger Endangered Species Act consultation by requiring the EPA to consult with the U.S. Fish & Wildlife Service and the National Marine Fisheries Service when developing the national program criteria, determining program effectiveness and final approval of each State program.

The joint policy statement indicates that voluntary and incentive-based approaches "will be given due credit." This statement is absolutely meaningless. Either the program is acceptable or unacceptable. According to the August 1999 proposal, only 10 unidentified States were considered to have acceptable programs. EPA does not provide any indication as to how this was derived.

Question 5. EPA states that existing Federal law requires forest operations on National Forest System lands to be conducted consistent with water quality requirements. Therefore, EPA/USDA provide an outright exemption from permitting requirements for U.S. Forest Service lands How does the forest community respond?

Response. This is a political decision with absolutely no technical, legal, statutory or regulatory basis. This decision gets at the very heart of the entire misguided approach to the NPDES portion of the August 22, 1999 regulation. Under this "revised" approach, EPA now asserts its ability to distinguish what constitutes a point source discharge subject to Federal NPDES permits based on whether it is occurring on public or private lands.

This is in addition to the fundamentally flawed premise contained in the proposed rule that EPA asserts discretionary authority to regulate forestry activities as a point source in impaired waterbodies but not in unimpaired waterbodies. This interpretation of their statutory authority is dubious at best and ripe for court policymaking rather than congressional policymaking.

Under this theory, if the National Forest Systems are exempt, why not the National Park Service, the U.S. Fish & Wildlife Service, the Bureau of Land Management, Department of Defense, or every State/county forest or park or any private landowner that conducts forestry operations consistent with water quality "requirements." State forestry best management practices programs are also designed to be consistent with achieving "requirements." There should be equal treatment and recognition for all landownership under the Clean Water Act. EPA must withdraw the NPDES regulations of the proposed August 1999 rulemaking.

Question 6. EPA claims that point source discharges to waters of the United States are not required to get a permit and will not be subject to citizen suit or government enforcement action under the Clean Water Act. How would the forestry community respond to that statement?

Response. Once EPA removes the regulation recognizing most forestry activities as nonpoint sources, forest landowners will be open to citizens suits alleging they must obtain a permit. When such a claim was filed against forestry activities on national forest lands, the court rejected the claim based on EPA's 23-year old recognition of forestry as a nonpoint source. *Newton County Wildlife Assn.* V. *Rogers,* 141 F.3d 803 (8th Cir. 1998). Moreover, EPA has already lost on the issue of failing to identify which forestry activities have discharges making them point sources. *Natural Resources Defense Council* v. *Costle,* S68 F.2d 1369 (D.C. Cir. 1977). EPA then adopted the current regulations that designate most forestry activities as nonpoint sources. Removal of this regulation will likely result in new citizen suits over this issue.

Question 7. EPA states in their April 5 letter that "Clean Water Act permits will not be required from diffuse runoff from forestry operations under any circumstances."

Response. EPA has yet to confirm under the April 5 or May 1 approaches that NPDES permits will not be required under any circumstances for the following forestry activities: Nursery operations; Reforestation; Thinning; Pest and fire control; Site preparation; Cultural treatment; Prescribed burning; Harvesting operations; Road Construction and Maintenance; and Surface drainage.

Question 8. What are the costs and benefits of the redesignation of forest activities as a point source discharge?

Response. EPA has not provided any estimates of the specific benefits that can be obtained from the proposed NPDES forestry requirements. In addition, EPA's estimate of the incremental cost of the proposed rule totals less than $13.2 million. Other independent analyses conducted by university economists estimate the impact on the forestry community and State agencies at well over $100 million a year. In light of this rather large discrepancy in cost estimates and because the impact on forestry alone could exceed $100 million annually, we believe EPA has a responsibility to comply with the Unfunded Mandates Reform Act, the Regulatory Flexibility Act and Executive Order 12866 and conduct a thorough benefit and cost analysis before these rules are finalized.

STATEMENT OF SI BALCH, CHIEF FORESTER, MEAD PAPER, WILTON, ME

If TMDLs are not based on science they will be indefensible. Your tax dollars and mine will have been wasted on a worthless product, and will be further wasted defending them in court.

S–2417—"The water pollution program enhancement act"—is needed to fix some of the problems with the EPA proposal.

I'd like to make the following points.

1. *Non Point Sources should not be included in TMDL process.* There is no established method for allocate a portion of the pollution load to a Non-Point Source. If the TMDL process proceeds and a pollutant is attributable to silvicultural activities then that activity would get an allocated amount. which would then have to be monitored to assess compliance. No method exists for this process.

2. *Retain the definition of most silvicultural activities as non-point in nature.* Honor congressional portent. The 1977 and 1987 Clean Water Act amendments (reference 64 Fed Reg. 46,077) confirm Congress's intent to continue its fundamental policy to not regulate water pollution from most silvicultural activities through permit programs.

3. *Provide the States sufficient time and resources to develop quality TMDL's.*

4. *List only waterbodies that are now "impaired".* Do list list ones that are not currently "Impaired" but are threatened" I believe this requirement does beyond EPA's legal authority and should not be included in the final rules.

5. *Each State should have a clear listing methodology based on science.*
6. *Use a 5-year listing cycle, which allows segments to be de-listed once they have attained standards.*
7. *The TMDL development schedule should be able to be re-negotiated at each listing cycle to address new changing circumstances.* The rules should allow the schedule to be revised each time the State lists its waters.
8. *The EPA should not take the power to approve a State's listing process and criteria.* EPA says they will not be involved in approving the State developed listing process. however the experience in Idaho shows that they will get involved in deciding what criteria the State can use. EPA has disallowed the Idaho criteria.
9. *The EPA should not take the power to approve State implementation plans.* EPA says it will not approve TMDL implementation plans. it will only require that they be developed. I have grave doubts about this. When Maine was dealing with the CZARA process, the State agencies proposed leaving silviculture off the list of pollution sources within the coastal zone. EPA refused to allow that.
10. *The EPA should not take the authority to take over a State TMDL development process.* EPA says it will have the authority to completely take over the TMDL development process, if it feels a State is not doing it properly.

I think the USDA comments earlier in the year were particularly well done. I would like to support both their efforts and those of the American Tree Farm system and AF&PA.

STATEMENT OF JOHN M. HODSDON, DIRECTOR, NATIONAL ASSOCIATION OF CONSERVATION DISTRICTS

I would like to thank Senator Smith and the committee for this opportunity to emphasize our commitment to clean water and also to express some concerns with the proposed TMDL regulations. It is nice to have you back in New Hampshire.

I am representing the National Association of Conservation Districts (NACD), of which I am a director. I am mainly a vegetable and Christmas tree farmer from Meredith in the Lakes Region and I am also chair of the water quality committee of the New Hampshire Association of Conservation Districts.

There are nearly 3,000 local Conservation Districts nationwide run by volunteer boards and usually paid staff including 10 in New Hampshire organized along county boundaries. We work with landowners on a volunteer basis protecting and enhancing soil quality and water quality as well as working with Planning Boards to minimize the environmental impact of development Our partners, the Natural Resources Conservation Service (NRCS), are essential for providing technical advice and conservation planning. Because of a gradual loss of about half of their personnel over the last 20 years they are no longer able to do all that is needed. Conservation Districts working with NRCS, the Extension Service, and our other local partners are able to direct resources where they are needed most.

A voluntary incentive-based approach has been very effective in reducing erosion, sediment, and polluted runoff. Farmers are more than willing to do still more. However, they have limited capital. Last year requests for Environmental Quality Incentive Program (EQIP) cost share funding in New Hampshire was about five times what was available. Remaining problems like streambank erosion and manure storage to modern standards will require more funds than farms can generate.

The proposed regulations appear to be a very prescriptive, one-size-fits-all approach. This is an inefficient, expensive, and less effective method to reduce nonpoint source pollution. Since Congress never intended for EPA to use TMDLs to regulate nonpoint source pollution and it will not work as well as the voluntary incentive-based approach; it follows that EPA should not do it nor direct States to do it.

We have some specific concerns with the proposed regulations. It is not clear how the margin of safety will work. I fear that EPA will require stricter controls when the level of ignorance is higher. The use of a margin of safety is appropriate when something new is being introduced into the environment with possible unforeseen effects. It is not appropriate for setting effluent limitations.

We are also concerned with how the regulations would affect watersheds classed as pristine. Best Management Practices (BMPs) should be required in those watersheds, but there is no assurance that BMPs would be allowed and regarded as adequate.

In summary, more resources are needed to get the job done. It takes people in the field to assist private land managers with sound, technology-based conservation. Cost-share assistance is required to implement some of the more expensive BMPs. NACD has done a workload analysis that documents a need of $900 million for

NRCS for Conservation Technical Assistance. NACD is requesting $325 million for EQIP, $50 million for the Wildlife Habitat Incentive Program (WHIP), $25 million for the Forestry Incentive Program, $53 million to fully fund Resource Conservation and Development (RC&D) councils, $300 million for NPS Control (319) grants, and $25 million for the Stewardship Incentives Program (SIP). We would also like to see funding resumed for Section 208(j) of the Clean Water Act to get more funding at the local level.

STATEMENT OF DAVID BONNEY, FORESTER, NEWRY, ME

Hello, I am David Bonney. I am a Maine licensed forester residing in Newry, Maine. I have practiced forestry for 21 years in the States of Maine, New Hampshire, and New York. I am currently employed by Wagner Forest Management, which is headquartered in Lyme, New Hampshire.

Wagner manages large acreages in New England, New York, and parts of Canada. As a practicing forester I strongly object to the EPA's proposed efforts to redefine forest management activities as a point source polluter. If this action is allowed, the ability of landowners to responsibly manage their land will be adversely impacted. This ability to manage forestlands is crucial to the economy supported by the management of our forests.

Landowners currently follow State and Local laws along with implementing Best Management Practices when conducting forest management activities. To require that landowners practicing forestry go through the delay and expense of receiving Federal permits, given the effective programs already in place is completely unacceptable. These proposed permit requirements threaten the forest landowner's already narrow profit margin. These requirements would also open the door for other laws and civil lawsuits. Landowners faced with not having the opportunity to profitably manage their holdings may choose to sell to developers. This permanent loss of forestland would impact the environment to an extent that no forestry activity would ever induce.

I urge that the determination of forest activities as a non-point source polluter not be reversed.

STATEMENT OF JIM LEHNER, GENERAL MANAGER, NORTHEAST REGION PLUM CREEK TIMBER CO.

My name is Jim Lehner and I am the General Manager for Plum Creek Timber Co. in our Northeast Region.

On behalf of Plum Creek, I am here to express strong opposition to the Environmental Protection Agency's proposed revision to the Water Quality Planning and Management Regulations.

First, we believe the proposal exceeds EPA's legal authority. EPA's attempt to bring nonpoint sources under the Total Maximum Daily Load program directly contradicts the Clean Water Act, as it does nothing to improve water quality. Congress never intended for forestry to be regulated as a point source, and policy changes such as this proposal should be made only by Congress.

Second, we believe the proposal will result in a tremendous increase in bureaucracy and red tape without a commensurate increase in water quality. Significant resources would be drained from not only large landowners like Plum Creek, but thousands of small landowners growing and harvesting trees on their property—jeopardizing the health and vitality of the timber industry.

Lastly, Plum Creek and the entire forest products industry have made tremendous strides in the improvement of water quality through the use of Best Management Practices or BMPs for forestry. These BMPs have proven to be highly effective in controlling pollution from forestry activities.

The current EPA proposal is unwarranted and should be withdrawn.

STATEMENT OF JON OLSON, MAINE FARM BUREAU ASSOCIATION

Senator Smith and members of the Senate Committee on Environment and Public Works, my name is Jon Olson. I am the Executive Secretary of the Maine Farm Bureau, the State's largest general farm organization of 5,000 members.

Maine Farm Bureau is opposed to the EPA's proposed Total Maximum Daily Load (TMDL) rule under the Clean Water Act (CWA). Confined/Concentrated Animal Feeding Operations (CAFO's) and Animal Feeding Operations (AFO's) will also be impacted by these rulings. We feel the proposed rules would affect farmers and for-

esters by forcing costly compliance. The rules as currently written will be costly for States to implement for the vast majority of States do not have sufficient data to develop accurate TMDLs for their waters, and the regulatory authority for nonpoint source pollution will shift from the States to the Federal Government.

Specifically, Maine Farm Bureau has the following concerns with the proposed TMDL rule.

1. The rule expands EPA's regulatory reach and intervention in water quality decisions authorized to the States by the CWA. Exceeding EPA authority to regulate nonpoint source pollution would alter the Federal-State relationship.

2. The rule will create substantial costs on the private sector and States in implementing it. EPA should be required to conduct a cost-benefit analysis describing the impact of the proposed rule.

3. The rule exceeds EPA's authority to require States to list and develop TMDLs for nonpoint source-impaired waters. Congress established Section 319 in the CWA to address impairment from nonpoint sources, and specifically decided not to include nonpoint sources in the TMDL program.

4. The rule exceeds EPA's authority to regulate "threatened" waters. By definition, "threatened" waters currently meet all applicable water quality standards. Congress expressively authorized EPA to require States to list and prepare TMDLs only for impaired waters.

5. The rule includes the listing of waters impaired by air deposition. The CWA does not authorize this listing.

6. The rule lacks an effective delisting process for waters improperly listed or when water quality standards have been achieved.

7. The rule incorrectly bases listing on evaluated (anecdotal) data and narrative criteria rather than monitored and numerical data.

8. The rule includes requirements for "unknown" causes of impairment. Listing is a regulatory trigger, and "unknown causes" is not a threshold justifying this step. Chemical, physical, and biological evidence of an actual pollutant should be sufficient for causes of impairment.

9. The rule defines all pesticide detection as "chemical wastes," even those that have FIFRA labels authorizing water treatment.

10. The rule defines silviculture activities as point sources. Congress clearly intended that silvicultural activities are nonpoint sources not appropriate for regulation through Federal permit requirements.

Rather than have these rules go forward, we urge the passage of S. 2417, the Water Pollution Program Enhancement Act of 2000 introduced by Senator Mike Crapo and cosponsored by you, Senator Smith. This bill will properly delay the EPA's proposed TMDL rule until the results of a National Academy of Sciences study of the technical aspects of the TMDL calculations, costs, and availability of alternative programs or mechanisms to reduce water quality impairments from point and nonpoint sources are known.

A key provision of the S. 2417 addresses the lack of adequate resources for States and individual landowners to implement effective nonpoint source programs. Current voluntary, incentive-based stewardship programs cover millions of acres of farmland and forestland, and are producing significant improvements in reducing nonsource pollution. Reaching clean water goals for nonpoint sources will require more funding for a water management program based on sound science, good data, and a strong Federal, State and local partnership.

Thank you for your attention to the above.

WHAT IS NEW HAMPSHIRE SAYING ABOUT EPA'S PROPOSED TMDL RULE CHANGE

"*Additional Federal regulation of [forestry] activities would only add an unnecessary regulatory burden to the forestry industry without any clear environmental benefit.*"—Harry Stewart, Director of the NH Department of Environmental Service's Water Division in a January 20, 2000 letter to the EPA Comment Clerk

"*The proposed rule is misguided. It creates an ominous and uncertain Federal regulation over silviculture and forest management . . . The regulation of these activities on private lands belongs with the States, not the Federal Government.*"—Phillip Bryce, Director of the NH Department of Resources and Economic Development's Division of Forest and Lands in a January 20, 2000 letter to the EPA Comment Clerk.

"*We believe that the proposed rule changes are onerous in scope and could force land out of productive forestry and into development. Forcing landowners to choose between healthy forests and selling for development is not good for New Hampshire's environment, or for the nation's.*"—Susan Slack, Policy Specialist for the Society for

the Protection of NH Forests in a January 19, 2000 letter to the EPA Comment Clerk.

"Regrettably we have a few people in our town and surrounding communities who do not believe a tree should ever be cut . . . These individuals will welcome your proposed rule, especially the opportunity to bring legal action against landowners for perceived violations. It would only take a couple of well-publicized cases not only to curtail logging on private lands, but also to end good and active stewardship on such lands. More private land now open to the public will likely be posted against trespassing."—Whitefield Tree Farmers, in a January 17, 2000 letter to the EPA Comment Clerk.

"Tree Farmers are good citizens and help provide the public with clean air, water, habitat for wildlife, recreation, and healthy forests for the future. Please do not make us land developers."—Hollis Tree Farmer in a January 17, 2000 letter to the EPA Comment Clerk

"I do not want to sell my land for development purposes but if I am regulated out of this retirement hobby (forestry) I may be forced to sell."—Pittsburg Tree Farmer in a January 14, 2000 letter to the EPA Comment Clerk.

"If you propose to add more bureaucracy and threats of liability to our property it would indeed make more sense to turn it over to a developer."—East Wakefield Tree Farmer in a January 12, 2000 letter to the EPA Comment Clerk

"Government should encourage forest stewardship rather than add unnecessary costs to it."—Auburn Tree Farmer in a January 17, 2000 letter to the EPA Comment Clerk

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WHY IS THE EPA'S PROPOSED RULE CHANGE A THREAT TO NEW HAMPSHIRE'S FORESTS

New Hampshire has a long history of responsible forest management that gives proper consideration to the impact of forest management practices on all aspects of the environment—including water quality. Now comes word from Washington, DC that we need their help in accomplishing what has been the norm in New Hampshire's forests for years. This Washington-knows-best approach threatens to undo years of cooperation between forest industry, private landowners, environmentalists, and State government. Moreover, if put into place these rules may very well cause the exact opposite result that those in Washington say they are striving for.

If these rules go into effect, New Hampshire landowners, loggers and foresters may face increased regulation and bureaucracy, including:

- In impaired watersheds, *landowners could be required to get Federal permits* in order to conduct just about any forest management activity. You may not be able to harvest, build roads, or prepare sites without first getting a Federal permit;
- Under this system, *landowners could be subject to nuisance suits* for permitted activities, and face potential fines; and
- If you apply for a permit, *activities on your land might have to stop* while your actions are analyzed for their impact on endangered species—the same kind of analysis that has delayed new timber sales on the White Mountain National Forest for over a year.

By increasing the cost and risks associated with good forest stewardship the EPA is creating an incentive for landowners, who otherwise would protect their land from development, to sell it.

The benefits landowners, loggers and foresters provide the public are well known: clean air, clean water, good habitat for wildlife, forest products, recreation for our neighbors and healthy forests for everyone. NHTOA is concerned that these cumbersome new rules proposed by EPA could force land out of productive forestry and into development.

Many other members of New Hampshire's conservation community have expressed their opposition to these proposed rules. The NH Department of Environmental Services, the Society for the Protection of NH Forests, the State Division of Forests and Lands, the entire congressional delegation and hundreds of loggers and landowners all have said that further Federal regulation of forestry is not necessary.

ALTERNATE COMMENTS FOR TMDL HEARING AT WMRHS

Now that we have heard what can happen under these rules, I would like to relate a case where it did happen in similar circumstances.

It involved Ben Lacy, a small apple juice producer in western Virginia. He had a NPDES permit, similar to what is being proposed here, to discharge wash water from his operation into a local stream. He thus had to do quarterly testing of his

effluent and file Quarterly Monitoring Reports with the State. One day, at a time his business was beset with disasters, staffers from the Virginia Department of Environmental Quality showed up for a routine audit of his reports. Because of his troubles, he told them to come back another time. Instead they returned with a platoon of FBI and police and seized all his records. They found that over several years he had reported a few incorrect numbers, mostly in error. The Virginia Attorney General wouldn't prosecute, nor would the area Federal grand jury indict, but the intrepid feds shopped around until they found one that would. As a result, he was taken to Federal court, convicted on 8 counts of "making false statements," and was facing 24 years in jail and 2 million dollars in fines. That is, until the judge in the case discovered that your government and mine had suborned testimony from the chief witness against him, a disgruntled former employee, and threw the case out. And at no time in any of this was there any question of illegal pollution or exceeding TMDL's. In fact, a local environmentalist group tried to testify on his behalf.

So all you loggers, farmers, and anyone else engaged in resource-based activities out there, make sure you have enough lawyers, accountants, consulting engineers, and EPA-certified testing labs at your disposal to deal with this latest disgorge of mindless regulatory bulimia, or you too, could be facing 24 years in jail and 2 million dollars in fines for trivial paperwork violations, also possibly based on suborned testimony by your own government.

STATEMENT OF COMMISSIONER STEPHEN TAYLOR, NEW HAMPSHIRE DEPARTMENT OF AGRICULTURE, MARKETS AND FOOD

The New Hampshire Department of Agriculture, Markets and Food supports additional study of proposed Environmental Protection Agency rules relative to Total Maximum Daily Load (TMDL) methodology for water quality protection. The draft rules fail to take into account the enormous amount of work and investment made by New Hampshire livestock and dairy producers working in concert with the USDA Natural Resources Conservation Service on abatement and prevention of point and nonpoint sources of pollution. Final rules must recognize the distinct differences in soils, hydrology, production practices and other salient factors between States and even between watersheds.

STATEMENT OF SARA PACKER, FORESTER, WAGNER FOREST MANAGEMENT

Hello, my name is Sara Packer, I'm a forester out of Northern Vermont with Wagner Forest Management, I'm an active member of the Society of American Foresters and serve on boards of the VT Sustainable Forestry Initiative and the VT Woodlands Association. I share with many others in this room, a strong commitment to the responsible management and protection of our natural resources and I do not believe expanded Federal regulation is necessary to meet the goal of achieving fishable and swimmable waters. Silvicultural activities have been exempt from a Federal permitting process since the original Clean Water Act and multiple State laws and programs along with various voluntary initiatives and educational programs have proven successful in addressing the protection of water quality on forest management operations.

Our ability to own and responsibly manage forestland is critical to the environmental and economic health of this region. Requiring landowners to go through the delay and expense of receiving a Federal discharge permit will undoubtedly threaten their ability to efficiently and profitably manage forestland and many landowners who have helped to maintain and protect our open space and working landscape, may choose to sell their land to developers. It is clear, that the permanent loss of this forestland poses a far greater environmental threat than any forest management activity ever could.

Thank You.

PROPOSED RULE CHANGES TO THE TMDL AND NPDES PERMIT PROGRAMS

THURSDAY, MAY 18, 2000

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON FISHERIES, WILDLIFE, AND WATER,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:04 a.m. in room 406, Dirksen Senate Office Building, Hon. Michael D. Crapo (chairman of the subcommittee) presiding.

S. 2417, WATER POLLUTION PROGRAM ENHANCEMENTS ACT OF 2000

Present: Senators Crapo, Boxer, Thomas, Wyden, Baucus [ex officio] and Smith [ex officio].

OPENING STATEMENT OF HON. MICHAEL D. CRAPO, U.S. SENATOR FROM THE STATE OF IDAHO

Senator CRAPO. The hearing will come to order.

Good morning and welcome. This is a hearing of the Environment and Public Works Committee, Subcommittee on Fisheries, Wildlife, and Water. Today, we will be hearing testimony on S. 2417, the Water Pollution Program Enhancements Act of 2000.

Senator Smith, the chairman of the committee and I introduced S. 2417 last month in response to both concerns with the current existing TMDL program and the proposal by the EPA to promulgate rules regarding the total maximum daily load and National Pollutant Discharge Elimination System, the NPDES programs under the Clean Water Act.

Since that draft rule was published last August, this is the eighth congressional hearing that has been conducted on the TMDL issue, and it is an exceedingly large and complex rule that impacts, if it were implemented, virtually every region of the country.

We have heard from Members of Congress who are stating that their constituencies are contacting them from the east to the west, and from the north to the south, and from across industry lines, from municipalities, local government entities and State governments, as well, with significant concerns about the rule, which is why this major attention has been brought to it.

In the previous hearings, we have found that the reasons for concern about the rule are broad and far reaching; not the least of which is the strong concern about the costs that would be imposed

and the fact that we still do not have a clear cost analysis that shows what the true costs are going to be.

There is serious concern about the lack of available and reliable data to manage the program that is being proposed. The concern that the rule, if implemented, would actually pull States away from programs that they are now undertaking, that are having some success, and hopefully will be able to be supported and strengthened in increasing their successes, but would deter the States from continuing on programs that they believe are going to be more effective than if they were diverted into this new rule proposal.

There are many other concerns that have been raised. But as a result of those concerns and the many others that we have heard, it became evident to us that something needed to be done.

In our discussions with the EPA, it became evident that the EPA continues to stick to its time line of trying to implement and finalize the rule by June 30. And as a result, we felt it would be necessary for Congress to act expediently.

S. 2417 would provide nearly a half-a-billion-dollar increase in funding for sections 106 and 319 activities, under the Clean Water Act, such as acquiring reliable data through site specific monitoring and implementing watershed management strategies aimed at improving water quality.

It would direct the EPA to contract with the National Academy of Sciences to obtain better science with respect to the TMDL program, and an in-depth analysis of the true cost of implementing the TMDL program.

It would create a watershed management pilot program in order to evaluate State programs that have been successful in improving water quality through incentives and innovative technologies.

And finally, the bill would provide an 18-month timeout, while the National Academy of Sciences is conducting its study, before the EPA could finalize its rules.

I think it is important to note that since the rules were published, the EPA has proposed some modifications to the regulations in response to the public comments that it has received and the congressional oversight.

At this point, I think that we are going to want to focus very carefully on these proposals, to see whether they justify any change in course. But the bottom line is that we need to find out exactly what it is that is being proposed and deal with it in a situation in which we are not under the kinds of time pressures that we currently face.

Finally, I would like to make a few remarks about the witnesses. I appreciate the time that you have all taken at this busy time of year to be here with us today. I would also like to note that not all of the witnesses to which the subcommittee extended invitations were able to make it here today.

There are views by stakeholders that are not adequately represented here today, for a variety of reasons. Most everyone who is familiar with this process is aware that the written testimony may be submitted for the record. And I hope that the groups that were not able to join us today will take the opportunity to submit testimony for the record.

With that, I have concluded my opening statement. We would turn first then to our Ranking Member, Senator Boxer.

Senator BOXER. Thank you so much, Mr. Chairman. I am very pleased to be your Ranking Member for the remainder of this Congress. As we all know, Senator Reid's duties as the Assistant Democratic Leader precluded him from really being as active on this subcommittee as he wanted to be. With all of your concurrence, and I really appreciate it, I have agreed to do this.

[The prepared statement of Senator Crapo follows:]

STATEMENT OF HON. MICHAEL D. CRAPO, U.S. SENATOR FROM THE STATE OF IDAHO

Good morning and welcome. This is a hearing of the Environment and Public Works Committee's Subcommittee on Fisheries, Wildlife, and Water. Today, we will be hearing testimony on S. 2417, The Water Pollution Program Enhancements Act of 2000.

Senator Smith, Chairman of the Environment and Public Works Committee, and I introduced S. 2417 last month in response to both concerns with the current existing TMDL program and the proposal by the Environmental Protection Agency (EPA) to promulgate rules regarding the total maximum daily load (TMDL) and National Pollutant Discharge Elimination System (NPDES) programs under the Clean Water Act.

Since the draft rule was published last August, this is the eighth congressional hearing that has been conducted on the TMDL issue. It is an exceedingly large and complex rule, and its impacts, if implemented, are extremely far reaching. This regulation would affect every region of the country, it would affect both rural and urban areas, public and private entities, and it would affect public and private lands. Furthermore, there are major economic consequences associated with this regulation.

One would think that a rulemaking effort of this magnitude, with these types of serious and widespread impacts, would be, for example, based on science. As a matter of fact, we have learned through the series of hearings conducted by both the Environment and Public Works Committee and this subcommittee, that what EPA is asking States to do is not based on science. There is little scientific basis that justifies the elements contained in the proposed rule and the General Accounting Office has testified before this subcommittee that the vast majority of States do not currently possess the reliable data necessary to even develop TMDLs.

With significant concern regarding the cost of implementing the proposed rules, it would be a logical step for EPA to have completed a comprehensive economic analysis. Although EPA asserts that the cost of implementing the rules would be minimal because the rulemaking is a clarification of existing regulations, the costs of the proposed rule have never been adequately examine. This seems like a particularly important undertaking in view of the overwhelming concerns with respect to costs, and some of the exorbitant estimates that have been provided by organizations outside the Federal Government.

It also seems as though EPA might have engaged the organizations that will be left to implement these regulations before rushing to finalize them. After having been the EPA's partners in implementing the Clean Water Act for nearly the last 30 years, EPA did not engage the States in a collaborative manner in developing these regulations.

Although EPA failed to accomplish these very important and common sense tasks, they cannot be left undone. S. 2417, the Crapo-Smith bill addresses many of the inadequacies of the proposed rules.

S. 2417 would: Provide nearly a half a billion dollar increase in funding for sections 106 and 319 activities under the Clean Water Act, such as acquiring reliable data through site-specific monitoring and implementing watershed management strategies aimed at improving water quality. Direct the EPA to contract with the National Academy of Sciences to obtain better science with respect to the TMDL program and in-depth analyses of the true cost of implementing the TMDL program. Create a watershed management pilot program in order to evaluate State programs that have been successful in improving water quality through incentives and innovative technologies. Finally, the bill would provide an 18-month time out while the National Academy of Sciences is conducting its study before EPA could finalize the rules.

I think it's important to note that since the rules where published, EPA has proposed some modifications to the regulations in response to the public comments re-

ceived and congressional oversight. At this point, I lack the details to draw any conclusions about these modifications, and am, frankly, skeptical about whether the modifications address the concerns that have been raised. But I look forward to hearing more of the details about EPA's proposed changes and the thoughts of our witnesses on those proposed changes.

Senator CRAPO. We welcome you.

OPENING STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. Thank you so much. I do look forward to working with you and all our colleagues.

I want to take a moment to simply say how important the quality of water is to my home State of California. In many ways, the quality of life in California depends on our water.

Water has even been likened to gold in my State, because it is in such short supply. And yet, it is so critical to recreation, to tourism, to health, to fish and wildlife, to agriculture, to industry, and of course, to the many millions of people who live there.

We have 34 million people in California. I like to remind you sometimes, if I look frazzled some days, you know why. And we are getting up to 50 million in the year 2025. That is the prediction.

So water is really very, very key. And for that reason, I do have a great respect for my Chair, here. But I do have serious concerns about S. 2417.

The bill would delay the implementation of the new EPA rule designed to clean up approximately 40 percent of the nation's waters that still do not meet water quality standards.

As you know, in 1972, Congress wrote the Clean Water Act. In the law, we set out an important goal, restoring the nation's rivers, streams, and lakes to make them once again fishable and swimmable. And it was, I believe, President Nixon, is that correct, who signed that law.

Now while we have made many strides toward accomplishing this goal, we are still falling far short. In California, over 25,000 stream, river, and coastal miles are not meeting water quality standards.

It was for that reason that I, for one, was very pleased when the EPA proposed to strengthen the Clean Water Act total maximum daily load program. This rule would help us tackle the single most significant water pollution problem still facing us as a nation, polluted runoff.

While the rule is not perfect, and in fact, I believe it could be strengthened, in a few respects, it does represent an important step forward and a step that is long overdue.

It is important to note that EPA's authority to issue the rule, which has been a subject of dispute in this committee, was recently reaffirmed by a Federal District Court in California. That court held that EPA had the authority to regulate the sources of polluted runoff under this program.

S. 2417, however, would stop the EPA from moving forward with this rule. The bill is based on the premise that we need more time to study the cause of the nation's remaining water quality programs. But we know already that our failure to control polluted runoff is the basic cause of our failure to clean up our waters.

Further, EPA's rule gives States 15 years to develop the water pollution limits that are called for in the Clean Water Act. So even if a State needs more specific information, they have been given an extremely long period of time to obtain it.

Now I do understand that EPA's proposal has been reviewed as controversial, and I do respect my colleagues who do not agree with it. But it really is important to remember that this proposal was included in the original 1972 law. And over the years, although EPA has made several half-hearted efforts to implement it, this new rule reflects, I believe, the first genuine attempt to breathe life into the program.

So for the Californians who have waited 28 years to see EPA implement this program, I think the time has come to move forward.

I would also like to note that the State of California has supported EPA's rule. In fact, the State filed a friend-of-the-court brief on the side of EPA in Federal litigation over this program.

For that reason, I was disappointed that the only witness from my State here today is generally opposed to the rule and supportive of S. 2417. So while I welcome this witness, we did try to work with your staff to include one that represented the views of our State.

My State takes the view that water is critical to all of us, that all of us need to lend a hand in solving our remaining water quality programs, if we are to realize the Clean Water Act's goals.

So I do look forward to hearing from my colleagues on both sides of the aisle and from the witnesses. Again, Mr. Chairman, it is a delight to work with you.

Senator CRAPO. Thank you, Senator Boxer.

Senator Thomas.

OPENING STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM THE STATE OF WYOMING

Mr. THOMAS. Thank you, sir.

I appreciate the hearing. As you said, we have had a number of hearings on this matter, but hopefully we are getting down to it.

I think we should have hearings. I consider it sort of an unjust burden on our nation's landowners and communities. All of us agree on water quality. I do not think you can justify everything that is done because you say I like water quality. We all like water quality.

But what we have here, of course, is a problem with our States. In Wyoming, conservation districts, landowners, and the Department of Environmental Quality have long questioned the availability of information, of course, to implement the actions that are called for.

Earlier this year, GAO validated their concerns. GAO found the States overwhelmingly lacked the data to both identify non-point source and develop non-point source TMDLs.

Furthermore, GAO indicates that most all States cited the need for additional funding and staffing. Most States also cited the need for additional methods and technical assistance to analyze complex problems. So there are some problems out there.

The court decision that was mentioned here also had something to do with the States having jurisdiction. So I do not think that is quite as clear as my friend from California would suggest.

I am pretty upset with EPA that, despite the thousands of comments, it is going to go ahead with this rule on June 30. It has indicated they are going to change some of it, but the regional people are putting it out as the way it was. I think you need to explain that, Mr. Fox, as we go by. I think it is a little rushed for that.

I am a cosponsor of this bill. I think it is a bill that has merit. We have already described what it is. Since the passage of the Clear Water bill, we have spent $80 billion on point source reduction, and only $2 billion on non-point sources.

There is not the kind of material that is there to allow people to move forward with this rule. So I think we are going to have lots of examples from the States today. And I hope that we can come to something that is sensible.

Thank you, sir.

[The prepared statement of Senator Thomas follows:]

STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM THE STATE OF WYOMING

Thank you Mr. Chairman for holding today's hearing.

S. 2417, the "Water Pollution Program Enhancements Act of 2000" addresses what I consider an unjustified attack on our nation's landowners and communities. The Administration's proposed rule regarding total Maximum Daily Loads (TMDLs), as part of the broader Clean Water Action Plan, is an initiative I have followed closely over the last 2 years.

In Wyoming, our Conservation Districts, landowners and Department of Environmental Quality have long questioned the availability of data and resources necessary in order to implement the various actions called for under the Clean Water Action Plan. Earlier this year, the General Accounting Office validated their concerns. The GAO found that States, overwhelmingly, lack the data to both identify non-point sources and develop non-point source TMDL's. Furthermore, the GAO report indicates that almost all States cited a need for additional funding and staff. "Most States also cited the need for additional analytical methods and technical assistance to analyze complex pollution problems and develop TMDLs."

Mr. Chairman, I am dismayed that the EPA, despite the thousands of comments submitted on the proposed rule and the inadequacies found by the GAO, remains adamant that the TMDL rule will be final by June 30th. it is clearly a rushed proposal—and unfortunate that this Administration continues to push its environmental agenda, no matter the cost.

I cosponsored S. 2417 because it provides a much needed balance to the EPA's approach:

- First, it requires the National Academy of Sciences to report on the quality of science used to develop and implement TMDLs; the costs associated with implementing TMDLs; and the availability of alternative mechanisms to reduce pollutants from both point and non-point sources.

It seems to me that prior to implementing a rule of such magnitude, we should already have this information.

- Second, the bill authorizes increased appropriations for States to address data quality problems and to enhance non-point pollution reduction efforts.

Since passage of the Clean Water Act, the Federal Government has directed $80 billion toward point source reduction efforts—non-point sources have received only $2 billion.

Lastly, while I support increasing Federal assistance to the States for non-point source programs, I strongly believe that Congress must be explicit in how those funds are to be made available to the States. I know each of our States can provide examples of where they were required, by the EPA, not Congress, to undertake or meet additional requirements before receiving funds. It is time to stop the EPA's attempts to bypass Congressional intent.

Thank you Mr. Chairman for your leadership on this issue.

Senator CRAPO. Thank you.

Senator Baucus.

OPENING STATEMENT OF HON. MAX BAUCUS,
U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Thank you very much, Mr. Chairman.

This is an important hearing. It is a concept that is here, that we have to deal with and not duck. We should deal with it very directly and honestly.

Since 1972, when the Clean Water Act became law, I think it is clear that we have made a lot of progress in cleaning up our water. I can remember, and a lot of us can, the old Cuyahoga River burning.

And I can remember, Mr. Chairman, the Potomac River. You could not get near it. It just smelled so bad. You would not dare fall into it. I am being serious. It was not a pretty sight.

There are lots of examples like that. Over the years, this country has done a very good job to make our water cleaner than it was.

It is incredible what this country has done, even beginning back in 1972, especially with respect to point sources; The stuff that comes out of the municipal plants and private company plants and so forth; We have done a very good job.

I think it is fair to say, however, that we still are far from reaching our goal—clean rivers, lakes, streams, and coastlines. All of us can think of lots of examples where we have not met that goal.

And this is where TMDLs come in. They provide a targeted, flexible approach to pollution problems in an individual watershed.

And it is much like the State implementation plans under the Clean Air Act. That is, it is an umbrella approach, in addition to addressing each of the finite sources, as we do in the Clean Air.

In addition, under the Clean Air Act, we have the State Implementation Plans and the ambient standards. And it is necessary. That is the only way we can honestly work in an effective way to make our air cleaner.

The same concept applies here, because it is a fluid. Air and water are fluids, just different kinds. It is a little bit more difficult, frankly, to deal with the problem with water, because there are more sources of pollution. Whether they come from underground into the stream or runoff, or whether it is a point source, or whatever else it might come from. But making it more difficult does not mean we should duck it.

EPA's proposed rule, I think, makes some improvements. In the heart of the rule, it clarifies the TMDL program, which requires implementation plans to go along with the law. I think it is important to remind ourselves that back in 1972, the States were required to have programs. Here it is 2000, and it has not happened.

Now there may be good reasons why it has not happened. But again, this is an issue that has been around a long time. It is not something that is new and just recently sprung upon us.

The rule also gives States more time to complete their lists and more time for allocations and plans. I think, frankly, that is a pretty good tradeoff.

But there still are problems with the EPA rule. I am concerned, in particular, about the silviculture provisions, which I think take a long and winding path that may not get us to the right destination.

Furthermore, there are many other groups and, in fact, most groups from all sides have criticized the proposed rule; obviously, for different reasons. The environmental community does not like it. Most of them do not like it, in fact. It is under attack, as I said, virtually from all sides.

This brings me to your bill, Mr. Chairman. I very much agree that we should give the States more money to complete TMDL. That is clear. I think we all agree on that point.

I am a little less certain, though, about the pilot projects, and also a little less certain about the National Academy of Science's study.

And the reason is because, as I understand it, EPA convened a group of stakeholders who worked on TMDLs for at least 2 years, submitting detailed conclusions. We have studied this thing. I am not sure what another study is going to add.

Then there is section 6 in the bill, which effectively delays any new TMDL rule for 18 months. Mark me down as skeptical. Even if the NAS study provides useful information, it is my judgment that it is unlikely to make our decisions here any easier. It will just put them off.

Before falling back to delay, I would like to know whether it's possible to fix the problems with the rule, whether we can work with EPA here on this committee to make the necessary changes in order to have a strong TMDL program that has broad support.

That is the whole key here, how to build support for a reasonable, good, common sense TMDL program, because the concept is accurate. The concept is right. I do not think anybody disputes the concept. It is just how we do it.

Clean water, as an issue, is not going to go away. It is going to be a greater and greater and greater problem in this country as the population grows. The Senator from California mentioned the problems of growth in California.

I might add, I was in Atlanta not many weeks ago. And there was a key problem that everybody raised in Atlanta, everybody. What is the problem with Atlanta? They said congestion and water. Atlanta has a huge water problem. It just needs more clear water.

The TMDL concept will also take a little of the pressure off the point sources, the identities who have more pressure put on them to clean up the water. So the non-point sources do degrade the water. There is no doubt about it.

Sure, it is much more difficult to try to deal with. There is no doubt about that, either. But it really is not fair to put all the burden on the point source folks, when there are some non-point source people who are also causing degradation of water.

And the umbrella concept, I think, is here. You cannot duck this issue. Let us stand up and do what we are elected to do.

It is not going to be easy. But I just urge us to do it in a cooperative, non-partisan way. We can open up our ears, and kind of sit down like good honest men and women, and just get this thing done.

Thank you.

Senator CRAPO. Thank you.

The chairman of our committee, Senator Smith.

OPENING STATEMENT OF HON. BOB SMITH,
U.S. SENATOR FROM THE STATE OF NEW HAMPSHIRE

Senator SMITH. Thank you very much, Mr. Chairman, and thank you for holding this hearing on this important bill. Thank you for introducing it. I am pleased to be a cosponsor.

This legislation addresses numerous concerns with the proposed regulation on the total maximum daily loads. Since EPA has released the proposed rule on TMDL, there have been a lot of things that have happened.

I think it should give a clear signal that something is wrong with the rule and with the proposal to implement it. We have some 35,000 comments, about 80 percent of which are negative, to the proposed rule change. Thousands of people have attended town meetings all across the country.

There have been, I think, seven congressional hearings that have taken place; three in this committee. There was one that Mr. Fox was at in New Hampshire. We are planning another one in another location, shortly.

I want to say, Mr. Fox, although at the hearing in New Hampshire, most of the people there, with a couple of exceptions, were against your position, you were respectful, and you were firm in your presentation.

I respect you for that. We do not agree, but you handled yourself very well. And a lot of people indicated that, that I talked to, even though they disagreed with you.

And I think for the most part, the people up in northern New Hampshire were respectful to you, with one or two exceptions, which was not right, but it happened.

But you know, we have bipartisan support in both legislative bodies in this. The Environmental Protection Agency has admitted some faults in the drafting, that the rule was not clear. The Agriculture Department had concerns with it, which I know the chairman is planning to get into in a few moments.

GAO released a report outlining a substantial lack of water quality, due to insufficient economic and personnel resources. And, yet, in spite of all this, we stay on this fast track of an arbitrary June 30 deadline.

And I think I have made my positions pretty clear, in terms of what my objectives are as the chairman of this committee. I support the Clean Water Act. I recognize fully what it has done to clean up the water supplies, whether it be the waterways around this Nation, including the Potomac River.

But you know, I would have to say to you, for centuries and centuries here in America, we have farmed and we have practiced forestry. Now in approximately 45 days, we are going to implement a rule.

And it is as if we do not implement it by June 30, the whole world is going to come to an end. All of the water is going to be polluted. We are not going to be able to get any more water cleaned. We hear all these horror stories.

But the truth is, this is the wrong approach, with all due respect. There are many millions of people out there in America who farm.

And yes, there are a lot of large logging industry people out there, and there are also a lot of small woodlot owners, who prac-

tice good practices, good forestry, good agriculture, who take care of the land. They live on it. They cannot live without. That is very important to them. They hunt on it. They fish on it. They hike on it. They farm on it. They forest on it. They cut fire wood. They protect that land.

They are all over America. They are in New Hampshire. They are in Arkansas. They are in Montana. They are in Idaho. They are in California.

I just do not understand why we would want to create this confrontation when, in fact, I know, having talked to many of these people, and I know Mr. Fox, you met with several, but at least one in particular who I know, a woodlot owner in New Hampshire, who wants to work with the EPA in not a confrontational way, but a cooperative way to work together. What are the things that you feel we need to do, to do a better job? If you have information tell us, because we want to do a better job.

But they do not want to be put on the other end of some permit and some regulation that is going to cause class actions suits or some other lawsuits or stakeholder suits to keep them from doing what they need to do on their land to survive.

We have 22 co-sponsors on this legislation. And Senator Crapo has gone into the details of what it does. I will not repeat that.

But let me just conclude by saying, you know, as the chairman of the committee for the Clean Water Act, I believe strongly that we have to move this legislation.

And I do not like the fact that we have to do it, because I think this is a reactionary policy. I do not think that is good environmental policy. I think good environmental policy is to move forward in a proactive sense, and not a reactive sense.

We did have to react to terrible problems in the 1960's, 1970's, and 1980's, when we realized what we had done, and we passed these laws.

But now, things are changing. There is a new paradigm out there. People want to help, want to be cooperative, want to work together to not create more problems. And this flies right in the face of everything we need to do to stop creating more environmental disasters.

We have got 200 organizations that have written to me, personally, and I am sure other Senators have received them, in support of this legislation, ranging from State and national agriculture, forestry associations, U.S. Chambers, and National Association of Conservation Districts. That is just to name a few.

I received a letter this week from the Governors of Wyoming, Idaho, Colorado, Nebraska, Montana, Nevada, and Arizona supporting the legislation, again out of desperation, knowing the impact that this is going to have.

And it is going to have a negative impact, because people are going to wind up being in court. They are going to be thrown off their land. We are going to have parking lots. That is what we are going to have in a lot of areas of this country, as a result of this rule, if it is implemented.

That is not good. I would rather have a clear cut than a parking lot. The worst clear cut is better than a parking lot. And we are not talking about bad clear cutting, for the most part.

So with all due respect, and I have indicated this to you privately and publicly, Mr. Fox, I think you are making a terrible mistake doing this.

It is everything that we hear bad about the EPA personified, right up there, so everybody can see it; that you are the bad guys from Washington. You are coming in there, you are pushing, and you are aggressive. And you are not giving the good stewards of the land the opportunity to work together.

I deeply, deeply resent it. It is exactly the opposite of what we are trying to accomplish here on the committee. I hope reason will prevail and that you will understand that again, after centuries of practicing forestry and agriculture, there is no way that in the next 45 days, if we do not pass this rule, that something terrible is going to happen. That makes no sense.

I urge you, and I do not know whether this legislation will pass or not. I mean, I know what the political pressures are here, and I know what the political pressures are on the other side of the aisle. But I can tell you one thing, good environmental politics is not always good environmental policy. As a matter of fact, sometimes it is bad environmental policy.

I am sorry that we are at this point, and I hope that reason will prevail before it is over. I am not very optimistic about that, but I hope that reason will prevail.

Thank you, Mr. Chairman.

[The prepared statement of Senator Smith follows:]

STATEMENT OF HON. BOB SMITH, U.S. SENATOR FROM THE STATE OF NEW HAMPSHIRE

Good Morning. I want to thank Senator Crapo for holding this legislative hearing on a very important bill he and I introduced on April 13, 2000, S. 2417 the "Water Pollution Program Enhancement Act of 2000." This legislation addresses numerous concerns with the existing and proposed regulation on Total Maximum Daily Loads.

Since EPA released the proposed rule on total Maximum Daily Loads last August:

- 30,000 comments have been filed;
- town hall meetings across the U.S. have drawn thousands of people concerned about the rule;
- seven Congressional hearings have taken place (3 in this committee);
- bipartisan legislation on this issue has been introduced in both legislative bodies;
- the Environmental Protection Agency has admitted failure in drafting a clear rule; and
- GAO released a report outlining a substantial lack of water quality data due to insufficient economic and personnel resources; and

And yet, in spite of all of this, EPA apparently remains committed to finalizing this rule on June 30th.

Organizations representing a broad range of perspectives, including the environmental community have asked for a "time out."

Senator Crapo and I not only agree that a time out is needed but also that many other concerns need to be addressed. We introduced this legislation along with 22 other co-sponsors.

S. 2417 addresses three major issues that have been clearly outlined in Congressional hearings before this committee.

First, the States are in great need of increased funding so they can implement nonpoint source programs, conduct monitoring to develop scientifically based water quality programs, issue permits, and list waters under existing requirements.

Second, there are a lot of unanswered questions about the cost and scientific basis underlying the implementation of TMDLs. We also need a better understanding of alternative programs or mechanisms that exist at the State level that may be more effective to accomplish the same goals of the TMDL program. These questions need to be answered before we mandate more requirements on the States and private sec-

tor. This legislation asks the National Academy of Science (NAS) to answer these questions.

Third, we need to take a time out. Before we significantly expand the existing TMDL regulatory program we should have answers to questions like:

- Do States have the data they need to implement the proposed rule?
- What will the rule cost?
- Is this rule the best, most effective way of targeting resources to meet our State water quality goals.

To proceed without these answers is irresponsible.

As the Chairman of the authorizing committee for the Clean Water Act I will do everything I can to move this legislation through the committee quickly in hopes of having it signed into law. Over 200 organizations have written to me in support of this legislation, ranging from State and national agriculture and forestry associations, the U.S. Chamber of Commerce and the National Association of Conservation Districts to name just a few. I received a letter earlier this week from the Governors of Wyoming, Idaho, Colorado, Nebraska, Montana, Nevada and Arizona supporting this legislation.

In closing, I'd like to emphasize one point. I know there are critics of our bill who will claim that we aren't serious about cleaning up our nation's rivers, streams and lakes. They are wrong. I strongly support the goals of the Clean Water Act and, as Chairman of this committee, I am committed to seeking the best programs to achieve fishable and swimmable waters. I don't believe, however, that EPA's proposed rule is the answer.

I look forward to hearing from the witnesses on this very important issue. Thank you.

Senator CRAPO. Thank you.

Senator Wyden.

OPENING STATEMENT OF HON. RON WYDEN,
U.S. SENATOR FROM THE STATE OF OREGON

Senator WYDEN. Thank you, Mr. Chairman. I have listened to five opening statements now, this morning. And I find myself in agreement with each of the speakers on several of the points that they have made.

Senator BAUCUS. That is why you are successful, Senator.

Senator WYDEN. That is arguable.

[Laughter.]

Senator WYDEN. But I think we can find common ground on this committee, and that is what I would like to do.

As you know, Mr. Chairman, in our part of the world, we have gotten hundreds and hundreds of letters, each of us in the Pacific Northwest. And almost all of them, in effect, say, and I think Senators Boxer and Baucus said it very well, "We want to clean up the Nation's waters." And to do it, we have got to be bolder and more effective in dealing with the nonpoint sources of pollution.

At the same time, what we have heard from our constituents is that they want to make the machinery of government, the wheels of government, more user-friendly. They want to make a management process that is workable.

I think we know that the end gain, to a great extent, involves taking a watershed approach, a kind of holistic approach, where we look at all the pollution sources, point and nonpoint, within that watershed.

So what I am going to try to do, Mr. Chairman, and you and I have talked, I know, a number of times already, is to try to develop a third path alternative that would build on the good things in your bill.

The two that I am particularly attracted to are the fact that you all are willing to fund more generously the best management prac-

tices program to deal with non-point pollution. I appreciate the fact that you are willing to, on an ongoing basis, review the science associated with the TMDL program. And I think that is something that every member of the committee can be for.

I think if we can pick a third path that incorporates some of the additional principles that I think are important to make this system more responsive and more flexible, and particularly find a way to link the clean water requirements with the ESA requirements, if we do that we will save folks time and money while we cleanup our treasured waters.

I think we can get there. I think we can get a bill that will receive widespread bipartisan support in this committee, and go forward on the floor. The alternative, of course, is more gridlock.

What we have sought to do in our part of the world, and as westerners, we are confronted with these natural resources issues all the time, and I suspect for Bob, it is the same way in New England, we try to bring people together and find common ground. I think we can do it.

I will offer a kind of third path legislative proposal, between S. 2417 and building on the good features that you all have, and the EPA proposal, so that we can try to find common ground. As you know, we have talked about that. I intend to work very closely with you and Senators Boxer and Baucus in this regard.

Thank you for the chance to participate. In some sense, I benefit from being able to go last, because all my colleagues have spoken and, frankly, have each made points that I find myself in agreement with. It makes me feel more optimistic that we can get a common ground approach here and address this issue.

I thank you.

Senator CRAPO. Thank you, Senator Wyden.

As you know from our discussions, I agree with your approach on trying to address both the Endangered Species Act and the Clean Water Act, as we try to find an efficient way to move forward. I look forward to working with you on that.

The problem we face with this legislation is the June 30 deadline that we have to deal with. So I look forward to your support, if we can get it, in addressing that problem, in the short term, and working in the longer ranges for the solutions you have identified.

Senator WYDEN. Without continuing, I would only be concerned that if we take action by June 30, that further polarizes the debate on this issue, which I suspect we would do.

If we just set aside the EPA rule and did not offer a comprehensive alternative, I think then we would undermine the very important comments that you and Senator Smith and others have made about making the machinery of government more user-friendly.

So I am prepared to work to address this by June 30. I think that is important to have that date. But I hope we will not take action that will further polarize the debate that has already generated these hundreds and hundreds of letters, and makes it tough for us to solve that.

Senator SMITH. Mr. Chairman.

Senator CRAPO. Yes.

Senator SMITH. I appreciate the comments of the Senator from Oregon. Unfortunately, though, I have just been told that your

party has objected now to us meeting. They are saying now that they are going to impose a 2-hour rule, which means that at 11 o'clock we have to shut down. And here we sit here talking about bipartisanship and working together.

I mean, the issues on the Senate floor right now are totally unrelated to this. So here we are. We are stuck, unless something changes.

It is just very frustrating. We talk, and yet, when it comes to action, politics takes precedence. That is exactly what is happening here, and everybody knows it. It has nothing to do with this.

Why should you shut down committees where witnesses will be inconvenienced, and cannot testify now because we will have to shut down at 11 o'clock, because of some partisan wrangling on the floor on an issue that is totally unrelated to this? So maybe somebody can explain to me how that is good bipartisanship.

Senator BOXER. Let me just comment on that, if I might, Mr. Chairman.

Senator SMITH. Yes, I would like to hear your answer on that.

Senator CRAPO. Go ahead, Senator Boxer.

Senator BOXER. Yes, I will be very happy to.

There is a rule in the Senate that there can be a disagreement that does, in fact, say that the committees cannot meet.

I do not know if you were on the floor, Senator, when Senators Lott and Daschle had a very deep and disturbing, I think, debate about where we are in this U.S. Senate, in terms of our ability to work together. It is a very important issue.

But to say that the fact that the Democrats exercise our rights as the minority is somehow wrong, I think, then you would have to change the rules of the Senate. We do have that capacity.

I think we do have some problems. I do not know exactly what prompted that call to be made, not to agree. But it may well be related to the fact that, as you know, yesterday, the majority party precluded us from offering amendments to Appropriations bills that are not construed as being completely germane. This is the first time that has happened in 16 years.

Our Democratic leader felt, first of all, that he had an agreement to vote on the two gun issues. Then suddenly, we almost lost that opportunity. And the price we had to pay for a vote on that was to allow that issue to be voted on. So there are some disturbing matters.

But I just want to pick up where Senator Wyden left off here for a second. I honestly do believe we can work in a bipartisan way on this issue. I really, really do.

Short of saying, let us just throw this rule out, I mean, I think what you heard, Mr. Chairman, are some people reaching out here to work together. Just because we cannot have the committee meet past 11 o'clock does not mean that we cannot talk to each other on this matter.

So I would hope that we can pick up on Senator Wyden's point. And when I heard Senator Baucus, you know, he also expressed things that he agreed with.

So it is true that we are having a real serious and difficult disagreement on the rights of the minority in this Senate. But it

should not preclude us perhaps from setting an example, because we do work together.

Senator BAUCUS. Mr. Chairman, we have 20 minutes. I suggest we listen to the witnesses.

Senator CRAPO. I think that I have been discussing this with the chairman. We face a problem now in that we have seven witnesses who are here to testify. And if we allow any of them to go and present their case before others are allowed to present theirs, and not allow others to present their case, it is an extremely inappropriate way to proceed, I think.

I think that we may just simply not take testimony, and spend the next 20 minutes, if we would like to, to discuss this issue further among ourselves.

Senator BAUCUS. Or you can have each of them speak for 3 minutes.

Senator CRAPO. Well, we could, but I am afraid that that would probably be less productive, I think. I realize this is a serious imposition on the witnesses, from all perspectives, who have changed their schedules to come here today. But I think that giving each witness 3 minutes would probably stop any of them from being able to present any part of their case effectively.

Senator BAUCUS. I agree.

Senator CRAPO. So at this point, I am not going to recess the committee, because I am going to stay here, if any of you would like to spend the next 20 minutes talking about it. But I will excuse all of the witnesses and give you our deepest apologies. We did not expect this.

Senator WYDEN. Mr. Chairman.

Senator CRAPO. Yes.

Senator WYDEN. If we could spend a few minutes talking, because one of the things that I think there was bipartisan support for was giving the States a really key role.

Senator CRAPO. All right, let me excuse the witnesses, first then, and then let us do that.

Senator WYDEN. OK.

Senator CRAPO. The witnesses will be excused. And, again, you have our apologies for what has happened. I think every one of us, for our own reasons, are very unhappy with the developments. We do give you our deepest apologies, but we cannot proceed. Thank you.

I would indicate that all witnesses still do have the right and most have already submitted written testimony. That testimony has been reviewed and will be reviewed.

Senator BAUCUS. Mr. Chairman.

Senator CRAPO. Senator Baucus.

Senator BAUCUS. Mr. Chairman, I would just like to address the problem we have in the Senate now, of excessive partisanship. And I might say, it is the worst I have seen it in the 22 years I have been in the Senate.

We are here, at this point, forced to cancel this hearing at 11 o'clock, because of an action that the chairman of the Judiciary Committee just made; namely, he said there would be no more hearings on judges until after the recess, and he promised there would be hearings.

I want to address that in two points. First of all, I think it is irresponsible for the Congress not to have hearings on and process the judicial nominees that the President of the United States submits to the Congress.

Under the Constitution, the President submits the judicial nominees to the Senate, and the Senate has the right to advise and consent. Clearly, the Senate should not reject the President's nominees and should not hold up justice in America, unless there are very strong, compelling reasons not to confirm a particular nominee. At the very least, there should be hearings. And at the very least, we should move ahead and process these nominees.

We hear about judicial backlog. We hear about vacancies in the courts. And I think it is very irresponsible for the U.S. Senate not to have hearings and not process these.

Let me just finish. I have the floor here, Mr. Chairman.

We have confirmed only seven judges this year, only seven.

Senator CRAPO. Senator Baucus, would it be possible——

Senator BAUCUS. Let me finish. I have the floor, Mr. Chairman. I will relinquish it in a second.

So it is wrong. It is just wrong. And the second reason we are here is because of, what I would call, a breach of faith. We had an understanding, the Democratic side's understanding, that we would have hearings on and we would process judges on the floor of the Senate.

Now, lo and behold, the chairman of the Judiciary Committee says, no more hearings until June. What are we supposed to do, the majority party, just kind of roll over and play dead?

No, we are Senators. We are elected to fulfill our responsibilities and to do the best we can as Senators, in response to our constituents.

So all I am saying is, and I do not want to be partisan about this, but I just want to give you the facts. Those are the facts. Those are just the straight facts.

And it behooves all of us on both sides of the aisle to frankly figure out some way to get together here, so that we do not have these problems nearly to this degree.

And I might say, Mr. Chairman, leadership starts at the top. I am not referring to you, Mr. Chairman. You have done a great job here. I am talking about the floor. Leadership starts at the top on both sides.

And my judgment is that the way we get rid of the partisanship, frankly, is for the leadership to sit down and realize that the politics is the best policy. We do not have that now. It is regrettable, and that is why we are going to have to close up here at 11 o'clock.

Senator CRAPO. Well, Senator, I appreciate your comments. And in an effort not to get into a partisan battle, I would simply say that I do not know the reasons for the chairman of the Judiciary Committee's actions.

I do know the chairman of the Judiciary Committee. He is a very reasonable and decent man. And if he took the course that he is described to have taken here, I believe he did so for some reason.

However, there are points that each of us could make in terms of the difficulties that we are facing on the floor of the Senate, today. And I do not believe that it would be productive for us to

get into that. You have made your points. I am not going to engage you on it. There are points that I could make.

What I would like to do is to spend the 15 minutes that we have here to talk about the proposals for us to find a bipartisan way for us to work together on the issues before this committee today.

In that context, I would simply say to the Senator from Oregon that I very much look forward to working on and agree with him that I believe we can build a bipartisan path forward to achieve some of the objectives that we have all talked about here, including the expanded objectives of addressing both the Endangered Species Act and the Clean Water Act in a way that will bring a lot more common sense to the administration of both statutes.

The only problem that I see is that we have now 5 to 6 weeks. And if we could get that comprehensive solution put together in 5 to 6 weeks and move it, I would do it. And I will work with you, as you know we have, to try to get that done.

But failing in that, we are faced with a deadline that has been imposed on us by the EPA of action that will be taken. And I would like to know how we could get past that problem.

Senator BAUCUS. Mr. Chairman, let me give you some suggestions.

Senator CRAPO. Senator, I let you speak. Let me speak, please.

I would like to know how we can get past that problem. And it is not right to simply say that it is this committee or this Congress that is creating the deadline.

Right now, the EPA is going to do things its way. The issues are going to be solved the EPA's way in the proposed rule or whatever modifications they may make to it. And the answers and the solutions are going to be made essentially law under the regulation in 5 to 6 weeks.

So if we are going to build this compromise, and if we cannot do it within 6 weeks, then we need to find some way to have a breather for us to not then have to be put into a position of dealing with it after the issue has been resolved by a regulatory agency. That is the question that I would like to see us find a path around.

The Senator from Oregon had asked to comment.

Senator WYDEN. I was interested, but maybe I ought to let my Ranking Member speak. Then if I could have a minute after that, that would be great.

Senator CRAPO. Senator Baucus.

Senator BAUCUS. Mr. Chairman, I was only going to suggest that we pursue a course that we pursued under the Endangered Species Act.

As you all recall, Senator Kempthorne and I and Senator Reid and Senator Chafee sat down and just rolled up our sleeves. We worked out a very good compromise of reform to the Endangered Species Act. It took hard work, but we just sat around, and we just did it.

I suggest that you might consider the same kind of process with respect to TMDL, or ESA, or whatever issues that we have to resolve in the remaining months of this year.

It worked then. It did work with ESA reform. It was passed out at committee, if you recall. It went to the floor, and it frankly got

hung up on the floor by another Senator for reasons which I just disagree with.

Senator CRAPO. But it did not work in 6 weeks. That is the problem.

Senator BAUCUS. Well, I am saying that we sit down, and I think there is a good chance that in good faith, with the appropriate Senators, we may not get a total solution in 6 weeks.

But we will get an approach on how to deal with the problem, certainly within 6 weeks, and maybe an agreement about what to do with the problem overall, knowing we are not going to have a TMDL rule in 6 weeks. That is not going to happen. At least, I do not think it is going to happen.

But I do think it is very likely that in good faith that we could come up with an approach to deal with TMDL within 6 weeks.

Senator CRAPO. Senator Wyden.

Senator WYDEN. Thank you, Mr. Chairman. I think Max is on to something. Let me maybe just expand on it, because I was going to suggest going at it this way.

If we did, for example, nothing other than to put our staffs, starting today, on essentially the two or three kind of key issues, the Baucus staff, the Boxer staff, you two as the leadership of the committee, and as you know, I have been interested, and would like to participate, and we put our staff on what I think are essentially the three sort of key issues.

The first would be the role of the States. As you know, the USDA and EPA put out a program that tried to expand the role of the States and the landowners.

There was a good reaction to that. People said they are trying. There are an awful lot of details about what the role of the States would be. And our staffs could start working on that now. I think this is an area where we could get some common ground.

The second area that our staffs could start working on right away, it seems to me, is the flexibility, once you have the high environmental standards. We want to make sure we have got good environmental standards to deal with non-point pollution. The question for the private landowners is the flexibility in terms of how you meet those standards. And I think our staffs could work on that.

And the third area for us to begin with the staffs right away would be the question of can you streamline the process with Clean Water and ESA linked together?

I would just wrap up by way of saying, if we spend the next 6 weeks, along the lines of what Max is talking about with the staffs and the Senators, I think we would have a pretty good shot at finding common ground here.

And if we cannot, I think it is pretty clear that folks on your side of the aisle have the votes to pass pretty much what you would like, and so be it. That is the nature of the process. But let us at least try for the 6 weeks, to try to get this common ground.

And certainly, those three issues, having been to all of your hearings and certainly finding a lot to agree with in what you and Bob have said, strike me as the keys. And if my colleagues think there are others, so be it. Then let us get the staffs to work, and see if we can do it.

Senator SMITH. I think the main difference, and there are some agreements, but I think the main difference, as I understand it, is that you folks want the rule implemented on June 30. You do not want to delay the implementation of the rule. And that is a pretty hard bridge to cross.

That is the main concern, as I understand it. Unless you pass legislation such as this or some other legislation that prevents that from happening, I do not know how you get anywhere. Because once the rule is implemented, then the time pressure is off, and it is just going to drift on.

Senator BAUCUS. Mr. Chairman, it is my experience that there are many ways to skin a cat.

Senator SMITH. If you can catch the cat.

Senator BAUCUS. One side says black and the other side says white. Generally, there is a grey in there that is agreeable to most folks. It may not be everything, but it is agreeable, remembering that perfection is the enemy of the good.

Senator CRAPO. Well, as the Senator from Oregon knows, I am already working with him, and would be glad to increase our efforts to work together to find this common ground and build a path forward.

To me, as the chairman of the full committee has indicated, the rub is that if we do not get that path forward identified and identify a bipartisan solution that can become enacted into law within 6 weeks, then the entire effort is basically moot, at least until some action can be done to undo what the EPA is proposing to do on June 30.

And as Senator Smith indicated in his opening statement, this is not a course of action that we chose to take. We have both asked the EPA, on multiple occasions, to just put back the deadline that they have imposed on themselves, and let us try to work this forward.

So regardless of what happens with regard to the EPA's decision or the movement of this legislation, I will commit to you right now to try to build a common ground.

Senator BOXER. If I just might say this, and then I am going to leave you to the rest of your discussion. As the new Ranking Member here, I do believe we can work something out. We do not lose anything by trying.

I think the important thing is to include everyone on the subcommittee staff in these discussions. Otherwise, it is not going to happen. If it is two of us doing it, it is not going to happen.

And I would just say in closing, I am really sorry that this all took this turn. But the bottom line is, they are talking about delivering on the promise of the Clean Water Act, but also enhancing State flexibility in managing polluted waters, and streamlining the regulatory framework.

So it seems to me, we are all saying the same thing, but we may have different ways to get there and have to hammer it out. But I have seen this committee in the past really move mountains, this full committee, with Senator Baucus' leadership and the leadership of Senator Chafee.

And I know Senator Smith is a good guy to work with. You know, we have remained really good friends through all our disagreements. And I think it says a lot that we can do that.

So despite the fact that we have got these problems on the floor, maybe we can show that this committee can do something. I am going to leave you now.

Senator CRAPO. You have other business, I know.

Senator BOXER. I hope that we can work together. And my staff is ready, willing, and able to work with everyone's staff.

Senator CRAPO. Well, let me take the opportunity right now to close this hearing so that we do not end up in violation of any Senator rule. Although after I do so, I would be glad to stay around and visit with any of the Senators who would like to do so now or later.

And to each of the witnesses, I would like to ask you to come up afterwards, so that I can personally apologize to you for your inconvenience.

At this time, the hearing is adjourned.

[Whereupon, at 10:55 a.m., the committee was adjourned.]

[Additional statements submitted for the record follow:]

TESTIMONY OF J. CHARLES FOX, ASSISTANT ADMINISTRATOR FOR WATER, ENVIRONMENTAL PROTECTION AGENCY

INTRODUCTION

Good morning Mr. Chairman. I am Chuck Fox, Assistant Administrator for Water at the Environmental Protection Agency (EPA). I appreciate the opportunity to testify before this subcommittee on the work we are doing—in cooperation with other Federal agencies, States, and local communities—to identify polluted waters around the country and restore their health.

My testimony to your subcommittee in February described in some detail the key elements of the Clean Water Act program for restoring polluted waters—generally known as the "Total Maximum Daily Load" or TMDL program. It described the over 20,000 waterbodies identified by States as polluted in 1998. It also described our effort, begun almost 3 years ago, to work with a diverse Federal Advisory Committee to review the TMDL program and identify needed improvements in existing regulations. And, my earlier testimony described the changes to the current TMDL regulations that EPA proposed in August of last year.

Rather than review these topics again today, I would like to focus on work we have done since February with a range of interested parties to discuss the important issues raised in the proposed regulations.

As a result of these discussions, I am confident that we can develop a final regulation that addresses many of the suggestions we have heard while still providing for a strong, common-sense program—led by the States and local communities—to identify and restore the Nation's polluted waters.

I will also review some recent developments related to the TMDL program. For example, a Federal court in California recently confirmed the EPA's long-standing view that the Clean Water Act calls for polluted runoff from nonpoint sources to be accounted for in the identification of polluted waters and in the development of TMDLs. Finally, Mr. Chairman, I will describe the Administration's strong opposition to the legislation (S. 2417) you recently introduced with Senator Crapo calling for a delay of several years in finalizing revisions to the TMDL program regulations.

CONSULTATION WITH PARTIES INTERESTED IN TMDLS

Over the past several months, EPA has worked closely with many groups and organizations interested in the TMDL program and in the proposed revisions to the current TMDL regulations. We have also made a special effort to review the many public comments we received on the proposed regulations.

Consultation with States

As I indicated in my testimony in February, the Clean Water Act provides that States have the lead in identifying polluted waters and developing TMDLs.

It is critical that States stay in this leadership role and that they are partners in developing and implementing the program for restoring polluted waters described in our final regulations.

In developing the proposed revisions to the TMDL regulations, we worked closely with State officials, including a group set up by the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) and the Environmental Council of the States (ECOS). In addition, four senior State officials were members of the Federal Advisory Committee on the TMDL program.

Consultation with the U.S. Department of Agriculture

For the past several years, EPA and the United States Department of Agriculture (USDA) have worked in close cooperation to design and implement programs to protect water quality.

EPA and USDA worked together in developing the Clean Water Action Plan several years ago, developed the EPA/USDA Animal Feeding Operation Strategy issued last year, and worked with other agencies to draft the Unified Federal Policy for management of water quality on a watershed basis proposed earlier this year.

When the proposed TMDL rule was published last August, concerns were raised in comments by the USDA. In response to these concerns, I met with Under Secretary for Natural Resources and the Environment, James Lyons, and we established a joint EPA/USDA workgroup to review concerns of USDA with the TMDL proposal.

The USDA/EPA workgroup has been meeting on a regular basis over the past 3 months and these meetings have involved several dozen staff from different parts of both agencies. These intensive discussions have helped both agencies think through how our programs can best be coordinated.

EPA and USDA recently released a Joint Statement describing areas of agreement on the TMDL rule. Mr. Chairman, I ask that a copy of the Joint Statement be included in the record.

Some of the key elements of this Joint Statement describe changes EPA expects to include in the final TMDL rule on topics of interest to the USDA. For example, the Joint Statement outlines how EPA and USDA propose to address the problem of restoring polluted waters that are impaired as a result of forestry operations. The USDA/EPA forestry proposal is discussed in more detail later in my testimony.

In addition, the Joint Statement addresses the treatment of diffuse runoff in our August TMDL proposal. EPA remains committed to voluntary and financial incentive approaches to reduce runoff from diffuse sources of pollution where there is reasonable assurance that these controls will be implemented. The proposed rule would not require Clean Water Act permits for runoff from these sources.

The President's fiscal year 2001 Budget backs up this commitment to voluntary and incentive-based programs with proposals that State grants for polluted runoff programs be increased from $200 to $250 million and that funding for conservation assistance programs at the U.S. Department of Agriculture be increased by $1.3 billion. The benefits that result from these and other assistance programs will be given due credit in the TMDL process.

Since the majority of polluted waters are polluted in whole or in part by runoff from diffuse sources, a management framework that does not address them cannot succeed in meeting our clean water goals. As I discuss in more detail later in this testimony, this view was recently endorsed by a Federal court in California.

Review of Comments on the Proposed Regulations

I want to assure the subcommittee that EPA is fully, and carefully, reviewing the public comments on the proposed regulations.

The Agency received over 34,000 comments on the proposed TMDL regulation. The comments fall into three general groups:

- We received some 30,546 postcards addressing control of water pollution from forestry operations. Many of these comments are virtually identical.
- We received 2,747 comments from diverse individuals and organizations expressing a view on one or two elements of the proposal.
- We received 781 comments from groups or individuals expressing comments on multiple parts of the proposal.

The Administrator and I view each and every comment as important. In anticipation of extensive comment, EPA began working to organize and evaluate comments received even before the close of the comment period. Since the comment period closed, we have reassigned staff as needed to review and summarize comments.

This is an important effort begun over 3 years ago with the convening of a Federal Advisory Committee. EPA has made every effort to assure a full and careful review of public comments. If anything, the high level of interest in the regulation

has given us an extra measure of determination to assure that the final TMDL rule is based on a careful consideration of the record.

EXPECTED CHANGES TO PROPOSED TMDL REGULATIONS

I want to outline our current thoughts on how to change the proposed revisions to the TMDL regulations and proceed with the important work of restoring America's polluted waters.

Delivering the Promise of the 1972 Clean Water Act

The final rule will provide a common-sense, cost-effective framework for making decisions on how to restore polluted waters. EPA expects that the final rule will:

- Tell the Full Story—provide for a comprehensive listing of all the Nation's polluted waters;
- Meet Clean Water Goals—identify pollution reduction needed to meet the clean water goals established by States in water quality standards;

—Encourage Cost-Effective Clean-Up—assure that all sources of pollution to a waterbody are considered in the development of plans to restore the waterbody;

- Rely on Local Communities—foster local level, community involvement in making decisions about how best to meet clean water goals;
- Foster On-the-Ground Action—call for an implementation plan that identifies specific pollution controls for the waterbody that will attain clean water goals;
- Commit to Environmental Results—require a "reasonable assurance" that the needed pollution reductions will be implemented; and
- Assure a Strong Program Nationwide—EPA will establish lists of polluted waters and TMDLs where a State fails to do so.

Enhancing State Flexibility in Managing Polluted Waters

States will have the lead to identify and clean up polluted waters through the TMDL program. The final regulation will expand the flexibility that States have to tailor programs to the specific needs and conditions that they face. EPA expects that the final rule will:

- Give States More Time—allow States 4 years to develop lists of polluted waters, rather than 2 years as under current regulations;
- Give States More Time—allow States to develop TMDLs over a period of up to 15 years, rather the 8–13 year timeframe of the current program;
- Tailor to Local Conditions—tailor implementation plan requirements and add flexibility to account for different types of sources causing the water quality problem; and
- Endorse Voluntary Programs—give full credit to voluntary or incentive-based programs for reducing polluted runoff through diverse control measures, including best management practices (BMPs).

Streamlining the Regulatory Framework

In response to comments from many interested parties, the final rule will be streamlined and focused on what is needed for effective TMDL programs. EPA expects that the final rule will:

- Drop Threatened Waters—drop the requirement that polluted water lists include "threatened" waters expected to become polluted in the future;
- Allow More Flexibility in Setting Priorities—drop the proposed requirement that States give top priority to addressing polluted waters that are a source of drinking water or that support endangered species;
- Drop Petition Process—drop the proposal to provide a public petition process for review of lists of impaired waters or TMDL program implementation;
- Drop Requirements for Offsets of New Pollution—drop proposals to require offsets before new pollution can be discharged to polluted waters prior to the development of a TMDL; and
- Phase-In Implementation—new requirements for polluted waters lists become effective in 2002 and new requirements for TMDLs will be phased in over an 18 month period.

USDA/EPA Forestry Approach

In finding a common view of the best approach to reducing forestry impacts on water quality, EPA and USDA agreed that a number of States are doing an outstanding job of managing forest operations and preventing water pollution. We want to recognize and rely on these strong State programs to both prevent water pollution and to fix those pollution problems that do occur.

Not all States, however, currently have strong forest management programs. Many of these States are working hard to upgrade programs over the next several years. These efforts need to be encouraged and supported.

Finally, some State forestry programs may not be adequate to prevent water pollution problems for the foreseeable future. In situations where States choose not to develop approvable programs within 5 years, EPA and USDA recognize the need to have a "safety net" for water quality. The safety net that we envision is to empower State environmental agencies to issue Clean Water Act permits for discharges of stormwater from forestry operations, in very limited circumstances.

Let me be clear that, under our approach, no Clean Water Act permits would be issued for at least 5 years from the date of the final TMDL rule. And, no permits would be issued in States that now have, or that develop, adequate forest water quality programs. The final rule will describe basic criteria of adequate programs, including appropriate best management practices identified in consultation with USDA.

Where a State has not developed a strong forest water quality program after 5 years, forestry operations might be asked to have a permit, but only if:

- the forestry operation resulted in a "discharge" from a point source (diffuse runoff from a silviculture operation will not be subject to a permit under any circumstances);
- the operation contributes to a violation of a State water quality standard or is a significant contributor of pollutants to waters; and
- the State Clean Water Act permit authority determined that a permit, as opposed to a voluntary or incentive-based program, was needed to assure that pollution controls would be implemented.

EPA may also designate forestry operations as needing a permit, but our ability to do so is even more limited than that of the State. In addition to meeting the conditions mentioned above, the EPA would need to be establishing a TOOL where a State did not do so. EPA agrees that, where a State finds that a permit is needed, best management practices, rather than numeric effluent limits, are appropriate as permit conditions.

In addition, because States have the discretion to issue permits, forest operators that have not been told by the permit authority that they need a permit will not be subject to government or citizen enforcement for failure to have a permit.

IMPORTANT RECENT DEVELOPMENTS RELATING TO TMDLS

I want to briefly review some recent, important developments related to the TMDL program.

Reducing Workload and Assuring Adequate Resources

State officials have expressed concern over the workload and costs of the TMDL program. EPA is making every effort to respond to this concern. Last month, EPA issued a regulation eliminating the requirement that States submit lists of polluted waters this year; new lists will not be due until 2002. The decision to eliminate the 2000 listing process has saved States and others hours of work and has allowed us all to concentrate on the important job of developing TMDLs for the over 20,000 waterbodies already identified as polluted.

States are also concerned about the costs of administering the TMDL program. The annual appropriation available to States to administer and directly implement TMDLs and the clean water program has steadily increased from $131 million in 1993 to a proposed $410 million in the Administration's proposed 2001 budget.

The President's fiscal year 2001 Budget increases State grant funding for TMDLs by $45 million in fiscal year 2001 alone. When States match this new funding, about $70 million in new funding will be available for implementing the TMDL program.

In addition, EPA has provided States with the discretion to use up to 20 percent of funding under section 319 to develop TMDLs and for related work. The President's request for 319 funding in fiscal year 2001 is $250 million and thus provides up to $50 million in additional TMDL funding.

And, EPA expects that the final rule will support more cost-effective development of TMDLs by specifically encouraging States to develop TMDLs for groups of polluted waterbodies on a watershed scale.

EPA has worked with States to develop detailed assessments of the costs of key elements of the clean water program. Based on this analysis, and in consultation with the Ounce of Management and Budget, EPA projects that the funding proposed in the President's budget would be sufficient for States to administer the TMDL program in 2001 under the final TMDL regulations expected to be promulgated this summer.

Garcia River Decision

A Federal court in California, reviewing a challenge to a TMDL developed for the Garcia River, concluded last month that the Clean Water Act authorizes EPA to establish TMDLs for waters "polluted only by logging and agricultural runoff and/or other nonpoint sources rather than by any municipal sewer and/or industrial point sources."

The court noted that the Supreme Court has consistently referred to the Clean Water Act as establishing a "comprehensive and all-compassing" program of water pollution regulation. The court found that the logic of section 303(d) required that listing and TMDLs were required for all impaired waters, and concluded that excluding nonpoint source impaired waters would have left a "chasm" in the statute. And, the judge found that Congress' passage of section 319 in 1987 was consistent with the view that section 303(d) covered nonpoint sources of pollution because TMDLs were needed for the planning required under Section 319.

This decision confirms EPA's long-standing interpretation of the Act. It also makes clear that the requirement to list waters polluted by diffuse or nonpoint sources, and develop TMDLs for these waters, is based on the Clean Water Act rather than the existing or proposed TMDL regulation.

GAO Report on Water Quality Monitoring

Also in March, the General Accounting Office released a report critical of data used by States and EPA to make water quality decisions.

EPA has responded to the report in detail, agreeing with some conclusions and disagreeing with others.

EPA agrees with the GAO conclusion that some States lack the data that they need to fully assess the water pollution problems in their State. In many States, the lack of an extensive, and expensive, monitoring network prevents the State from evaluating all waters on a regular basis. Given limited resources, however, knowledgeable State managers focus monitoring resources on the most likely problem areas. The GAO report recognizes this approach and reports "State officials we interviewed said they feel confident that they have identified most of their serious water quality problems."

The GAO report suggests that the polluted waters identified from this monitoring may not be all of the polluted waters in the State. It does not indicate that the polluted waters that are identified as polluted are improperly identified as polluted. In other words, the TMDL program may not be focused on enough waters, but it is not focused on the wrong waters. In addition, if a waterbody is listed as polluted by mistake, it can be removed from the list.

Some observers have incorrectly concluded that the report found that States do not have the data that they need to develop TMDLs. There are several problems with this conclusion.

First, GAO generally found that States do have the data they need to develop TMDLs for point sources.

Second, while most States now lack detailed data to develop a TMDL for waters polluted by nonpoint sources, the development of these site-specific data has not been a priority of State monitoring programs. EPA and States recognize and expect that, once the process of developing a TMDL is begun, sometimes, several years later, States will need to supplement the initial screening data used to identify the problem with more detailed assessments needed to develop a TMDL. The lack of these data today is not a reason to delay a TMDL.

Third, GAO concludes that the lack of detailed nonpoint source related data makes it "difficult to directly measure pollutant contributions from individual nonpoint sources and, therefore, assign specific loadings to sources in order to develop TMDLs." This would be a concern if EPA's existing or proposed TOOL regulations required that States have data to assign specific loadings to individual sources, but they do not. Rather, EPA's proposed regulation specifically provided that allocations to nonpoint sources may include "gross allotments" to "categories or subcategories of sources" where more detailed allocations are not possible.

Atlas of America's Polluted Waters

States submitted lists of polluted waters in 1998. Over 20,000 waterbodies across the country are identified as not meeting water quality standards. These waterbodies include over 300,000 river and shore miles and 5 million lake acres. The overwhelming majority of Americans—218 million—live within 10 miles of a polluted waterbody.

A key feature of the 1998 lists of polluted waters is that, for the first time, all States provided computer-based "geo-referencing" data that allow consistent mapping of these polluted waters. In order to better illustrate the extent and seriousness

of water pollution problems around the country, EPA prepared, in April of this year, an atlas of State maps that identify the polluted waters in each State. The maps are color coded to indicate the type of pollutant causing the pollution problem. And, bar charts show the types of pollutants impairing stream/river/coastal miles and lake/ estuary/ wetland acres.

Mr. Chairman, I ask that a copy of the Atlas of America's Polluted Waters be included in the hearing record.

Economic Analysis

Several Members of Congress have suggested that EPA did not conduct an adequate assessment of the cost of the TMDL regulation. As you know, Mr. Chairman, cost assessments of proposed regulations are strictly governed by statute and by Executive Order.

In compliance with these requirements, EPA described the incremental costs of the proposed regulation. We did this work carefully and fully, in compliance with applicable guidelines. EPA is working with States and others to define the overall costs of administering the TMDL program, including both the base program costs and the incremental costs of the new regulations. EPA is committed to providing an estimate of these costs prior to promulgation of the final TMDL regulations.

Many commenters on the proposed revisions to the TMDL regulations indicated an interest in EPA's estimate of the overall costs of implementing the TMDL program and restoring the Nation's polluted waters.

It is important to note that several provisions of the Clean Water Act call for attainment of water quality standards adopted by States. Notably section 301 (b)(1)(C) of the Act requires that all discharge permits include limits as necessary to meet water quality standards. The TMDL process does not drive the commitment to meet water quality standards. Rather, it provides a comprehensive framework for identifying problem areas and allocating pollution reductions necessary to fix problem among a wider range of pollution sources (i.e. not just point sources).

EPA recognizes that the TMDL process imposes some administrative costs for States, communities and pollution sources. We believe, however, that these administrative costs could be largely offset by the significant savings to be achieved over the next decade as a result of the TMDL process. By bringing all sources of pollution in a watershed together, the local community and the State can work together to evaluate various approaches to achieving needed pollution reductions. For example, the cost to remove a pound of a given pollutant may be high for some sources and low for others.

The TMDL process lays out these considerations and lets the local community decide how to meet its clean water goals. EPA expects many communities to opt for cost-effective approaches, many of which rely on low cost controls over nonpoint sources.

Under the final revisions to the TMDL rules to be published this summer, opportunities for shifting pollution control responsibility from high cost point source controls to lower cost controls over nonpoint sources will be greatly enhanced. Under the new rules, States and EPA will be able to defend point source permits that alone will not result in attainment of water quality standards because the TMDL must provide a "reasonable assurance" of implementation of other needed pollution reductions.

Under the TMDL rules in effect today, "reasonable assurance" is not a necessary element of a TMDL and cost effective sharing of pollution reductions is much less likely. As I have testified, "reasonable assurance" of implementation can be established based on voluntary and incentive-based programs.

EPA is developing rough estimates of the costs of attaining clean water goals using the TMDL model and not using the TMDL model (i.e. relying on point source controls only to meet water quality standards) and will make this estimate available in conjunction with promulgation of the TMDL regulation.

OPPOSITION TO S. 2417

Mr. Chairman, the legislation you introduced with Senator Crapo, S. 2417, includes some important provisions expanding authorizations for State clean water grants. But the Administration must strongly oppose the bill because it would delay final TMDL regulations by at least 3 years, and perhaps much longer.

The bill would expand authorizations for several key State grant programs, including the clean water program management grants under section 106 of the Clean Water Act and the nonpoint pollution control grants under section 319 of the Act. The Administration believes that adequate State grant funding for clean water programs is critical to effective operation of the Nation's clean water program. We have proposed an increase of $150 million over the past 2 years in funding for State

nonpoint control programs and an increase of $45 million in fiscal year 2001 for State water program grants. However, the Congressional Budget Resolution limits domestic discretionary spending such that it will be very difficult to meet the Administrations's proposed increases. Given the Congressional Budget Resolution, the funding levels proposed in the bill are unrealistic. One of the unintended consequences could be to divert funding from other valuable water quality efforts. The Administration stands ready to work with Congress to achieve our ambitious goals of substantially increased funding for important water quality work.

The bill would increase the section 106 grant authorization to $250 million with $50 million of this amount reserved for implementation of TMDLs. The President's fiscal year 2001 budget provides an increase of $45 million in the section 106 grant that is reserved for TMDL development with an appropriate State match. This $45 million increase would bring the total amount of the section 106 grant to $160.5 million in fiscal year 2001.

The bill would authorize $500 million for the section 319 grant program, which is double the President's fiscal year 2001 request. Some $200 million of this amount would be reserved for grants to implement nonpoint pollution control projects. Further, the bill would significantly lower the current non-Federal matching requirement. The Administration recommends maintaining the current non-Federal match, which is a more appropriate rate of 60 percent Federal funds with the remaining project costs provided by non-Federal funds. For any given level of available Federal funding, the bill's proposal of a 90 percent Federal matching requirement would result in fewer projects funded, and fewer areas and people being served.

Provisions of S. 2147 call for a study of the scientific basis for the TMDL program. While there are technical issues associated with the development of TMDLs, many of the essential scientific bases for developing TMDLs and restoring polluted waters are already available. There is no need for a review of this science by the National Academy of Sciences. In addition, other objectives of the study, such as assessments of total costs of meeting water quality standards, are questions that the National Academy of Sciences is not best suited to answer.

Section 5 of the bill provides for the funding of five watershed management pilot projects. States and EPA already have extensive experience in the development and implementation of watershed management projects at several geographic scales. For example, the National Estuary Program has invested tens of millions of dollars in watershed management projects on over 28 estuaries around the country. Numerous other watershed management projects have been completed or are underway. It would be a mistake to divert $2 million to these five projects when this funding is badly needed to support broader State efforts to develop TMDLs.

Finally, section 6 of S. 2147 would prevent the finalization of TMDL regulations until the completion of the study by the National Academy of Sciences. The Administration is strongly opposed to this provision of the bill.

Enactment of this proposal could result in the effective shut-down of the TMDL program in many States as they and other parties defer work on TMDLs until the comprehensive studies mandated by Congress are completed. Sadly, Congress would be telling thousands of communities across the country that are eager to get to work restoring the over 20,000 polluted waters to stand down—to pack up their clean water plans and put them into the deep-freeze for the foreseeable future while a panel of scientists meets here in Washington, behind closed doors, for almost 2 years, to write a report.

Many States have strong public confidence in their TMDL programs and expect to work cooperatively with the public in listing polluted waters and developing TMDLs. State efforts to meet commitments to the public to run effective TMDL programs would be hampered because many affected pollution sources could cite the Congressionally mandated national study as a reason to delay any action on TMDLs before release of the study and subsequent revision of the rules. Public confidence in the TMDL process could be seriously eroded.

Citizens may step-up efforts to seek court orders to complete lists of polluted waters and TMDLs. Without final regulations to guide EPA and State efforts to implement the TMDL program, courts could issue detailed judicial guidance for the TMDL program.

I hope, Mr. Chairman, that I can convince you and other Members of Congress that we do not need to postpone any longer these important improvements to the TMDL program. We have a solid legislative foundation in the Clean Water Act. We have a good TMDL program that will be even better with the revisions to the program regulations that we will finalize this summer. Most importantly, people all over the country want to get to work restoring polluted rivers, lakes, and coastal waters, and they want to start now.

CONCLUSION

The 1972 Clean Water Act set the ambitious—some thought impossible—national goal of "fishable and swimmable" waters for all Americans. At the turn of the new millennium, we are closer than ever to that goal. Today, we are able to list, and put on a map, each of the 20,000 polluted waters in the country. And, we have a process in place to define the specific steps to restore the health of these polluted waters and to meet our clean water goals within the foreseeable future.

It is critical that we, as a Nation, rededicate ourselves to attaining the Clean Water Act goals that have inspired us for the past 25 years. The final revisions to the TMDL regulations will draw on the core authorities of the Clean Water Act, and refine and strengthen the existing program for identifying and restoring polluted waters.

Mr. Chairman, I consistently hear from critics of the TMDL program that it is more of the old, top-down, command-and-control, one-size-fits-all approach to environmental protection. In fact, the TMDL program offers a vision of a dramatically new approach to clean water programs.

This new approach focuses attention on pollution sources in proven problem areas, rather than all sources. It is managed by the States rather than EPA. It is designed to attain the water quality goals that the States set, and to use measures that are tailored to fit each specific waterbody, rather than imposing a nationally applicable requirement. And, it identifies needed pollution reductions based on input from the grassroots, waterbody level, rather than with a single, national, regulatory answer. In sum, we think we are on the right track to restoring the Nation's polluted waters.

The final revisions to the existing TMDL regulations will support and improve the existing TOOL program and they will be responsive to many of the comments we have heard from interested parties.

Thank you, for this opportunity to testify on EPA's efforts, in cooperation with States and other Federal agencies such as the Department of Agriculture, to restore the Nation's polluted waters. I will be happy to answer any questions.

STATEMENT OF JIM LYONS, UNDER SECRETARY, NATURAL RESOURCES AND ENVIRONMENT, DEPARTMENT OF AGRICULTURE

Mr. Chairman and members of the committee, thank you for inviting me to appear before you today to join my colleague Chuck Fox, Assistant Administrator of the Environmental Protection Agency (EPA), to discuss EPA's proposed rules on Total Maximum Daily Loads (TMDL).

USDA shares this committee's commitment to cleaning the waters of the United States and building on successes reducing water pollution over the past several decades. To some degree, those accomplishments were the easy part. The remaining pollution concerns, as highlighted in the President's Clean Water Action Plan which EPA and USDA helped prepare, are nonpoint sources of pollution such as soil erosion, urban runoff, pollutants from animal feeding operations and other sources that do not come from the end of a pipe. Addressing these nonpoint sources is the great challenge that remains to further improve our waters to make them fishable and swimmable for all Americans to enjoy.

To accomplish these next steps in cleaning our waters will take a concerted effort from farmers, ranchers, and forest landowners, as well as urban and suburban residents. Notwithstanding the work that remains, farmers, ranchers, and foresters have been working for years to reduce the effects of their operations on water quality. Much has been achieved in this regard using many of the conservation tools that the Congress and Department wrote into the 1985, 1990, and 1996 Farm Bills.

For example, the Conservation Reserve Program (CRP) has been an extremely effective tool in reducing erosion on highly erodible lands. Continuous sign-up of buffer practices under CRP has become an important part of water quality protection. The Wetlands Reserve Program and the Environmental Quality Incentives Program (EQIP) have benefited thousands of farmers and ranchers and helped them improve the productivity of their operations through improved conservation. The Conservation Reserve Enhancement Program (CREP) is playing an important role in protecting the waters of the Chesapeake Bay, salmon habitat in Oregon and Washington, and drinking water supplies for New York City. The President's fiscal year 2001 budget request includes $1.3 billion above currently authorized levels to bolster our agriculture conservation programs.

I am proud of agriculture's and forestry's contributions to the nation's efforts to clean our waters, while recognizing that we can and should do more. As Secretary of Agriculture Dan Glickman noted before a Senate Committee in February it is not

a matter of whether farmers should do more, but "how to proceed with our efforts to reduce nonpoint sources of pollution."

It is no secret that USDA's relationship with EPA got off to a rocky start last fall when my office filed comments highly critical of their proposed rules. However, as I have pointed out before, these comments were not cleared through the Office of the Secretary and do not represent USDA's official position. Having said this, many of those concerns had validity and we realized to obtain the best rule possible, we needed to be part of EPA's efforts in refining their initial proposal. So in January Assistant Administrator Fox and I established an interagency workgroup of our senior staff to review key issues. That group worked through the winter and came to the agreement that has been outlined by Mr. Fox on the issues of interest to USDA. As you have heard, EPA has agreed to reflect these agreements in its final TMDL rule.

I want to briefly highlight the aspects of our agreement pertinent to agriculture and forestry. Both agencies decided that giving local citizens and State governments the most say in how pollution budgets are established for impaired waterways would have the greatest measure of success. The agreement grants States more flexibility in setting priorities, more time to develop lists of impaired waters, and simplifies listing requirements, dropping a requirement that "threatened waters" be listed. States will have 15 years to develop TMDLs for their impaired waters and the final regulation will not set a time limit for attainment of Water Quality Standards.

Most importantly from the standpoint of agriculture, EPA and USDA agree that voluntary and incentive-based approaches, such as the water quality improvements that farmers make through Federal conservation programs or on their own initiative, will be given due credit in the development of TMDLs.

Much of our concern was related to the regulation of pollution from forest operations—harvesting, road building and other activities. Under the revised regulation no NPDES permits will be required for 5 years from publication of the final rule. After that period States are given choices in determining the degree of Federal regulation that will apply. Forest operations in States that develop adequate forest water quality programs based on EPA-approved BMPs will never be subject to NPDES permits. EPA will consult the USDA in determining the standards for approving BMPs. Operations on National Forest System lands, where operators already follow regulations that require consistency with State water requirements, will be exempt from NPDES permit requirements.

We were concerned whether operators who are implementing those BMPs required by a State would be subject to penalty for failing to meet water quality standards. I learned that the EPA cannot legally mandate States to adopt these requirements, but as an incentive to good faith compliance with forestry BMPs, the EPA will encourage State programs to include a good faith exemption from any directly enforceable State water quality standard. If a State fails to gain approval for their forestry BMP program after 5 years, the State or EPA will have the authority to designate discharges of significant stormwater pollution as needing a NPDES permit. Any NPDES permits that are issued by EPA will include BMPs, as opposed to numerical effluent limitations. EPA expects that States will follow this practice. Finally, dischargers that are allowed to operate without a NPDES permit will not be exposed to citizen suits for failure to have a permit. This is a brief summary of our silviculture proposal, I would be happy to answer any detailed questions you may have.

Adequate funding of the programs that will help landowners address TMDLs is key to their success. The EPA is currently developing estimates of the overall cost of the TMDL program and the analysis will be available when the final rule is published. USDA agricultural conservation programs are dramatically enhanced by the Farm Safety Net proposal in the fiscal year 2001 budget. The Environmental Quality Incentives Program (EQIP) would be increased from $200 million to $325 million. The Conservation Reserve Program (CRP) would be expanded to 40 million acres. Under our current authority, we are increasing CRP continuous sign up incentives by $100 million in fiscal year 2000 and $125 million in each of fiscal years 2001 and 2002. The Wetlands Reserve Program (WRP), which will reach its statutory 975,000 acre cumulative cap in fiscal year 2001, will enroll 250,000 acres annually. Finally, under the President's budget, a new $600 million Conservation Security Program would be funded and will provide annual payments to farmers and ranchers who voluntarily implement various conservation practices, many of which will benefit water quality.

However, in both House and Senate appropriation bills, a provision has been inserted limiting fiscal year 2001 EQIP funding to $174 million, $151 million less than the President's Budget and $26 million below its authorized level. Congress also has

not authorized additional funding for WRP, CRP, or the new Conservation Security Program, as requested by the President. I strongly urge Congress to drop the objectionable EQIP provision and fully fund these important programs that can provide State and local partners the tools to successfully build their TMDL programs.

USDA believes education and outreach to the affected communities will play decisive roles in these efforts to improve water quality. We and the EPA believe the final TMDL rules must be fair, clear, and provide farmers with greater certainty. With this in mind, we are working diligently with the EPA to achieve these goals.

Mr. Chairman, I thank you for this opportunity to appear before your committee. We welcome the opportunity to discuss the issues and respond to your questions.

TESTIMONY OF JIM GEISINGER, PRESIDENT, NORTHWEST FORESTRY ASSOCIATIONS

INTRODUCTION

Mr. Chairman, members of the committee, my name is Jim Geisinger and I am the President of the Northwest Forestry Association. I appreciate the opportunity to present my testimony today on behalf of the entire forestry community. My focus will be on Senate bill S. 2417 and the forestry-related components of the Environmental Protection Agency's (EPA) August 23 proposed regulations to revise the Total Maximum Daily Load (TMDL) program under Section 303(d) and modifications to the National Pollutant Discharge Elimination System (NPDES) permit program under Section 402 of the Clean Water Act. Let me state up front to the subcommittee. The forestry community strongly supports S. 2417. It will provide the needed time and scientific investigation required to make sense of a total maximum daily load program that is projected to cost States over $1 billion to implement.

There has been much confusion regarding the forestry-related aspects of this rule. The EPA wants to make the American public believe that forestry is a significant contributor of pollution to waters of the United States. I am here today Mr. Chairman to tell you that forest management is the best land use of any to protect water quality and the practice of forestry provides an economic incentive to maintain lands in forest cover. The facts are undeniable and yet we are hearing statements from an Agency that cites inaccurate information and out-dated data. I'll share that with you in a moment but first I want to talk to you about the "Revised Approach" published by the U.S. Department of Agriculture and Environmental Protection Agency in a joint statement on May 1, 2000.

While we have numerous concerns with the proposed regulations, our paramount concern remains *EPA's attempt to re-classify forestry activities as a point source. subject to EPA permitting.* In their May 1 revisions, the EPA has done nothing to change that—only to attempt to confuse their true intent and saddle over nine million private landowners with unprecedented Federal bureaucracy. Sometimes, the forestry community has separate voices on issues of Federal policy. Today, I can tell you, the entire forestry community is one hundred percent united against this designation and the May 1 USDA/EPA forestry revisions. Whether its private landowners, those who access public lands, easterners or westerners believe this rulemaking is an assault on the practice of forestry in the United States. In fact Mr. Chairman, the Governors of Oregon and New Hampshire submitted letters after the to the EPA Administrator after the May 1 "revised approach" opposed to the forestry re-designation.

The May 1 "revised approach" actually expands the proposed rule, rather than improves it. And the so-called revision continues to include one of the most overreaching parts of the proposal—the effort by EPA, contrary to historic Congressional intent, to label all forestry activities as a point source discharge subject to permit requirements. In addition, EPA and USDA now claim authority to review every State's forest management program under the TMDL program, and even claim additional authority to approve the TMDL program based on undefined criteria that won't be developed until after the rule is finalized. This is more expansive than even the original proposed rulemaking, and it is not supported by those at the State level who must actually administer these programs.

For the first time in the history of the Clean Water Act, the Federal Government is claiming the authority to dictate how private forestry practices should be conducted in the United States.

The May 1st EPA/USDA revised approach did not take into account the concerns of industrial or non-industrial forest landowners and the agencies did not share it with affected stakeholders until after it was sent to Congress. Moreover, the revision contains an exemption from permitting requirements for the federally owned U.S. Forest Service lands, yet imposes this requirement on private forest lands. The U.S.

Department of Agriculture cut a deal to exempt their own land when the same exact Federal water laws apply to private lands. Is this the way Federal environmental policy should be developed? If the Federal Government needs to exempt Federal forestlands from this rulemaking, then private landowners should be exempt as well. I ask to submit for the record a more detailed response to EPA's May 1st announcement.

This proposed rule could well require a private forest landowner to obtain for the first time a Federal permit to work his or her forest. According to EPA, this includes nursery operations, site preparation, reforestation, cultural treatment, thinning, prescribed burning, pest and fire control, and general harvesting operations to name a few. These permits can take over 6 months to obtain and at significant expense to the landowner. To put it simply, we shouldn't have to get a Federal permit to plant a tree.

We believe Congress must act to reassert the Congressional intent of the Clean Water Act. We support legislative action, including S. 2417 introduced by Senator Mike Crapo and Bob Smith. The legislation would restore sound science and basic environmental research into a program that is growing out of control and lacks the high quality monitoring data that are needed to determine pollutant allocations in a watershed. Through the combination of a National Academy of Sciences study, pilot projects and increased funding, the nation's waterbodies will be restored more cost-effectively, efficiently and benefits truly realized.

We also support legislation authored by Senate Blanche Lincoln (S. 2041) and Senator Tim Hutchinson (S. 2139) to maintain the responsibility for administration of sustainable forestry on private lands where it belongs—on the ground at the State level.

Before I close Mr. Chairman, I want to return to a subject I mentioned earlier—the quality of the data. The EPA Assistant Administrator for Water sent a letter to the House Agriculture Committee claiming that 25 States reported 727 silviculturally impaired waterbodies. There are several organizations involved in evaluating this list including State agencies. Very briefly, I would like to share with you the "good science" presented by the EPA in that March 7, 2000 letter to Chairman Goodlatte in the House Agriculture Subcommittee. The Florida Agriculture Commissioner responded to EPA's allegations in an April 10th letter. It states, the Section 319 Assessment was largely a qualitative survey, in which "water quality impairments" were typically reported without supporting data, or any other means of field verification. Further, the Assessment did not engage in nor provide any cause-and-effect analysis to determine or verify any source(s) of nonpoint pollution. It goes on to state: "No doubt, the qualitative and nonscientific nature of the Assessment, accounts for the "silvicultural impairment" of waterbodies such as the Everglades, Sarasota Bay and the Myakka River, where silviculture is virtually non-existent. A 25-State report will be forthcoming on these alleged impairments. Preliminary contacts with State forestry and water quality agencies indicate that this same "good science" was applied.

Mr. Chairman and members of the committee, thank you for the opportunity to speak on behalf of the forestry community. I'd like to close with one last comment. The EPA indicates that this rule "only generated" a little over 30,000 comments as compared to a wetlands proposal that generated over 100,000 comments. I can guarantee the U.S. Congress that if EPA extended the comment period on this rulemaking and was looking for real input, they would receive over 1 million comments. I'd be happy to answer any questions you might have.

STATE OF OREGON,
Salem, OR, May 8, 2000.

Hon. CAROL BROWNER, *Administrator,*
U.S. Environmental Protection Agency,
Washington, DC.

DEAR MS. BROWNER: The State of Oregon support the EPA's proposed TMDL regulations but we do not supports redesignating Oregon's silviculture activities from nonpoint to point source status. We appreciate and support the Agency's proposed positive response to other issues we raised with regard to the TMDL portion of the regulations, but we are very concerned that EPA's proposed approach on silviculture, as outlined in the May 1st, 2000, Joint Agreement by EPA and USDA, will delay adoption of the regulations as a whole.

The proposed EPA/USDA agreement lacks specific, predictable criteria for EPA to judge State forest practices and thus would lead to major opposition and delay in TMDL rule adoption. It is premature and incomplete. Oregon has a Forest Practice

Act, backed by a strong monitoring element, that provides for statewide management practices, which can be intensified under individual TMDL's.

In summary, Oregon opposes adoption of the silvicultural provisions of the regulations. We also believe that Section 3 of the Joint Agreement between EPA and USDA is an inappropriate way to address silviculture activities. In order to not jeopardize adoption of the TMDL regulations as a whole, we recommend that EPA remove the silviculture provisions from this rulemaking, and take those provisions through full public comment and debate as occurred with the remainder of the regulations.

Sincerely,

JOHN A. KITZHABER, M.D.

STATE OF NEW HAMPSHIRE,
Concord, NJ, May 5, 2000.

Hon. BOB SMITH, *Chairman,*
Committee on Environment and Public Works,
U.S. Senate,
Washington, DC.

DEAR CHAIRMAN SMITH: Thank you and the members of the Committee on Environment and Public Works for taking the time to conduct a hearing in Whitefield, New Hampshire on the proposed Total Maximum Daily Load (TMDL) rule and the National Pollution Discharge Elimination System (NPDES) permit process. I appreciate the opportunity that you have provided to New Hampshire residents to present their concerns on the TMDL rule to both the committee members and EPA officials.

As Governor, I have been a strong advocate for both the forest products industry, which has expressed significant concerns with the proposed TMDL rule, and the environment. We must continue to strike the right balance for New Hampshire between the needs of this important traditional industry and environmental protection if we are to maintain our strong economy and quality of life.

The original proposed TMDL regulations were highly criticized by the New Hampshire Department of Environmental Services, the New Hampshire Department of Resources and Economic Developmental, and New Hampshire businesses. The proposed regulations were too burdensome on both DES and the regulated community, particularly the forest products industry. The proposed rules were also too prescriptive, removing the flexibility of States to tailor programs to State-specific priorities and needs.

New Hampshire has been successful in developing partnerships between State government and business that improve both the economy and the environment. It is critical that Federal regulations provide us the flexibility to develop innovative solutions and programs that are tailored to meet the needs of New Hampshire.

Forestry is a critical component of New Hampshire's heritage, and our economy, especially in the North County. Our long history of forest stewardship is reflected in the many tree farms that are found across New Hampshire. We must maintain this working landscape by supporting working forests, not discouraging them. New Hampshire already has programs in place to prevent and resolve environmental problems potentially caused by forestry operations. This program includes three critical elements:

- Implementation of best management practices. It is important to note that a best management practices manual for timber harvesting operations was published in February 2000 by the Division of Forests and Lands of the New Hampshire Department of Resources and Economic Development (DRED), in cooperation with DES, the University of New Hampshire, Federal agencies including USDA and EPA, and the New Hampshire Timberland Owners Association.
- Training and outreach through partnerships of State and Federal agencies and nonprofit organizations including the New Hampshire Timberland Owners Association and the Society for the Protection of New Hampshire Forests.
- Technical Assistance, compliance and enforcement by DES and DRED.

Under any reasonable criteria, our existing programs are effective. There should never be a need for Federal NPDES permits for forestry operations not already covered by existing requirements because these problems will be addressed at the State level.

EPA has recently proposed, in conceptual form, a number of changes in the proposed rule, which move in the right direction. Chuck Fox, the Assistant Administrator for Water, should be commended for his efforts to be responsive to public comments. However, the many who have shown such deep concern and who would be affected by these new rules deserve the opportunity to review and evaluate the de-

tails of EPA's proposed changes. I urge EPA to publish the actual language of proposed changes for forestry for public review as soon as possible to allow evaluation and comment on the changes by all interested parties prior to final promulgation. This is only appropriate considering the magnitude of the comments received about the TMDL rules as originally proposed, and the significance of expected changes.

As in most other States, New Hampshire's TMDL program is significantly underfunded. Additional Federal funding to support State development to TMDL's is needed, regardless of the results of the EPA rulemaking. The President's budget contains $45 million for Federal fiscal year 2001, which translates into just over $200,000 for New Hampshire to assist with TMDL development. This is a good start, but is not adequate to sustain New Hampshire's TMDL program. I request that you consider adding at least another $5 million to the President's budget proposal. At the $50 million level, small States like New Hampshire will receive a 50 percent increase in section 106 funding, equivalent to what large States are already receiving at the $45 million funding level under EPA's new formula for distribution of section 106 funds.

The President's proposed budget also includes rigid conditions for the State match for the "new" Section 106 moneys which New Hampshire and many other small States will not be able to meet. Consequently, I would also request that you change these provisions and ensure that any additional finding for the TMDL program includes maximum flexibility for matching these Federal funds. This is the only way to ensure that the Federal funds allocated for New Hampshire will be fully utilized to make significant progress toward the goals of the Clean Water Act.

I look forward to working with you to ensure that New Hampshire's waters are protected and improved while ensuring that our forest products industry and other traditional activities can continue to flourish.

Very truly yours,

JEANNE SHAHEEN.

RESPONSES BY AF&PA TO QUESTIONS BY DEPARTMENT OF AGRICULTURE AND ENVIRONMENTAL PROTECTION AGENCY

Question 1. Is the USDA/EPA policy consistent with almost 30 years of Clean Water Act statutory interpretation, Federal regulation and court decisions that forest management activities are a "nonpoint" source category subject to State regulation under Section 208 and 319 of the Act?

Answer. No. Nowhere in the policy statement does EPA/USDA even mention that they intend to do exactly what EPA originally proposed in August 1999. The EPA will remove the designation of such forestry activities as nursery operations, site preparation, reforestation, thinning, cultural treatment, prescribed burning, pest and fire control, harvesting, surface drainage and road construction and maintenance as a nonpoint source category. Instead, it will redesignate them as potential point source discharges of pollution on a case by case basis, thereby ultimately subjecting the activities to Federal Clean Water Act discharge permits.

Under the Clean Water Act, forest management operations have never been considered discharges subject to point source permits. Forestry operations have always been considered to have diffuse nonpoint source runoff. Congress in 1972 and, EPA in 1976, determined that there are no discharges from forestry operations that require a permit. In fact, EPA reaffirmed Congressional intent that forestry operations be designated as a nonpoint source category.

Question 2. By granting a 5-year waiver from Federal NPDES permit requirements for forestry activities, does this provide for a more "flexible" State TMDL program?

Answer. No. States now have the authority to regulate forestry operations as nonpoint sources. The suggested revision keeps this authority in place for 5 years. The only increase in flexibility occurs from the absence of any Federal permit requirements during this period. At the end of the 5-year period, flexibility will definitely decrease as EPA will presumably insert Federal requirements into what has heretofore been an area of State jurisdiction.

The removal of the nonpoint source designation exposes forestry activities to litigation over their status. Recognizing the authority to require NPDES permits, but not exercising that authority, has been ruled improper in the past by the Federal courts. The 5-year moratorium would very likely be subjected to a similar challenge.

If there is a 5-year moratorium, why delete the designation of forestry as a nonpoint source category immediately? If permits will not be imposed for 5 years, why remove the designation and subject forest landowners to citizen suits. The new

permitting requirements will jeopardize hundreds of billions of dollars in forest land ownership and investment. This revised approach provides no measurable improvements to water quality today and this uncertainty will place 9 million forest landowners around the country at legal risk. It will likely lead to the conversion of forest land to suburban sprawl and development.

Question 3. EPA proposes to work with USDA and the public to develop guidance for States to follow in designing and adopting forestry BMP programs for the protection of water quality. What implications will this likely have?

Answer. Under the Section 319 of the Clean Water Act, EPA reviews State nonpoint source programs for approval including State forestry programs. The forestry community continues to work with States and EPA to address State programs through a collaborative effort at the State level.

This revised approach is more expansive than the proposed rule. EPA/USDA now claim authority to review and approve entire State forestry programs as opposed to reviewing each individual TMDL submitted by the State. There is no statutory basis or case law to allow the EPA to say that a forestry activity is or is not a point source discharge subject to Federal permits based on the proven effectiveness of a State forest management program.

Through a public process to develop national forestry practices guidance, EPA/USDA now intend to federally dictate the development, implementation and enforcement of virtually every forest management activity conducted on all private forest lands in the country. In other words, if State forestry programs such as tree planting, harvesting, prescribed burning, pest and fire control, surface drainage, road construction and maintenance, thinning, cultural treatment, site preparation and nursery operations are inconsistent with Federal standards, EPA will impose Federal NPDES permits.

Through this Federal oversight, EPA/USDA have for the first time provided environmental non-governmental organizations the ability to dictate how forest management operations should be conducted on private forest lands throughout the country. This could include the species of tree to plant, in what type of forest management operation is conducted, the width of a streamside management zone or if harvesting should even be allowed.

Question 4. EPA claims that forest operators in States with approved programs will know what is expected of them, what BMPs are effective in reducing pollution and need to be implemented. The Agency indicates the willingness to provide "credit" for voluntary programs. What is the forestry community response?

Answer. EPA does not specify what precise forest management criteria will qualify a State for having "reasonable assurances" that a TMDL will be implemented. EPA wants the discretion to approve State forestry programs based on undefined criteria. This is a blank check. In fact, the revised approach is likely to trigger Endangered Species Act consultation by requiring the EPA to consult with the U.S. Fish & Wildlife Service and the National Marine Fisheries Service when developing the national program criteria, determining program effectiveness and final approval of each State program.

The joint policy statement indicates that voluntary and incentive-based approaches "will be given due credit." This statement is absolutely meaningless. Either the program is acceptable or unacceptable. According to the August 1999 proposal, only 10 unidentified states were considered to have acceptable programs. EPA does not provide any indication as to how this was derived.

Question 5. EPA states that existing Federal law requires forest operations on National Forest System lands to be conducted consistent with water quality requirements. Therefore, EPA/USDA provide an outright exemption from permitting requirements for U.S. Forest Service lands. How does the forest community respond?

Answer. This is a political decision with absolutely no technical, legal, statutory or regulatory basis. This decision gets at the very heart of the entire misguided approach to the NPDES portion of the August 22, 1999 regulation. Under this "revised" approach, EPA now asserts its ability to distinguish what constitutes a point source discharge subject to Federal NPDES permits based on whether it is occurring on public or private lands.

This is in addition to the fundamentally flawed premise contained in the proposed rule that EPA asserts discretionary authority to regulate forestry activities as a point source in impaired waterbodies but not in unimpaired waterbodies. This interpretation of their statutory authority is dubious at best and ripe for court policymaking rather than congressional policymaking.

Under this theory, if the National Forest Systems are exempt, why not the National Park Service, the U.S. Fish & Wildlife Service, the Bureau of Land Manage-

ment, Department of Defense, or every State/county forest or park or any private landowner that conducts forestry operations consistent with water quality requirements.“ State forestry best management practices programs are also designed to be consistent with achieving “requirements.” There should be equal treatment and recognition for all landownership under the Clean Water Act. EPA must withdraw the NPDES regulations of the proposed August 1999 rulemaking.

Question 6. EPA claims that point source discharges to waters of the United States are not required to get a permit and will not be subject to citizen suit or government enforcement action under the Clean Water Act. How would the forestry community respond to that statement?

Answer. Once EPA removes the regulation recognizing most forestry activities as nonpoint sources, forest landowners will be open to citizens suits alleging they must obtain a permit. When such a claim was filed against forestry activities on national forest lands, the court rejected the claim based on EPA's 23-year old recognition of forestry as a nonpoint source. *Newton County Wildlife Assn.* V. *Rogers,* 141 F.3d 803 (8th Cir. 1998). Moreover, EPA has already lost on the issue of failing to identify which forestry activities have discharges making them point sources. *Natural Resources Defense Council* v. *Costle,* 568 F.2d 1369 (D.C. Cir. 1977). EPA then adopted the current regulations that designate most forestry activities as nonpoint sources. Removal of this regulation will likely result in new citizen suits over this issue.

Question 7. EPA states in their April 5 letter that “Clean Water Act permits will not be required from diffuse runoff from forestry operations under any circumstances.”

Answer. EPA has yet to confirm under the April 5th or May 1st approaches that NPDES permits will not be required under any circumstances for the following forestry activities:

Nursery operations; Reforestation; Thinning; Pest and fire control; Site preparation; Cultural treatment; Prescribed burning; Harvesting operations; Road Construction and Maintenance; and Surface drainage

Question 8. What are the costs and benefits of the redesignation of forest activities as a point source discharge?

EPA has not provided any estimates of the specific benefits that can be obtained from the proposed NPDES forestry requirements. In addition, EPA's estimate of the incremental cost of the proposed rule totals less than $13.2 million. Other independent analyses conducted by university economists estimate the impact on the forestry community and State agencies at well over $100 million a year. In light of this rather large discrepancy in cost estimates and because the impact on forestry alone could exceed $100 million annually, we believe EPA has a responsibility to comply with the Unfunded Mandates Reform Act, the Regulatory Flexibility Act and Executive Order 12866 and conduct a thorough benefit and cost analysis before these rules are finalized.

TESTIMONY OF STEVE MOYER, VICE PRESIDENT OF CONSERVATION PROGRAMS, TROUT UNLIMITED

Thank you for the opportunity to testify before the subcommittee today on behalf of Trout Unlimited (“TU”) concerning S. 2417, The Water Pollution Program Enhancements Act of 2000. TU is a nonprofit organization whose mission is to conserve, protect, and restore North America's Goldwater fisheries and their watersheds. TU has more than 125,000 members in the United States. TU is opposed to any delay in implementation of the proposed revisions to the regulations governing the Clean Water Act's Total Maximum Daily Load (“TMDL”) program, and therefore opposes the bill as currently drafted because of the 18-month delay provision it now contains. Instead, we urge the subcommittee to support funding increases through the appropriations process for implementation of the TMDL program and Section 319 nonpoint pollution program.

We believe that the subcommittee members share with the vast majority of the American people a strong desire to see the promises of the Clean Water Act fulfilled, to achieve fishable, swimmable waters throughout the Nation and to restore and maintain the integrity of the nation's waters. Although we have come far toward these goals, we have a long way to go, and getting a grip on nonpoint source pollution is surely our greatest water quality challenge.

TU has put much effort into working with landowners and local, State and Federal agencies to prevent nonpoint source pollution to restore trout and salmon resources and the watersheds on which they depend. From the Blackfoot River in Montana, to the Kickapoo in Wisconsin, to the Beaverkill in New York, and Kettle

Creek in Pennsylvania, we and our chapters have raised hundreds of thousands of dollars and spent thousands of hours working with agencies and other stakeholders to protect and restore great trout and salmon rivers. We understand the water quality challenges that lie before us because we are out there on the ground right now trying to address them.

Therefore, we support aggressive implementation of the TMDL program, and the EPA proposal, because we think the proposal will help improve implementation of the TMDL program and help it do what it was supposed to do, clean up the nation's polluted waters. The proposed regulations do not create a new program; rather. they represent an effort to provide a more manageable and effective framework for the implementation of a program that has been in the Clean Water Act since 1972. The proposed regulations do not impose any significant new burdens on the States or create any new regulatory mandates. Rather, the new regulations:

- create a locally driven process for the attainment of State water quality standards;
- provide for lengthy and flexible time deadlines for the publication of lists of impaired waters, for the drafting of TMDL plans, and for the actual attainment of water quality standards; and
- create no new regulatory requirements, but instead provide an effective framework for marshalling existing programs under the Clean Water Act, the Farm Bill conservation programs, and Federal land watershed programs, in order to make progress toward attaining water quality standards.

S. 2417 provides two specific justifications for delaying implementation of the new regulations: the burden on States in complying with the regulations and the lack of adequate data for effectively implementing the TMDL program. Neither of these concerns justifies delaying the new regulations.

I. THE TMDL REGULATIONS PLACE NO NEW BURDENS ON STATES

Section 2 of S. 2417 points to the claims made by numerous States that they do not have the resources to implement the proposed regulations, and sections 4 and 6 would delay implementation of the new regulations until completion of a study that would, among other things, examine the cost of and alternatives to the TMDL program.

At the outset it is critical to note that there is nothing "new" about any burdens imposed by the TMDL program. The statutory requirements for TMDLs were included in the original Clean Water Act when it was passed in 1972. Congress included the TMDL provisions largely at the request of the States to serve as a backstop when the Act's technology-based programs might prove inadequate to achieve the Act's goals of fishable and swimmable waters. The new regulations in fact only build on existing regulations that implement a statutory requirement that is more than 25 years old.

The current impression of a "rush" to complete section 303(d) lists and TMDLs is in part a product of the fact that the States ignored the requirements of section 303(d) until quite recently. The fact that the TMDL program has not been adequately implemented in the past is no reason not to move ahead and implement it now. In fact, the unfortunate truth is that over 25 years of inaction has brought us to this point:

- 20,000 water body segments are impaired and are in need of a TMDL pollution budget;
- of the 20,000 impaired waters, hundreds are in Idaho and dozens are in New Hampshire; and,
- in large part because of habitat loss, 35 species of trout and salmon are on the Federal Endangered Species Act list and many aquatic species populations are in decline in all regions of the nation.

EPA's proposed changes do add some specificity to the TMDL program, including the requirement that each TMDL have an implementation plan. This additional specificity will lead to some additional resource needs. EPA has proposed increasing the annual appropriations available to States to administer and implement the TMDL and other Clean Water Act programs to $410 million in the Administration's 2001 budget. It has also proposed increasing funding to the States for nonpoint source programs from $200 to $250 million in fiscal year 2001. Some States, such as Oregon, have already stepped forward and committed additional resources to the restoration of water quality through the TMDL program. We urge you to help States get the additional funds they need by supporting the Administration's proposals in the appropriations process.

It is also important to note the extensive time cushions built in to the new regulations. Currently, EPA requires States to submit lists of impaired waters under sec-

tion 303(d) of the Act every 2 years; EPA has now proposed extending that to every 4 years. The new regulations give States 15 years just to develop the TMDLs for their impaired waters, but this is the deadline for the drafting of TMDLs only. EPA imposes no deadline whatsoever for TMDL implementation, that is, for when any given TMDL must actually result in attainment of water quality standards. The States thus have the maximum amount of flexibility in assessing when it is realistic and feasible to achieve water quality standards in any given water body.

In addition, the new regulations impose no new substantive regulations. The development of a TMDL is fundamentally a locally driven process designed to marshal existing programs in a way that will restore a particular water body. First, each State develops its own water quality standards and, under general EPA guidelines, assesses which water bodies are not meeting those standards. Then, the States, working with localities and affected parties, collect and analyze water quality data, models, and other information to arrive at the most efficient way of reducing pollution. Indeed, the type of program that appears contemplated by the bill's "Watershed Management Pilot Program" could take-place under the TMDL program as envisioned by the new rules.

The new regulations do include the requirement that every TMDL have an implementation plan. This plan must include a description of how existing State and Federal programs will be used to reduce pollution for the affected water body, and a timetable for achieving water quality standards. The regulations do not, however, require any specific timetable, but leave that decision up to the State and others participating in the drafting process. Although the drafting of an implementation plan for each TMDL may impose some additional burden, most TMDLs will be useless in achieving water quality standards without some meaningful effort to describe how the TMDL will be implemented. The implementation plan is a critical step that will move the TMDL from being a paperwork requirement to being a program that actually improves water quality. Indeed, we question how a State can be committed to cleaning up its waters, yet be opposed to deciding and planning how it will accomplish that with respect to each impaired water.

II. MORE AND BETTER DATA IS NOT NEEDED TO START ON TMDLS

In principle, TU supports improving the amount and quality of water quality data collected by the State and by Federal agencies. Indeed, we believe that more and better data would uncover additional water quality problems that current programs are missing. A recent GAO report, for example, found that, while data gaps are a problem, existing data do serve to identify the country's biggest problems, and that additional monitoring would likely turn up more problems, not less. Specifically, the report found that "[e]ven though the State officials we interviewed are confident that they have identified their most serious pollution problems, they nonetheless acknowledge that more thorough monitoring would likely reveal additional waters that do not meet standards." (GAO, March 2000).

More importantly, disputes about data do not justify further delay. The TMDL process is intrinsically adaptive to new data. Section 303(d) lists are not written in stone; every 4 years each State will have the opportunity to add and remove water bodies from its list as some waters achieve water quality standards, as others violate them, and as new data demonstrates that certain waters should be added or removed.

Improvements in data collection and analysis will allow lists to improve in accuracy, and will also inform the drafting of TMDLs as that process unfolds over the next 15 years. For example, many States are already investing in improved data and monitoring methodologies that include biological and physical criteria in addition to the chemical criteria that are currently used. The scientific basis of biological and physical criteria is well supported by peer-reviewed research. Any additional study of these methodologies would be merely duplicative effort. There is absolutely no reason to further delay these new regulations for more than 18 months to study improved data collection and analysis.

III. EPA'S TMDL PROGRAM HAS ALREADY BEEN SUBJECT TO EXHAUSTIVE STUDY

Section 4 of S. 2417 directs EPA to contract with the National Academy of Sciences to study the scientific and regulatory underpinnings of the Clean Water Act's TMDL provisions. S. 2417 authorizes $5 million for this study. The irony of this directive is that the TMDL portion of the Clean Water Act has been one of the most studied, written about, talked about, and litigated provisions of any environmental law—and it has not yet even been implemented on anything more than a trial basis in any State.

The TMDL provisions of the Clean Water Act have already been the subject of an exhaustive 2-year study. In November 1996, EPA established a Federal Advisory Committee Act Committee (FACA Committee) to provide recommendations on improving the EPA's TMDL regulations. The FACA Committee was charged with examining new policy and regulatory directives for TMDLs, including an examination of the science and tools needed to support establishment of TMDLs. In other words, the FACA Committee was given a directive nearly identical to the one S. 2417 gives to a National Academy of Sciences study. In July 1998, the blue-ribbon, 20-member FACA Committee completed its deliberations and issued a final report that contains over 160 specific recommendations for improving government efforts to identify impaired waters and establish TMDLs. Although not all of the FACA Committee recommendations were adopted, their final report informed the EPA's promulgation of its proposed TMDL rule.

CONCLUSION

The TMDL program, including the EPA's new, proposed regulations, provides a large degree of flexibility and a considerable time cushion to the States. In addition, it sets up a process that is fundamentally locally driven, and imposes no new substantive regulations on pollution. Taking the position that these regulations are too burdensome is, in TU's views, equivalent to saying that cleaning up our waters is too burdensome, too expensive, or not worth the effort. Of course, we believe that cleaning up impaired waters is not only worth the effort, it is imperative. Instead of delaying the new TMDL program, TU urges you to help the States get the resources they need to restore their impaired waters.

Thank you for the opportunity to testify today.

TESTIMONY OF DALE GIVENS, SECRETARY, LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY

Mr. Chairman, members of the committee. My name is Dale Givens. I am the Secretary of the Louisiana Department of Environmental Quality.

I am here today concerning S. 2417, the Water Pollution Program Enhancements Act of 2000. I appreciate the opportunity to provide these comments to you on behalf of the State of Louisiana.

The list of comprehensive findings outlined in S. 2417 addresses many of the same issues and concerns raised by the State of Louisiana long before the U.S. Environmental Protection Agency (EPA) drafted the proposed new Total Maximum Daily Load (TMDL) regulations and the companion regulation pertaining to the National Pollution Discharge Elimination System (NPDES) permit program.

In particular, Louisiana wholeheartedly agrees with the statement in the bill that "any Federal regulatory or nonregulatory water quality management program must be based on sound science, must be effectively and efficiently implemented, and must have the strong support of affected stakeholders, including State and local governments, landowners, businesses, environmental organizations, and the general public".

The concept of focusing public and private resources first on those waters where reliable monitoring data has demonstrated actual impairment by pollutants as opposed to listing waterbodies as impaired based on anecdotal information unsupported by reliable monitoring or other analytical data should be fundamental to an efficient water quality management program. Unfortunately, States have often not been allowed to do so due to requirements and "guidance" provided by EPA.

I am pleased to see that this bill considers adequate funding for these water quality issues to be a high priority and as such proposes to increase funding to both Sections 106 and 319 of the Federal Water Pollution Control Act while at the same time providing for a reasonable match requirement for the Section 319 program. The current 40 percent match requirement has been a significant impediment to getting nonpoint source control projects on the ground. Similar language should be added to the bill concerning Section 106 as EPA is now proposing increases in the match for this program as well. These proposed amendments recognize not only the need for additional funds but also the need to be able to use those funds in support of both traditional and new and innovative corrective mechanisms envisioned for nonpoint sources.

S. 2417 appropriately focuses on key funding gaps that impede the States in the successful execution of water quality management programs. Specifically, this proposed bill targets additional funding for the collection of reliable monitoring data. I am extremely pleased with the focus of attention on the need for comprehensive, reliable monitoring data that accurately represents true water quality conditions.

How else can a reliable and defensible assessment of the quality of our waters be prepared?

S. 2417 proposes a study to be conducted by the National Academy of Sciences to address key elements of a credible and successful water quality management program. In particular, the study proposes to investigate scientific methodologies used to identify impaired waters and develop and implement TMDLs, and how much those methodologies cost. The study will investigate total costs associated with a water quality management program that would be responsible for not only appropriately identifying impaired waterbodies but also implementing whatever traditional and non-traditional mechanisms are available to support the management program's success.

Such a study is long overdue. States and others have commented to EPA that they believe the original costs estimates concerning the implementation of the proposed rules were grossly underestimated and that credible tools and methodologies were lacking in key areas.

I agree that EPA should be required to review and consider the completed National Academy of Sciences Study before finalizing their proposed changes and additions to the National Pollutant Discharge Elimination System Program and Federal Antidegradation Policy (published August 23, 1999) and the Water Quality Planning and Management Regulations Concerning Total Maximum Daily Loads (published August 23, 1999).

While many argue that the development of TMDLs has been delayed far too long, and that argument is a key part of many of the 34 lawsuits that I am aware of concerning the States and EPA's failure to timely develop TMDLs, there is no national emergency that would justify rushing to implement quick solutions that may not result in successful outcomes for these complicated issues. These "quick fixes" may actually be responsible for the expenditure of great sums of money without an attendant improvement in water quality. This bill would allow additional time to investigate some of the major issues that States are facing in trying to promote a credible program to improve impaired waters. It is sometimes very difficult to fairly and accurately determine what valid and documentable connections exist between individual sources and any impacts that are occurring in the waters. As this bill has so succinctly declared, there is a very real need to obtain and sustain scientific, financial, and public support necessary to develop sound TMDLs. This is particularly true in light of the difficult and expensive implementation decisions that will undoubtedly have to be made as a result of the TMDLs developed.

S. 2417 provides for the needed additional time for the nation's water quality management authorities—and EPA, to make a deliberate and critical review of the many diverse uses of water resources and to determine what are the best tools and methods to be used to address those waters that need improvement.

Louisiana remains committed to developing high quality TMDLs that can actually help to improve water quality and restore impaired waterbodies so that they may fully support their designated uses. In fact, Louisiana was one of the first States to make a substantial commitment toward this end by successfully implementing a 15 percent fee increase that provides for funding ($1.7 million per year) and 36 additional employees to work in the TMDL program.

However, I believe that all States should be afforded the opportunity to utilize comparable timeframes and methodologies in order to develop and implement scientifically credible and practical TMDLs that will successfully address the pollutants of concern. The current situation where the courts are ordering drastically compressed timeframes in which the TMDLs must be developed and implemented (5 to 7 years)—while EPA is proposing up to 18 years in States not involved in the lawsuits, is both unfair and impractical if not impossible to accomplish. The only way to correct this gross injustice is for Congress to provide for this standard schedule by surgically amending the Clean Water Act to accomplish this end.

In addition, the new TMDL regulations should ultimately provide all States with the flexibility to establish their own priorities and associated schedules in developing successful TMDLs that are in concert with the water quality needs of each State while embracing national perspectives and goals.

While I am aware that EPA has indicated to the Congress, States and others that it intends to modify the proposed regulations in partial response to concerns raised, it is my opinion that such modifications do not go far enough and that the regulations should be delayed until the conditions set forth in S. 2417 have been met and additional opportunity for review by the Congress and the States has been provided.

Mr. Chairman, members of the committee, I believe that you are aware that the States and their citizens support the Federal Water Pollution Control Act's goal to restore and maintain the nation's water quality. The State of Louisiana has always been an active and successful advocate for the protection of water resources. It is

important to ensure that all of our management resources are utilized productively and that we focus our first efforts on those waters that are actually impaired and need priority attention. This bill proposes the needed additional time to identify credible tools and methodologies while providing essential additional funding with which to implement those tools.

In closing, I would like to offer my support to the committee and EPA in further developing effective regulations that will assist the States in improving and maintaining water quality in this country.

TESTIMONY OF ROBERT P. MIELE, CALIFORNIA ASSOCIATION OF SANITATION AGENCIES

INTRODUCTION

Mr. Chairman and members of the subcommittee, I appear before you today on of the California Association of Sanitation Agencies (CASA), an organization representing 92 POTWs throughout the State of California. Thank you for the opportunity to present our views on the TMDL rulemaking process, issues of concern in California and our recommendations to address these concerns. CASA agencies provide clean water services to more than 25 million Californians. I also appear before you as a representative of the Los Angeles County Sanitation Districts that provide treatment to more than 5 million citizens in 78 cities within Los Angeles County. In this capacity, I have first hand experience with the TMDL process and water quality standards.

With the enactment of what is commonly called the Clean Water Act (CWA) in 1972, Congress supplemented previous water quality control practices, which were solely based on a water quality standards approach, with a new technology-based program applying specific limitations to industrial and POTW dischargers. Municipal dischargers were required to implement "secondary treatment," while industrial dischargers were required to implement "Best Available Technology." While there were other sections of the Act that were intended to address other sources of pollution (section 208), it is clear that Congress wanted first to have these so-called point sources controlled. Any remaining pollution after implementation of technology-based practices would be addressed by implementation of practices such as section 303(d) etc. Later, additional sections were added to the Act to address these other nonpoint sources of pollution (section 319). These technology standards made huge strides in improving water quality by preventing billions of pounds of pollutants from flowing into our nation's waters from POTWs and industries each year. This is no small feat considering that the number of Americans served by POTWs has more than doubled nationwide.

Section 303(d) of the CWA was virtually ignored by States and by the EPA until fairly recently. Due primarily to the numerous lawsuits filed and won by environmental organizations, much attention has been focused lately on the TMDL provisions of Section 303(d). TMDLs have become very controversial because EPA estimates that within the next 15 years 40,000 TMDLs must be adopted,[1] each of which will result in more stringent controls on pollutant sources.

Although it is hoped that responsibility for attaining water quality standards and requisite pollutant loads will be equitably allocated among point and non-point sources of pollutants, POTWs have become concerned over the TMDL program as additional restrictions on point source discharges are likely to be the most heavily weighted part of the TMDL equation. This concern stems primarily from the potential permitting ramifications and the costs associated with having to install additional control technologies, beyond secondary treatment or even tertiary treatment, to meet wasteload allocations assigned under a TMDL adopted as a result of a 303(d) listing. POTWs also fear that "if nonpoint source tradeoffs are not available or the controls developed as a result of a 'tradeoff' fail to achieve water quality standards, the NPDES permit becomes the ultimate method of achieving standards."[2]

With this background, CASA appreciates the opportunity to provide Congress with the following comments:

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[1] EPA, Analysis of the Incremental Cost of the Proposed Revisions to the TMDL Program Regulations at 9, 32 (Dec. 21, 1998).

[2] EPA Memo from Geoff Grubbs, Director, Assessment and Watershed Protection Division, EPA Headquarters to TMDL Coordinator, Regions I-X, re: Supplemental Guidance on Section 303(d) Implementation, attachment on Section 303)d) Program Guidance at 2 (Aug. 13, 1992).

Positive aspects of EPA's proposed TMDL program

We support requiring States to adopt a listing methodology pursuant to State law. States should adopt an explicit listing methodology that specifies the type and quality of data to be used and the minimum number of exceedances of a water quality standard required to demonstrate impairment. This methodology should go through public review and comment prior to finalization. However, there should be no requirement for States to submit listing methodology to EPA for approval.

We support requiring an implementation plan for TMDLs. It will be difficult to determine whether a TMDL will reasonably be achieved and attain water quality standards until the details of implementation are identified. Thus, TMDL allocations, allowances, and implementation plans are needed to make sure a TMDL will result in the attainment of water quality standards. Without these implementation measures, it is likely that either (1) little action would be taken to go beyond the establishment of a TMDL, or (2) limited public resources would be spent on litigation forcing the process to move forward instead of actually moving forward toward the attainment of water quality standards. However, TMDL allocations, allowances, and implementation plans should be done by States pursuant to CWA's Continuing Planning Process requirements under Section 303(e), not required as part of the TMDL that must be approved by EPA.

We support the use of good data in decisionmaking processes. In particular, we support the collection, analysis and use of quality assurance and control programs to assure scientifically valid data. While we understand the impatience of many over not having all our nation's waters achieve their water quality standards; it is foolish to move forward without good data. EPA should establish minimum data quality requirements to be used at every level of the TMDL process, from listing waters as impaired to calculating the appropriate loads to apportioning the allocations among sources. If minimum data quality is not required, the States' and EPA's limited resources would be wasted on waters that later are determined not to be impaired.[3]

We support EPA's public participation requirements. These requirements mandate that States provide no less than 30 days of public review and comment on 303(d) lists, priority rankings, TMDL schedules, and the TMDLs themselves. States must also provide EPA with a summary of all comments as well as the State's response to comments, and must indicate how the public's comments were considered in the State's final decision.

Problemmatic aspects of EPA's proposed TMDL program

We do not support a regulatory program that overrides the watershed approach. The watershed approach to water pollution control involves consideration of all pollutant sources in a particular watershed to optimize the solutions and ensure water quality standards are attained; thus, a watershed approach prevents some sources from falling through the cracks. EPA has been advocating a watershed approach for several years now, and has acknowledged that this approach will result in cost-effective and equitable solutions. However, EPA's proposed TMDL program backs away from its commitment to a cooperative local watershed approach in favor of a command-and-control approach where EPA possesses greater authority and the ability to trump locally devised water quality control programs.

We believe TMDLs should be viewed as merely one tool for controlling water pollutants and meeting water quality standards. Instead of considering TMDLs to be one of the many tools provided to EPA and the States under the CWA for protecting and maintaining water quality, the proposed program elevates TMDLs to the ultimate weapon in EPA's arsenal for meeting standards. CASA believes that this result was unintended by Congress. Below, CASA provides other alternative mechanisms that EPA could utilize to accomplish the same result, potentially in a more reasonable, equitable, and cost-effective manner.

We advocate conducting in-depth water quality standards reviews on a regular basis nationwide. Generally applied water quality standards, although meeting the minimum requirements of the CWA and EPA regulation, may be inappropriate (either over- or under-protective) for a specific water body that has not had an in-depth standards analysis. Even if an in-depth standards analysis has been done in the past, changes in the uses of the water body since that time may make different standards more appropriate. Furthermore, site-specific criteria may be appropriate because of specific local environmental conditions. Congress recognized this need by requiring triennial reviews of water quality standards under Section 303(c). However, in-depth review rarely if ever occurs, and adjustment of uses and criteria to

[3] See EPA's recent decision to withdraw the TMDLs for copper in two east coast waters because of a subsequent determination that the waters were not impaired for copper. 65 Fed. Reg. 2398–2400 (January 14, 2000).

properly fit existing or attainable conditions is even more rare. Since TMDLs are triggered by a failure to attain water quality standards, EPA should be required to delay final promulgation of these TMDL regulations until they promulgate its promised water quality standards regulations to ensure appropriate standards result in appropriate control measures.

We believe EPA has exceeded its statutory authority in its proposed regulations. For example, in requiring "pollution," endangered species and drinking water issues, threatened waters, and antidegradation concerns as part of the 303(d) listing process, it appears that EPA has exceeded the authority granted the agency under the plain language of the CWA.

We question the accuracy of EPA's cost estimates. We believe that EPA seriously underestimated the costs of adopting and implementing TMDLs by incrementalizing the process and only looking at one small increment. EPA narrowed its analysis to only those costs associated with the States (and Tribes) responsibilities in listing waters and adopting TMDLs and implementation plans. EPA failed to estimate the larger increment of costs incurred by the sources allocated a limited load under the TMDL (e.g., POTWs, industries, storm water dischargers, and landowners). Congress should encourage EPA to look at the total cost of the proposed program from listing to attainment of water quality standards.

Explanation of California's situation

One of the reasons CASA was asked to testify in these TMDL hearings was to explain the unique factual and legal issues present in California. California is home to the Pronsolino case, where the timber and agricultural communities sued EPA over whether or not EPA has the authority to regulate non-point sources under CWA Section 303(d). Numerous environmental organizations, most recently the San Francisco and San Diego BayKeepers, have sued EPA to establish schedules for adopting and implementing TMDLs in California.

In addition, CASA and a companion organization, the Southern California Alliance of POTWs (or SCAP), have sued the State and EPA over Clean Water Act issues, including section 303(d). A copy of our Federal complaint is attached to this testimony. These lawsuits were filed, in part, because of POTW frustration with the 303(d) listing process and the permitting implications of discharging into a waterbody deemed to be impaired. EPA Region IX has issued draft guidance for issuing permits in the absence of TMDLs. The guidance directs the State to impose a number of onerous requirements on POTWs before TMDLs are completed, including immediately enforceable mass limitations with significant impacts on local community growth and economic development. In addition, the guidance calls for "no net loading" of certain pollutants, which will require POTWs to offset 100 percent of their discharges, without regard to their proportional contributions.

As a case study, one could look at the Sacramento Regional County Sanitation District, a CASA member agency. The Sacramento regional plant discharges treated wastewater into the Sacramento River, which flows into the Sacramento/San Francisco Bay Delta and San Francisco Bay, both of which are on California's 303(d) list for mercury. Most of the mercury loading to these waterbodies is from historic, and now abandoned, mining operations, and some comes from atmospheric deposition. The Sacramento regional plant discharges less than 1 percent of the total mass loading of mercury to the Bay Delta. Despite this fact, Sacramento has been instrumental in spearheading, and securing congressional funding for, a stakeholder driven watershed program to address water quality issues such as mercury. Sacramento has spent large amounts of staff time and over $500,000 annually since 1995 on the watershed program and on collecting ambient water quality monitoring data, which can be used to calculate and implement a TMDL.

Although Sacramento should be rewarded for its efforts, it is currently facing severe discharge restrictions in the interim before the TMDL is done. If other recent permitting proposals overseen by EPA Region IX are any indication, these discharge restrictions potentially could include the imposition of interim mass limits thereby imposing corresponding growth limits on the surrounding community. Regulators may also propose the elimination of dilution and mixing zones, or impose zero discharge requirements,[4] which could require Sacramento to install expensive control

[4] *See* Letter from Alexis Strauss, Acting Director, Water Division, EPA Region IX to Loretta Barsamian, Executive Officer, California Regional Water Quality Control Board, San Francisco Bay Region re: Comments on the Tentative NPDES Permit for the Tosco Corporation Avon Refinery at 1 (July 22, 1999) (stated that because pollutants being discharged were included on the State's 303(d) list, the discharge must be controlled by criteria applied end-of-pipe or through equivalent mass limits, and "mixing zones should not be allowed for the listed pollut-

Continued

technologies. All this is prior to the adoption of (and may well presuppose the outcome of) a TMDL that is supposed to equitably allocate the total loading to all sources. Moreover, even if Sacramento spent its sewer ratepayers' money to build additional treatment facilities that would be needed to comply with these discharge restrictions, in the absence of a fully implemented TMDL, the water quality benefits of removing less than 1 percent of the loading would be negligible and the water quality standards would still not be attained.

CASA wants to be certain that the TMDL regulations, or even worse the permit-by-permit policymaking, do not impose treatment requirements for treatment's sake. Limited financial resources should be utilized to solve the water quality problems in an equitable manner taking into account technical and economic constraints. We think this can be done within the confines of the existing CWA language, or through congressional directives given to the EPA, as follows:

Potential approaches to attain water quality standards

When read in its entirety, the CWA sets out a logical stepwise process for addressing water quality. Unfortunately, the implementation of the Act's mandates by States and EPA has been less than comprehensive and, thus, the inherent logic of the Act has been lost. This result could have been different had EPA and the States properly followed the statutory mandates per the explicit legislative intent of the Clean Water Act. However, we believe that it is not too late to refocus the water quality regulatory processes and we suggest the following:

Re-energize the Section 208 planning processes. We believe that Section 208 was intended to be the primary planning procedure under the CWA. Section 208, under the areawide waste treatment management planning process, required the establishment of a regulatory plan to deal with many of the currently pressing pollution problems at issue under TMDLs, such as agricultural return flows, animal manure disposal, mine-related pollution, land use planning, construction activity runoff, and dredge and fill materials.[5] States were also charged with identifying measures necessary to carry out the plan, the costs of doing so, and the economic, social, and environmental impacts. Unfortunately, most States adopted plans, saw the price tag, and shelved them. Congress required annual updates and certifications that are not being performed. A simple directive to EPA could reinvigorate the 208 process.

Recognize the importance of the 305(b) Reports. Section 305(b) requires States to biennially produce a report providing a broad assessment of all waterbodies, the types of impairments, and the available and practicable options for meeting statutory objectives along with the resultant costs, benefits, and environmental impacts of each option. If properly done, Congress and the public would have been made aware of the significance and cost of meeting water quality standards and remedying impaired waters as reflected in the 305(b) Report. However, no State has ever attempted to describe the full extent of economic and social benefits and costs associated with progress in improving and protecting water quality conditions in 305(b) Reports.[6] A simple directive to EPA could encourage additional oversight over State 305(b) submittals to ensure compliance with statutory requirements.

Discourage overly stringent permit restrictions prior to TMDL implementation. The U.S. Supreme Court has determined that nothing in the CWA suggests that Congress intended to prohibit discharges to impaired waters.[7] Instead, the Act contains provisions, namely Section 303(d), designed to remedy water quality impairments and allocate the burden of attaining standards between existing sources. A simple directive to EPA to discourage the imposition of effluent limitations under Section 301(b)(1)(C) prior to the adoption of a TMDL to implement a water quality standard could remedy the current adversarial permitting situation, particularly in California. CASA has prepared draft language to amend the Act to deal with this short-term problem and I would like to submit this language for the record as part of this testimony.

Encourage an economic analysis component within water quality standards adoption and revision. In addition to urging EPA to uphold the triennial review process

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ants."); Letter from Alexis Strauss, EPA Region IX to Lawrence Kolb, Assistant Executive Officer, California Regional Water Quality Control Board, San Francisco Bay Region re: Comments on the Tentative NPDES Permits for the Tosco Corporation Avon Refinery at 7 (Nov. 12, 1999) ("in the absence of these TMDLs, the only [water quality-based effluent limitation] that would assure the discharge does not cause or contribute to an exceedance of the narrative criteria is a loading of zero.")

[5] *See* 33 U.S.C. 1288(b)(2)(C).

[6] *See e.g.,* EPA's "National Water Quality Inventory—1996 Report to Congress," EPA Document No. EPA841-R–97–008 at pg. 509 (April 1998); EPA's "National Water Quality Inventory: 1992 Report to Congress" at pg. 321 (March 1994).

[7] See *Arkansas v. Oklahoma,* 503 U.S. 91, 107–108 (1992).

and to promulgate water quality standards regulations alongside the proposed TMDL regulations, a simple directive to EPA urging inclusion of a social and economic component to the consideration of "use and value" required under the Section 303(c)(2)(A) standards revision and adoption processes could encourage the adoption of more appropriate, site specific water quality standards. Such an analysis would be particularly valuable for dischargers in Western States that discharge into water dominated by or dependent upon treated wastewater to maintain flow.

In conclusion, CASA believe that to achieve full compliance with the goals of the Clean Water Act, there must be a realization that considerably more time and money will have to be expended than has already been spent to date. In a sense the easy part has been done (i.e. implementation of technology-based standards). A broader, more holistic approach must now be taken. Many of the tools to do this already exist in the Act. However, there may be the need to make some revisions to the Act that will ensure that cost-effective solutions are reached. CASA stands ready to assist you in that effort. Thank you for the opportunity to share our views with you today.

TESTIMONY OF JOHN BARRETT, AGRICULTURAL REPRESENTATIVE, EPA'S TMDL FEDERAL ADVISORY COMMITTEE

INTRODUCTION

My name is John Barrett, I am a fifth-generation cotton and grain farmer from Edroy, Texas. I appreciate the opportunity to appear before to this committee on S. 2417 and EPA's proposed revisions to the water quality planning and management regulation. My comments today will address S. 2417, the Water Pollution Program Enhancements Act of 2000 and EPA's proposed rulemaking to revise the regulations implementing the Total Maximum Daily Load (TMDL) program. I will briefly highlight several areas of interest and concern to agriculture.

THE WATER POLLUTION PROGRAM ENHANCEMENTS ACT OF 2000, S. 2417

I strongly endorse the approach to nonpoint source water quality issues in S. 2417. The legislation recognizes the need for increased resources to States and individual landowners in order to implement effective nonpoint source programs. Farmers, ranchers and foresters know that water quality can be protected and improved with the use of proper conservation and best management practices. Currently, voluntary, incentive-based stewardship programs cover millions of acres of farmland, forests, and rangeland and protect water quality. Additional financial and technical assistance is needed to ensure the continued protection of natural resources and productivity.

I also believe that it is necessary for further study of the use of Total Maximum Daily Loads as a method to improve water quality from point and nonpoint sources. The current EPA TMDL rule proposal could undermine ongoing State nonpoint source programs and impose large costs on States and landowners. The brief 18-month delay in the proposed rule is certainly reasonable in order to achieve a workable approach for nonpoint sources to protect water quality.

A recent General Accounting Office (GAO) report shows that States do not have the scientific data necessary to develop TMDLs for nonpoint source impaired waters. The funding proposed in the legislation to help States collect reliable water quality monitoring data and to improve the States' Clean Water Act (CWA) section 303(d) lists will be crucial in preparing accurate lists and directing resources to real problems.

An effective nonpoint source water quality program must be based on sound science, accurate data, Federal, State and local partnerships, and properly funded non-regulatory approaches to protect and improve water quality. For these reasons I strongly support S. 2417.

EPA'S TMDL PROPOSAL

The proposed regulations are contrary to congressional intent

The proposed regulations empower EPA to regulate nonpoint sources of pollution through the TMDL program. Congress did not intend for EPA to possess such power. Congress made a conscious decision to treat point and nonpoint sources differently and separately in the CWA. Point sources are directly regulated by EPA through effluent limitations and a permitting system. By contrast, nonpoint sources are managed by the States through Federal grant programs that encourage States to develop nonpoint source management plans.

The proposed regulations permit EPA to list nonpoint source-impaired waters; to develop TMDLs for nonpoint source-impaired waters; and to establish implementation plans for nonpoint source-impaired waters. In other words, the proposal provides for Federal land use regulation. EPA will be telling farmers and ranchers how and when they can harvest their crops and use their land. Cities can regulate land use, some counties can regulate land use, States can do it within limits, but the Federal Government needs unambiguous statutory authority to regulate land use. By this I mean Congress passing a law, not the EPA administrator writing a regulation.

The proposed regulations set unattainable standards

Congress elected to treat point and nonpoint sources distinctly for good cause. Congress realized that because of its diffuse and complicated nature, nonpoint source pollution did not lend itself to rigid point source-type controls. Rather, nonpoint source pollution had to be managed through flexible standards. Watershed managers and nonpoint source professionals are well aware of this problem. Farmers and ranchers can't control the rain! But nonpoint source TMDLs expect them to. All four components of the term—Total, Maximum, Daily and Load—imply a constant, engineered and controllable environment. Many environmental groups have long argued that a TMDL has to be just what it says it is—an enforceable DAILY load. For agriculture, this means that farmers are in jeopardy of breaking the law any time a significant rainfall event occurs. Such an outcome is preposterous. As Congress recognized in 1972, while nonpoint sources can be managed "to the extent feasible," they cannot be expected to meet any quantifiable daily load limitations.

The proposed regulations are impractical

In its zeal to redefine nonpoint source runoff as a "discharge" subject to 303(d), EPA is attempting to drive a square peg into a round hole. The Federal Section 319 Nonpoint Source Program merely encourages States to reduce pollution "to the maximum extent practicable" through best management practices (BMPs). Section 303(d) has a different bar. Compliance with Section 303(d) is not achieved until water quality standards are attained. For nonpoint source runoff, this raises the not-so-hypothetical possibility that a source would have to be eliminated from a watershed in the event that BMPs and modified BMPs ultimately prove ineffective in attaining water quality standards. This does not make sense to reasonable people who understand the vagaries of weather. The TMDL Federal Advisory Committee reached a consensus agreement that BMPs implemented to achieve TMDLs would have to pass the bar of practicability (economically achievable) as established in Section 319. EPA has failed to introduce the concept of practicability in either the preamble or the proposed TMDL regulation.

The proposed regulations do not adequately address data issues

Successful TMDL development and implementation will occur when States have attainable water quality standards, when they have 303(d) lists which are derived by an ambient monitoring program, and not by drive-by assessments or windshield monitoring. Sufficient resources must be devoted to the TMDL development process in order to provide scientifically adequate input parameters and robust stakeholder involvement in the entire process. EPA should revise its standard to require States to establish quality assurance/quality control (QA/QC) programs to ensure the reliability of water quality data on which listing decisions and TMDL calculations are based. EPA should revise its standard for data and require only the use of reliable data, e.g., to require the use of "all reliable and credible existing and readily available water quality-related data and information."

The proposed regulations cover pollution as well as pollutants

The statute requires the listing of waters for which technology-based effluent limitations—which govern the discharge of pollutants—are not stringent enough to meet water quality standards. The statute requires TMDLs "for those pollutants which EPA identifies . . . as suitable for such calculations." Placing "pollution" impaired waters on the Section 303(d) list can only increase confusion among States and the public over the function of the TMDL program.

The proposed regulations allow EPA to designate nonpoint sources as point sources

The proposed regulations allow EPA to designate nonpoint sources as point sources. They propose to regulate nonpoint sources, private forestry and livestock activities for such practices as harvesting, site-preparation, road construction, thinning, prescribed burning, pest and fire control, land application of organic nutrients and nutrient utilization plans by requiring landowners to obtain point source discharge permits for these land use activities. This proposed action is an unjustifi-

able expansion of the agency's authority, constitutes significant Federal intrusion into private activities and overrides State and private control of land-use decisions.

Agriculture is willing to be a part of reasonable and lawful water quality management programs

Agriculture is working at every level to ensure that farmers and ranchers are up to speed on water quality standards and monitoring programs. Farmers and ranchers are engaged in activities and practices to improve and protect water quality. Conservation tillage practices are being used on more than 60 percent of our nation's farmland, saving hundreds of millions of tons of topsoil annually. Over 600,000 miles of conservation buffers have been installed on farms. Thirty-six million acres are being protected through the Conservation Reserve Program. Voluntary nutrient management plans are prepared annually by USDA's Natural Resources Conservation Service for approximately 10,000 farms.

The process to protect water quality must be reasonable My experience as a member of a National Estuary Program Management Conference and as a participant in the development of a complex and contentious TMDL have convinced me that the only workable solution to watershed management is the "bottoms up" approach as opposed to "command and control."

CONCLUSION

Over the decades farm and ranch families have achieved extraordinary conservation gains through voluntary, incentive-based programs to conserve fragile soils, wetlands, protect water quality and wildlife habitats. I believe that EPA's current effort to expand the scope of regulation will not effectively or efficiently improve nonpoint source water quality I believe the nonpoint source issues outlined in EPA's TMDL proposal are best addressed through incentive-driven programs, implemented by those with the most interest in the environmental quality of America's land and water resources—farmers, ranchers, and foresters. I strongly endorse S. 2417 and its approach of supporting the efforts of our nations landowners to improve water quality.

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
Alexandria, VA, May 15, 2000.

Hon. MIKE CRAPO, *Chairman,*
Subcommittee on Fisheries Wildlife and Drinking Water,
U.S. Senate,
Washington, DC.

DEAR CHAIRMAN CRAPO: The Associated General Contractors of America (AGC) supports the Water Pollution Program Enhancements Act of 2000, S. 2417. This legislation will allow for a comprehensive study of nonpoint source pollution and strategies to manage it. This study, conducted by the National Academy of Sciences, will determine if the Environmental Protection Agency's (EPA) regulatory approach will achieve the desired results.

In August 1999, EPA proposed several regulatory amendments to the Total Maximum Daily Load (TMDL) program, the National Pollutant Discharge Elimination System (NPDES) also known as the storm water permit program, and the Water Quality Act. AGC believes that EPA's proposal overreaches existing authority under the Clean Water Act. It incorrectly places the burden of controlling nonpoint source pollution on the permit applicant that in many cases is the construction contractor. In addition, the proposal underestimated the cost of the rule on States and undermines State delegation of the National Pollutant Discharge Elimination System.

Current NPDES regulations require construction jobsites over five acres to obtain a storm water permit, design a storm water pollution prevention plan (SWPPP), and install and maintain BMPs. By 2003, jobsites over one acre will be required to obtain a permit, design a SWPPP, and install and maintain BMPs. AGC members would be directly affected by the offset proposals in the storm water general permit proposals in the TMDL proposed rule.

EPA is proposing a one and one half to one offset (1½:1) for pollutant load reductions. These offsets apply to operations in the same watershed and for the same pollutant. The proposal is attempting to regulate nonpoint sources like point sources through the offset provision. EPA states, "this proposed requirement will result in load reductions from sources that EPA and States authorized to administer the NPDES program cannot regulate under the NPDES program" (p. 46065). EPA admits this is an attempt to expand its regulatory authority over nonpoint sources without any statutory guidance from Congress.

According to the preamble, the offset proposal has no guarantees of achieving any environmental benefit. "Since nonpoint sources are not subject to a NPDES permit, the permitting authority may have less ability to ensure that offsets are implemented and maintained" (p. 46066). EPA is attempting to regulate an area in which it has no statutory authority by imposing permit requirements on the construction industry. Despite the lack of guaranties, EPA is seeking comment on the permittee being required to certify that offsets will be achieved. AGC objects to the certification requirement. Vagaries of weather, topography, and best management practices do not allow for guaranties of this nature. Certification would expose contractors to harsh penalties under the False Claims Act should an unexpected 500-year weather event undermine the best intentions of an approved offset plan.

Placing offset requirements and other requirements within the construction general permit is another area for which EPA is seeking comment. AGC objects to EPA's attempt to make substantial changes to the construction general permits controlled by delegated State programs. EPA is undermining the delegation of the program and reverting to command and control regulations by creating general permit provisions. States with delegated programs already have the authority to write permits to reflect best practices based on specific geologic, weather, and hydrologic needs in their State.

As the construction industry is regulated solely by best management practices (BMPs), AGC is concerned about the possible loss of flexibility for the States should EPA require more stringent national BMPs that are not appropriate in some areas. EPA is also seeking comment on the possibility of "offsetting" BMPs. Given that offsets would be required on the same watershed for the same pollutant, this trading program becomes difficult to manage should other construction sites not be willing to tradeoff sets. Competitive and economic reasons could prevent offsets from being found in the same watershed. Rather than seeking offsets from construction sites, owners, developers, and construction contractors will have to look for nonregulated entities to assist with storm water controls. Rather than offsets, construction contractors should focus on adequately maintaining BMPs on a jobsite. The construction industry strives to minimize the impact of construction operations on local watersheds. This practice will reduce or prevent any adverse impacts on a watershed. S. 2417 asks the National Academy of Sciences to examine the merits of a trading program.

EPA has reserved the right to object to permit extensions and other State controlled aspects of the storm water program. This undermines the States' authority to grant and monitor permits. This also increases the uncertainty that all the requirements of the permit have been completed by the permitee. It also exacerbates what we see as the cause of most violations of environmental law, an uncertainty of what is necessary to protect the environment and comply with the law.

Finally, EPA estimated that the proposal would cost $25 million a year to administer nationally. States and other groups estimate the cost of this program to be well over $100 million. In the original proposal, EPA gave States 60 days to inventory watersheds. EPA estimated this inventory to be $3 million. Both the time and cost does not accurately reflect the cost to the State, making this rule an unfunded mandate. S. 2417 recognizes the funding shortfall. The legislation authorizes $50 million annually to assist States in the collection and preparation of the total maximum daily load rule.

AGC disagrees with the merits of EPA's TMDL proposal. Mandating offsets and creating new permit restrictions without scientific data indicating the necessity of the action, creates a complex patchwork of regulations that may lead to more citations or create a more cumbersome permitting process, but achieve little, if any, environmental—benefit. The Water Pollution Program Enhancements Act provides a comprehensive study of the scientific data, the costs of implementation, and the trading program. The study will suggest alternatives to achieving water quality standards. AGC welcomes this independent review and pledges to work with the committee and the National Academy of Science to examine the TMDL proposal's impact on the construction industry.

Sincerely,

LOREN E. SWEATT,
Director.

STATEMENT OF CLEAN WATER NETWORK

FICTION VS. FACT

The Clean Water Act's Total Maximum Daily Loads Program

FICTION: The TMDL program requires non-point sources of pollution to be permitted.

FACT: *Non-point sources of pollution are NOT required to obtain Federal permits.* The TMDL program does not allow EPA to require NPDES permits, or any other kind of permits, for nonpoint sources of pollution such as runoff from agricultural fields. Instead, the power of the TMDL program lies in the fact that it requires States to draw together all the programs of the Act and coordinate them to clean up waters. States develop TMDLs for impaired waters, using watershed specific data to determine sources of pollution and a fair way to divide up responsibility among polluters for lowering water pollution levels.

The program requires that if a State decides to allocate pollutant reductions to a non-point source, there must be a plan put in place to assure the reductions will be made. The plans can be made up of voluntary programs, State regulatory programs or many other means allowed by law. A State could decide to target grant money and staff expertise of the Act's 319 program, State Best Management Practices (BMPS) programs, and other approaches to reduce pollution, but the TMDL program neither authorizes nor requires NPDES permits of non-point sources of pollution. Of course, nothing in the Clean Water Act prevents States from regulating nonpoint sources activities if they choose to do so under State law.

FICTION: EPA does not have the authority to include non-point sources in the TMDL process.

FACT: *The TMDL program has always included pollution from non-point sources. Excluding nonpoint sources from the TMDL program would guarantee its failure.* Surely this is not what Congress intended in 1972. A TMDL program that doesn't address non-point source pollution would be close to meaningless—EPA estimates that of the waters in need of TMDLs 47 percent are point source and non-point source combined problems, 43 percent are non-point only, and only 10 percent are point source only.

A recent court decision emphatically supported the fact that the Clean Water Act requires the TMDL program to address non-point source pollution. In *Pronsolino* vs. *Marcus*, the United States District Court found ". . . *as to whether TMDLs were authorized in the first place for all substandard rivers and waters' there is no doubt. They plainly were and remain so today—without regard to the sources of pollution.*"

The language of the Clean Water Act supports including nonpoint sources of pollution in the TMDL program. Section 303(d) of the Clean Water Act requires the identification of waters that would not meet water quality standards after the adoption of technology-based NPDES permits for point source discharges and requires the development of TMDLs for those waters. Clearly, waters polluted or impaired by nonpoint sources could not be restored through point source permits and thus should be listed and subject to TMDL development and implementation. A water either meets water quality standards or it doesn't—period. The source of that pollution should be irrelevant under section 303(d). *In addition existing TMDL regulations developed in 1985 specifically provide for inclusion of non-point source pollution in TMDLs.*

FICTION: The program is a top-down, Federal approach to water quality controls.

FACT: *This could not be farther from the truth. The TMDL program is the ultimate locally driven watershed clean up process.* First, States develop their own water quality standards under the Clean Water Act. States then develop lists of waters in need of clean up because they are not meeting State water quality standards. States prioritize their lists to decide which waters must be cleaned up first. States and localities then collect and analyze water quality data, models, and other information to decide what is the most efficient way to reduce pollution. The EPA only writes TMDLs (or the TMDL lists) if a State fails to develop a TMDL or does an inadequate job. This is a legal duty under section 303(d) for EPA—Congress held EPA responsible for the development of TMDLs where States failed and the courts have held EPA to that responsibility.

FICTION: The program places a huge new burden on the States.

FACT: *The statutory TMDL provisions were included in the original Clean Water Act back in 1972.* Congress included the TMDL section, largely at the request of the States, to serve as a backstop when the Act's technology-based programs proved unable to achieve the Act's goals of fishable and swimmable waters. The EPA's proposed program changes are simply building on the existing regulations—regulations that were written during the Reagan Administration.

While it is true that the TMDL program has largely not been adequately implemented in the past, that's no reason why it shouldn't be implemented now. In fact, the unfortunate truth is that over 25 years of inaction has brought us to this point—a time when 20,000 waterbody segments are in dire need of a TMDL pollution budget. On the other hand, the proposed changes do add some specificity to the TMDL program—specificity that will lead to some additional resource needs. Hence, *EPA has requested budget increases for both the TMDL and non-point source programs in order to increase grants to the States.* Some States have already stepped forward and committed additional resources to the restoration of water quality through the TMDL program.

FICTION: The TMDL program revisions create a rush to list and prepare TMDLs in the face of inadequate data on water quality.

FACT: While there is a need for better data on water quality, we have enough data to take action now. The first step in developing a TMDL is to collect additional data within a watershed. This sound science strategy allows local officials to refine the definition of the water quality problem and to begin the process of identifying pollutant loads and sources.

In addition, recent GAO report found that, while data gaps are a problem, the data do serve to identify the country's biggest problems and that additional monitoring would likely turn up more problems, not less. *Specifically, the report found that "Even though the State officials we interviewed are confident that they have identified their most serious pollution problems' they nonetheless acknowledge that more thorough monitoring would likely reveal additional waters that do not meet standards"* (GAO. March 2000).

FICTION: Existing Best Management Practices are adequate for reducing non-point source pollution, therefore silviculture, agriculture, and other types of non-point source activities that contribute to pollution in an impaired waterway shouldn't be subject to TMDL regulations.

FACT: Where BMPs are demonstrated as successful in restoring and maintaining water quality, nothing more would be required for non-point sources of pollution under the TMDL program. But let's face it: polluted runoff is the largest remaining source of pollution today. Forty percent of recently surveyed waters are unfit for fishing, swimming, aquatic habitat or other uses and 60 percent of that pollution is from non-point sources of pollution. For 28 years, point sources of pollution, particularly from sewage treatment plants and factories, have been required under the Clean Water Act to reduce their pollution through enforceable permits. Federal matching dollars and grants helped municipalities reduce their pollution, and private industry has been required to reduce pollution before it comes Out of their pipes.

Only voluntary BMPs and the backstop of the TMDL process are mentioned in the Clean Water Act for reducing non-point source pollution. We provide millions of dollars in grants a year through Federal clean water and agricultural programs to help implement BMPs. While these programs should be better funded, a TMDL process is the fairest and most efficient way to allocate responsibility for reducing pollution among all sources of pollution. *A TMDL outlines what voluntary BMPs need to be in place for non-point sources along with other enforceable requirements for point sources. in order for the waterbody to meet water quality standards.*

For more information on the TMDL program, contact the Network at 202–289–2392 or visit our web site at www.cwn.org.

STATE OF LOUISIANA,
Baton Rouge, LA, May 17, 2000.

BRIAN B. HOLOUBEK,
Senate Committee on Environment and Public Works,
Washington, DC.

DEAR MR. HOLOUBEK: As requested, I am submitting 100 copies of my testimony before the Subcommittee on Fisheries, Wildlife, and Water scheduled for Thursday, May 18, 2000. The purpose of the hearing is to examine S. 2417, the Water Pollution Program Enhancements Act of 2000. I have also included a copy of my testimony on a 3.5 inch disk in a WordPerfect file.

I request that you include into the printed record along with my testimony the following attached documents:

1. Letter dated May 11, 2000, from Mr. Bob Odom, Commissioner of the Louisiana Department of Environmental Quality, to Mr. Dale Givens providing comments on S. 2417.

2. Letter dated January 17, 2000, from Mr. William B. Richardson, Chancellor of the Louisiana State University Agriculture Center, to Comment Clerk, providing comments on the TMDL and NPDES/Water Quality Standards Proposed Rules.

3. Letter and attachment dated January 19, 2000, from Ms. Barbara Romanowsky, Assistant Administrator of the Louisiana Department of Environmental Quality, to Comment Clerk providing comments on the TOOL and NPDES/Water Quality Standards Proposed Rules.

If you have any questions or comments about this submittal, please contact me or Marian Mergist at 225/765–0639. Thank you for your help.

Sincerely,

J. DALE GIVENS,
Secretary.

LOUISIANA DEPARTMENT OF AGRICULTURE & FORESTRY,
Baton Rogue, LA, May 11, 2000.

DALE GIVENS, *Secretary,*
Department of Environmental Quality,
Baton Rouge, LA.

DEAR MR. GIVENS: We have reviewed the Smith-Crapo Bill (S. 2417) and believe this would provide very positive measures toward addressing our concerns on the current TMDL issues.

The main principles of the bill represent those by which the Soil and Water Conservation Districts, the Department of Agriculture and Forestry, and private landowners have operated since the inception of the Federal Clean Water Act—that being reliance on voluntary incentive-based measures to achieve realistic environmental goals. This bill will certainly promote and enhance this ongoing initiative in a manner that will achieve the greatest benefits. The emphasis on directing funds into nonpoint source activities is much needed and certainly will expand the current program to a level much more appropriate.

A few points about specific issues in the bill are as follows:

(1) The proposed funding to States to expand nonpoint source programs is greatly needed. It should also be noted that in this overall effort, there must be dedicated funding to achieve more technical assistance to private landowners through the USDA/NRCS.

(2) The mechanics of grants that could allow 90/10 funding and especially the liberalized guidelines for providing match have been speeded and requested many times and should prove very beneficial in our efforts to address nonpoint source water quality problems.

(3) The provision that would delay the promulgation of the impending EPA rules proposed August 23, 1999 will allow for "sound science." to be more adequately applied after the National Academy of Science study is completed. This is quite welcome from the perspective of those private landowners and conservation and environmental professionals who have repeatedly asked for this to occur. Recent meetings of stakeholders in Arkansas, Texas and Louisiana confirmed that the private landowners across the region desire and are willing to participate in incentive-based, voluntary programs. This bill would add impetus to this effort.

In summary, this bill could provide the framework to implement measures to meet environmental requirements relative to nonpoint sources including TMDL requirements in a manner that is acceptable to all those involved.

In relation to the TMDLs, I am providing you a copy of our summary of objections to the overall TMDL issue I recently presented to the Louisiana Legislature. In reviewing our concerns on the TMDLs it is quite obvious that if enacted, this bill would address our concerns.

Very truly yours,

BOB ODOM,
Commissioner.

TOTAL MAXIMUM DAILY LOADS (TMDLS)

KEY ISSUES FROM AN AGRICULTURAL/FORESTRY PERSPECTIVE

• The Clean Water Act is clear that the EPA cannot legally force States to regulate nonpoint sources with a permit system since the legal definition of a point

source specifically excludes agricultural runoff. The proposed rule clearly has EPA expanding the authority of the CWA to include nonpoint sources of pollution.

- The proposed regulations from the August 23, 1999, Federal Register would clearly create new and additional requirements that directly and significantly impact all stakeholders including agriculture and forestry.
- The proposed regulations would remove many innovative options to solving water quality problems currently being implemented by agriculture and forestry programs on both local, State and Federal lands.
- EPA should recognize the successes of the watershed-based voluntary approach under section 319 of the CWA currently in effect and seek ways to expand and enhance these and other voluntary and incentive-based programs currently in effect.
- For many years, there has existed a partnership of the USDA-NRCS, the State conservation agencies, the local Soil and Water Conservation Districts and the private landowner to address and implement these very effective voluntary, incentive-based programs. This should continue to serve as the primary mechanism for addressing the TMDL issues. It the Federal Government is going to require private landowners and managers to accelerate their efforts to control nonpoint sources of pollution, it should direct those efforts at a voluntary program that provides technical assistance and incentives rather than a strong handed regulatory approach with unrealistic goals.

LSU AgCenter Research & Extension,
Baton Rouge, LA, January 17, 2000.

Comment Clerk, Water Docket (W–98–31/W–99–04)
Environmental Protection Agency,
Washington, DC.

Re: Comments on TMDL and NPDES/WQS Proposed Rule

Dear Comment Clerk: Through this letter the Louisiana State University Agricultural Center (LSUAC) hereby submits comments on EPA's TMDL and NPDES/WQS proposed rules. The LSUAC takes issue with several very important aspects of these rules, mainly (1) EPA's decision to abandon the highly effective voluntary, incentive-based approach to water quality management for agriculture and forestry, (2) EPA's unwillingness to allow individual States to develop water quality policy that best fits the economic and technological ability of producers, (3) EPA's inability to accurately determine the significance of ambient nonpoint source pollution contributions within watersheds and (4) EPA's inaccurate estimate of the actual producer costs (and social benefits) associated with the implementation of the proposed rules.

Specific comments on the proposed TMDL regulations are outlined below:

- *EPA does not have the congressional authority to require specific actions in State TMDL implementation plans as a condition of final approval.* Section 303(d) of the Clean Water Act (CWA) does not provide EPA with any implementation authority. EPA has the responsibility to approve the numeric TMDL and States have the responsibility to develop and implement measures to achieve State-established water quality standards.
- *Non-point source activities (agriculture and forestry) are not required to have TMDLs.* EPA is proposing to require States to list and prepare TMDLs for waters that are impaired from only non-point source activities under Section 303(d). The CWA does not give EPA that authority. Waters impaired solely by non-point sources should only be listed in a State's Section 319 non-point assessment report.
- *Waters currently meeting water quality standards as "threatened waters" should not be required to be listed by States.* EPA to define "threatened waters" as waters where water quality standards are currently being met, but there is an expectation that the standard will not be met in the next monitoring cycle. There is no legal basis in Section 303(d) for listing waters now achieving water quality standards.
- *Section 303(d) listing for impaired waters should be based on accurate pollution monitoring data.* EPA is proposing to define impaired waters as any water that does not attain water quality standards due to an individual pollutant, multiple pollutants or pollution from an unknown cause of impairment. Low water flow or degraded habitat could be classified as pollution. A decision to determine impairment could be based on visual observations or monitoring data. An accurate determination of water quality impairment in Louisiana cannot possibly occur where there is a lack of sufficient data, outdated assessments, incomplete assessments, or no data at all. Use of these inaccurate measurements has resulted in a doubling of Louisiana's 1998 impairment list to approximately 345 waterbodies covering most State

watersheds. Only accurately collected monitored data for discrete, defined pollutants should be used to determine impairment. Visually observed degraded habitat, turbidity, or low stream flow should not be classified as pollution.

• *The process for listing and de-listing impaired waters should have the same criteria.* The standards for listing and de-listing a watershed under Section 303(d) should be the same. A system that requires less documentation and review for a listing than for a de-listing is scientifically and technically flawed.

• *In waters where both point and non-point source activities may be causing a 303(d) listing, EPA is proposing that both sources share the responsibility of achieving water quality standards.* EPA is proposing that both point and non-point sources be subjected to an allocation of a daily pollutant limitation through a TMDL. This, however, is not legally required, scientifically quantifiable/verifiable, or cost-effective. Nonpoint source pollution would be best addressed through the implementation of research-based Best Management Practices (BMPs) while point source pollutants are managed through the existing NPDES program and State developed TMDLs. The implementation of BMPs through voluntary, incentive-based mechanisms should be ruled as the functional equivalent of TMDLs for nonpoint pollution sources.

• *States will be burdened with large unfunded mandates if they are forced to implement EPA's proposed TMDL regulations.* EPA has not accurately determined the financial burden placed upon States and agricultural/forestry producers to develop and implement TMDLs as proposed. Additionally, EPA has not been able to accurately estimate the real benefits of meeting potentially un-achievable standards. Some economists are predicting that development and implementation costs (to States and producers) could realistically be in the billions of dollars.

• *Many agricultural dominated waterways in Louisiana have been significantly modified to directly meet the needs of crop production (i.e., irrigation, drainage, etc.)—in these cases crop production should be the primary use.* It may be prudent to develop a specific agriculture use designation/hat allows for continued, historic economic activity within such watersheds with reduced emphasis on other uses (swimming, fishing, etc.).

Specific comments on the proposed NPDES/WQS rule are outlined below:

• *Animal feeding operations, aquatic animal production facilities, and certain silviculture management activities (all historically classified as non-point sources) should not be subjected to the NPDES permitting program.* The proposed reclassification of these historically exempt activities as point sources (and thus requiring NPDES permits) reverses a 27 year determination under the CWA that these activities are "non-point" sources. There is no legal or statutory authority for EPA to develop these regulations. Congress clearly intended for these land uses to not be regulated through the NPDES program. EPA's authority to arbitrarily designate certain animal feeding operations (aquatic and terrestrial) as point sources (requiring NPDES permits) regardless of the number of animal units being produced is technically unsound and economically unreasonable. States have and should maintain the authority and responsibility to identify and address nonpoint sources of pollution under other sections of the Clean Water Act.

• *Restrictive NPDES permit conditions may lead to economic disaster in rural communities.* NPDES permit conditions will require offsets (reductions) of up to 1.5 times the proposed discharge from any new or expanding point source activity in an impaired watershed where a TMDL has been established. If the 1.5 point source offset cannot be achieved, business expansion within a watershed may not be allowed, virtually stopping all new economic development. States must be given the authority and flexibility to consider offsets on a case-by-case basis considering technical and economic feasibility and environmental and human health benefit.

In conclusion, it is our opinion that these proposed rules be suspended until an independent, in-depth cost/benefit analysis can be conducted, and a clear justification is delineated for increased regulation covering agriculture, ranching, aquaculture and forestry activities in Louisiana. Additionally, we feel that much more research-based data should be collected regarding the contributions of pollutants from undisturbed areas and the ability of a watershed to meet specific water quality standards with current economic activity in place. A very serious farm financial crisis has burdened agricultural producers over the past 2–3 years. The increased burden of un-warranted environmental regulation will no doubt result in financial ruin for many Louisiana farmers and ranchers. This will spin-off into accelerated economic decline in many rural Louisiana communities with little potential for economic diversification at this time.

It would be advisable for EPA to enhance education and outreach activities, and encourage voluntary, incentive-based water quality policy in Louisiana covering agriculture and forestry activities. BMP development and voluntary adoption has been

very successful in Louisiana, and the continuation of this effective approach is highly encouraged in lieu of new regulations.

Sincerely,

WILLIAM B. RICHARDSON, *Chancellor and Chalkley Family Endowed Chair.*

STATE OF LOUISIANA,
Baton Rouge, LA, January 19, 2000.

Comment Clerk for the TMDL Program Rule Water Docket (W–98–31)
Environmental Protection Agency,
Washington, DC.

Re: Comments on (1) the Proposed Revisions to 40 CFR Part 130 the Water Quality Planning and Management Regulation (W–98–31); and (2) the Revisions to the NPDES Program & Federal Antidegradation Policy 40 CFR Part 122 et. al. (W–99–04)

DEAR SIRS: The Louisiana Department of Environmental Quality (LDEQ) has reviewed EPA's proposed regulations (listed above) very carefully and offers the attached comments for consideration and EPA response. In addition, please consider the issues discussed within this cover letter as part of LDEQ's comments.

The State of Louisiana has been actively protecting and restoring its waters for over 30 years, and has continually supported the goals of the Clean Water Act (CWA). The CWA gave States the lead role in the development and implementation of water quality programs; therefore, these proposed regulations will have a direct impact on Louisiana's TMDL program. The LDEQ feels very strongly that the EPA should carefully consider the new and overly burdensome directions that these proposed regulations would focus both State and Federal resources and goals if finalized without major revisions. In order to do more than provide EPA with our concerns and questions regarding these proposed regulations, LDEQ would have to start at the beginning and completely rewrite the proposed regulations offering alternative language with a more detailed and constructive objective. There is simply insufficient time to begin such a project. The following bullets summarize some of the significant concerns that LDEQ has with the two sets of proposed regulations:

- The proposed regulations broadly expand the Federal role beyond the authority outlined within the Clean Water Act. LDEQ cannot support such unlegislated "mission creep" that significantly expands the authority of the EPA above and beyond what is currently in the CWA or the Federal regulations that support the CWA. It is imperative that States' lead role in the nation's Clean Water Programs, as envisioned and mandated by Congress, must be maintained and reinforced with any new regulations. The proposed regulations, however, are written with the specific goal of cementing EPA's command and control position over all development and implementation of TMDLs. EPA's goal with these proposed regulations seriously jeopardizes the partnership relationship that EPA has promoted with the States for years. States are and should be considered by EPA as full partners in the management, protection, and restoration of water resources. Sadly, with these proposed regulations, EPA has missed a unique opportunity to revise the current outdated TMDL regulations and establish a realistic choice of consistent mechanisms that States may utilize to successfully implement the first round of TMDLs. Instead, with these proposed regulations EPA turns the currently complicated and imperfect TMDL initiative into a controversial and litigious proposal that many State governments are understandably reluctant to endorse.
- The proposed regulations are far too prescriptive, and would force States to manage multiple water quality programs through the new mandates and expanded authorities of the revised Section 303 of the CWA. The proposed regulations ignore and effectively remove the flexibility required by States to achieve intended environmental outcomes and promote functionally equivalent approaches. The proposed regulations should have allowed States to be innovative in their approaches to managing State waters, and encouraged and empowered States to utilize existing programs to carry out water quality objectives wherever possible. The proposed regulations instead add overly burdensome and unnecessary new layers to existing programs. In addition, the more moderate language of the preamble is inconsistent with the rigid positions and mandates of the proposed regulations, and undermines the public's ability to provide EPA with constructive comments concerning these proposed regulations.
- The proposed regulations are obviously aimed at expanding the requirements of CWA Section 303 to more easily provide EPA with the authority to assume control of LDEQ's development and implementation of TMDLs and all other programs

that Section 303 impacts. LDEQ believes that EPA does not have statutory authority for establishing the nonpoint source pollution control requirements in these proposed regulations, nor does EPA have any clear congressional mandates to provide for the regulatory implementation of nonpoint source controls. The iterative approach to solving problems, with stakeholder involvement, has been and will continue to be crucial to successful water quality management, particularly for nonpoint sources. Point and nonpoint sources should be dealt with equitably, in a manner that is sensitive to their different characteristics. For example, EPA's position on silviculture in the proposed regulations ignores the already successful implementation of water quality-based forestry BMPs demonstrated not only within Louisiana forests but in other State forests as well. A national, "one-approach-fits-all," strategy for the development and implementation of TMDLs within each State is inappropriate and counterproductive. EPA should not have ignored in its proposed regulations the effective programs of the past and present (both point source and nonpoint source related), supported with years of Federal grants funding and State moneys, that relied heavily and successfully upon incentive-based and voluntary efforts among stakeholders.

• EPA maintains that the proposed regulations carry forth the status quo. On the contrary, these two proposed regulations add new requirements that will directly and significantly impact many entities, whether small or large, existing or new, public or private. It was improper for EPA to offer these proposed regulations as two independent actions, then address economic impacts separately, thereby diluting the apparent fiscal impact of the regulations. As a result, EPA has not accurately depicted the additional costs to State, local, and Federal Governmental agencies, private entities, and small businesses that these two proposed regulations will require. These proposals are indeed "significant regulatory actions," even if the economic impact is limited to only those incremental costs that will occur as a result of these two proposals. For example, the proposed language:

(1) adds the new requirement that TMDL implementation plans be submitted as part of an approvable TMDL,

(2) expands the current definition of pollutants to include contaminants regulated under the Safe Drinking Water Act and sets into motion regulatory consequences to address a waterbody that may, in fact, show no use impairment, and

(3) adds new terminology that is ambiguous and poorly developed and easily susceptible to subjective interpretation that results in arbitrary and costly decisions.

Even though EPA presents these proposed regulations as "not significant regulatory actions," EPA must nevertheless be willing to pursue additional funding increases to ensure the success of any final regulations and not rely on simply imposing unfunded mandates that must be paid for at the expense of other State programs. EPA must honestly examine their water program goals as a whole as well as these two proposed regulations in their totality, and properly acknowledge the true costs associated with all program elements. Only then can EPA accurately account for the economic impact of these two proposed rules.

The LDEQ encourages EPA not to rush these two proposed regulations to finalization before meticulously considering all comments received. The regulations should be drafted to acknowledge, accommodate, and promote the diverse approaches that can be and have been utilized and successfully implemented among States for the attainment of water quality standards. All States need to be able to set their own priorities as envisioned by the U.S. Constitution, establish realistic schedules, develop and pursue innovative solutions, and develop and implement incentive-based and voluntary efforts in managing water quality.

Please do not hesitate to contact me if you have any questions about the information or comments contained within this cover letter or the attachment. LDEQ appreciates the opportunity to work in partnership with EPA as part of our commitment to protecting and enhancing Louisiana's remarkable aquatic resources.

Sincerely,

BARBARA ROMANOWSKY, *Assistant Administrator,*
Louisiana Department of Environmental Quality.

COMMENTS OF THE LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY ON THE PROPOSED REVISIONS TO 40 CFR PART 130

COMMENTS ON DEFINITIONS

§ 130.2(d)—Pollutant

• EPA is proposing to clarify the definition of pollutant to encompass drinking water contaminants that are regulated under Section 1412 of the Safe Drinking

Water Act (SDWA) and that may be discharged to waters of the U.S. that are source waters of one or more public water systems. For public water systems served by surface water, EPA proposes that source water is any water reaching the intake. Has EPA determined the incremental costs associated with expanding the current definition of pollutant?

• LDEQ believes that by changing the definition of pollutant to encompass drinking water contaminants that are regulated under Section 1412 of the SDWA, the list of contaminants for waterbodies designated as drinking water sources that the State must address is increased significantly. There are 44 contaminants with a primary drinking water standard for which LDEQ does not have a water quality standard. There are 11 secondary drinking water standards with an MCL for which LDEQ does not have a standard. It is important to note that drinking water standards apply to treated drinking water, and LDEQ's water quality standards apply to source water-specifically surface water. LDEQ monitors and assesses source waters and the Louisiana Department of Health and Hospitals (DHH) applies the MCL standards to finished (treated) water.

• There are no national criteria for many of the compounds listed in the SDWA. Additionally, LDEQ does not test for many of the parameters indicated by the SDWA. There would be a tremendous cost added if LDEQ were to do so. Did EPA address this issue of monitoring for all "potential contaminants" in their cost analyses?

• With regard to source water being any water in the watershed reaching the intake, if the pollutant is discharged at great distances above a river intake, natural attenuation and dilution should alleviate concern. Although the Louisiana SWAP is delineating the entire watershed capable of feeding an intake, the actual on-the-ground inventory for potential sources of contamination (PSOCs) is 5 miles upstream from the intake and 1000 feet to either side of the stream. Beyond this, only a data base search for PSOCs is done for the contributing watershed. The reliability of these data bases is unknown. Furthermore, Source Water Assessments are potential sources of contamination, not sources of contamination. To consider PSOCs alone as a basis for listing a waterbody as impaired or threatened is overkill. Why has EPA chosen to expand the scope of the current listing language by requiring the use of flawed "new criteria" with which to assess raw water sources prior to treatment?

§ 130.2(f)—Load Allocation

• The definition of Load Allocation was changed (shortened), removing provisions allowing for "best estimates of the loading, which may range from reasonably accurate estimates to gross allotments . . ." The definition is also changed from "The portion of a receiving water's loading capacity that is attributed to . . ." to "The portions of a TMDL's pollutant load allocated to . . ." These changes lead to a possible interpretation that load allocations can be very precisely determined in the context of a TMDL model. Load allocations from nonpoint sources and natural background are rarely known precisely. This new definition will allow EPA to require more specific and therefore more costly estimates for load allocations. Is this incremental cost associated with changing the current definition of load allocation considered in EPA's cost analyses?

§ 130.2(h)—Total Maximum Daily Load

The definition of TMDL inappropriately expands the language of the CWA and the current regulatory definition.

• § 130.2(h)(9) requires that the TMDL must contain "An allowance for future growth which accounts for reasonably foreseeable increases in pollutant loads". EPA requires it as part of a TMDL but offers no clue as to how to develop such allowance. Is EPA prepared and capable of providing such an estimate?

• The proposed definition of TMDL is not appropriate and is dated. It is written to fill in the EPA's perceived gaps in the present definition. EPA in this new definition of a TMDL is attempting to address all of the issues that have been raised in the recent years through lawsuits. A TMDL is not a plan. A TMDL is an estimate of the pollutant load that a waterbody can assimilate without exceeding the established water quality standard for that pollutant. TMDLs are developed through a mathematical analysis of pollutant loads (both point source discharges and nonpoint source), in-stream water quality, and stream hydrology.

• The proposed expanded definition of TMDL places a new mandate upon the States to develop a detailed implementation plan along with the TMDL. Development of the required TMDLs will expend all of the State's resources. The State does not have sufficient staff or resources to develop an implementation plan for each

and every TMDL as described in the proposed regulations timely enough to meet the schedule that the Federal court has ordered EPA to implement in Louisiana.

• This expanded definition also requires that a TMDL include both a margin of safety and an allowance for growth. This adds to an already large conservative buffer built into every TMDL which presumes a level of uncertainty due to assumptions that are made in the analysis. This requirement is also inconsistent with the Clean Water Act Section 303(d)(1)(C), which specifies that the TMDL should include a margin of safety and take into account seasonal variations. There is no mention of inclusion of a growth factor.

§ 130.2(n)—Threatened Waterbody

• Threatened waterbodies are not considered in the CWA. § 303(d)(1)(A) specifically States, ". . . effluent limitations required . . . not stringent enough to implement any water quality standard applicable to such waters." (CWA § 303(d)(1)(A)). Inclusion of threatened waterbodies on the 303(d) list is not consistent with the CWA. By EPA's own definition, a threatened waterbody "currently attains water quality standards . . ." (Proposed 40CFR§ 130.1(n)). It is recognized that threatened waterbodies should be monitored closely to prevent further degradation and promote improvement, however, threatened waterbodies should not be considered on the § 303(d) list [as proposed in Sections 130.25 (a) and 130.25(b)(1–3)] because they "currently attain water quality standards."

• The proposed definition of threatened waterbody is flawed in that it assumes that a declining trend will continue to the point of a standards exceedence There is no way to predict that this will be the case for any given body of water. The Clean Water Act does not define threatened waterbody nor does it require that threatened waterbodies be identified for purposes of TMDL development.

§ 130.2(p)—Reasonable Assurance

• Reasonable assurance is defined for nonpoint sources as State regulations or local ordinances. LDEQ cannot assure that local governments will pass ordinances to require management measures for nonpoint source controls. Nor can LDEQ assure that any new State laws or regulations will be passed. In the case of nonpoint sources, LDEQ will continue to first pursue a nonregulatory, voluntary approach to implementing TMDLs rather than pursue legislation now that would require farmers to implement management measures on their land.

• On Page 46016: Column 3: Paragraph 2 EPA is proposing a definition of "reasonable assurance" in 130.2(p) as a demonstration that wasteload allocations and/or load allocations in a TMDL will be implemented. EPA proposes that each TMDL contain reasonable assurance that allocations contained in the TMDL will in fact be implemented to attain and maintain water quality standards. There is need for more clarification as to what would constitute reasonable assurance that a TMDL would be implemented. If the State outlines within the UPS Management Plan a step-by-step process that it will follow in the implementation of the TMDL at the watershed level, does that not constitute a reasonable assurance? What would be considered as "expeditiously implemented"? Would the State have the latitude to utilize all of the cost-share, technical assistance and educational tools available to ensure implementation of best management practices (BMPs) before it required that those BMPs be implemented through a regulatory mechanism? Who would decide the timeline . . . the State or EPA?

GENERAL COMMENTS

• Both rules are silent on the issue of antibacksliding. This has been a significant problem in some cases after the establishment of correct standards and/or a TMDL. If the existing permit limits are more stringent than necessary for either case, it has been extremely difficult in the past to implement less stringent limits. The proposed rule apparently continues an unwarranted economic hardship on NPDES permit holders.

• Taken as a whole, the proposed requirements are so strenuous that it appears that EPA wants to develop and implement all TMDLs and issue all permits themselves. Does EPA intend to follow their own regulations? If a State is unable or elects not to develop and/or implement TMDLs, where in the proposed regulations is language that forces EPA to develop and implement TMDLs (including issuing permits) following the same requirements that States will have to follow?

• Given the new requirements for listing, when does the 2-, 4-, or 5-year time clock begin after promulgation of the final standards?

• If the waters must remain listed until standards are achieved, the waters relying on NPS BMPs to achieve standards may be on the list for decades. Some BMPs will undoubtedly require in excess of 20 years to show effectiveness. Where in the

proposed regulations does EPA acknowledge this reality and provide reasonable mechanisms to address it (besides an enforcement mechanism)?

- It appears that EPA is trying to encourage the development of "non-mathematical" TMDLs with the new definition, but they fail to follow through with that option in the proposed language of the 10 elements. If EPA does intend to acknowledge "non-mathematical" TMDLs then the proposed definition must be revised. Does EPA intend to accept "non-mathematical" TMDLs?
- Incorporation of reasonable assurance requirements for TMDL implementation will undoubtedly slow down the rate of TMDL development. Has EPA performed an economic impact analysis for this additional requirement? Even if EPA succeeds in getting a 5-year cycle, the negotiations/agreements with NPSs which would be required in Louisiana would be hard to achieve and show progress in that timeframe. Is there language in the proposed regulations that acknowledges this reality?
- Threatened waters need to be removed from the 303(d) list and, if listed at all, handled as a first priority under 303(e). Where in the Clean Water Act does it require development of a TMDL for a waterbody that is currently meeting its uses (threatened waters)?
- The issue of "unknown causes" should also be treated separately and not made a part of the 303(d) listing. It is unreasonable to assume that the cause can be identified and the TMDL developed within one listing cycle. How does EPA expect to implement a TMDL when it has not yet identified the cause of impairment?
- The issue of natural conditions and incorrect standards is ignored by EPA in the proposed 4-part listing system. What mechanism can predict that water quality standards will be achieved in the future besides a TMDL?
- The issue of ranking the waterbodies and scheduling TMDLs continues to be in conflict. The proposed requirement ignores the watershed approach, which EPA has been touting for years. States are still required to assess and list all impaired and threatened waters. States are still required to prepare TMDLs for all those listed in Part 1 (which will probably be the majority of the waters). If Louisiana uses the basin approach and EPA succeeds in getting the 5 year cycle, Louisiana will be assessing all the waters within the cycle, but will still not be able to develop TMDLs on all waters in Part 1 during the cycle. How does EPA intend to accommodate the "disconnect" in the proposed regulations between encouraging a watershed approach and still providing for adequate time for States to develop scientifically credible TMDLs that have a realistic chance at successful implementation?
- 130.33(b)(5) of the proposed TMDL regulations (wasteload allocations) has been expanded in such a way that development and implementation of Dissolved Oxygen TMDLs will become even more complex than they are currently. Even with the authorization to consider some loads as part of background conditions, it will be difficult to avoid modeling every stream and every point source discharger in the watershed. Without modeling, there will be no way to show that those individual point sources included in background do not need to be reduced in order to maintain/achieve standards. Did EPA intend to predetermine the scope of TMDLs by drafting regulations that attempt to address all scenarios? EPA needs to be less prescriptive in their proposed regulations and acknowledge the probability that each TMDL will present enough unique considerations that such in-depth regulations are inappropriate. Has EPA considered removing much of the detail in these regulations and presenting it as guidance that can be tested and fine-tuned over the next few years to see if it works? EPA may regret finalizing such inflexible regulations if, in the end, they are required to develop and implement some of the more difficult TMDLs themselves. Will EPA be required to adhere to their own regulations?

  Where in the proposed regulations is that stated?
- 130.33(b)(6) of the proposed TMDL regulations (load allocations) presents similar problems for Dissolved Oxygen TMDLs in the case of nonpoint sources which may be included in background loads. Where in the proposed regulation is there language that acknowledges the difficulty in addressing nonpoint sources within the background loading?
- Presently, there are many unknowns associated with developing and implementing thermal TMDLs. The impact of this requirement could result in cooling tower requirements and end-of-pipe compliance for facilities subject to the requirement. Has EPA performed an economic impact analysis for this requirement? Louisiana does not believe that the cost estimates provided by EPA take this issue into consideration.
- After EPA approval, States are required to incorporate the TMDL into the water quality management plan. Does this mean that we will now have to have a second public process following approval?
- What Federal regulation gives EPA the authority to require States to adopt EPA derived TMDLs?

§ 130.11

• EPA states that with regard to reporting information to the public through the section 305(b) report, site specific monitoring efforts will be reviewed as well as source water assessments conducted under the Safe Drinking Water Act (SDWA).

• Furthermore, water quality problems identified in the 305(b) reports are to be "emphasized and reflected" in the source water assessments for all waterbodies where designated uses include public water supply.

• An EPA headquarters representative that oversees the SWAP has indicated to Louisiana that reporting would be through the Wellhead Protection Program biennial report. If the SWAP assessments are considered site specific monitoring relative to the 305(b) report, it would only duplicate the information found in the Wellhead Protection Program biennial report.

§ 130.22

• EPA is proposing at 130.22(b)(4) to include the results of source water assessments conducted under section 1453 of the SDWA as "existing and readily available data" which States must consider in deciding whether to list a waterbody as impaired or threatened. EPA states that a national primary drinking water regulation (NPDWR) is the SDWA's term for drinking water safety standards which are typically established as maximum contaminant levels (MCLs). Drinking water safety standards provide reference points (a) against which States can compare water quality monitoring data, or (b) that States can use to add or revise water quality criteria to support public water supply use in the absence of more stringent criteria that support more sensitive ecological uses.

Louisiana believes that Source Water Assessments are potential sources of contamination, not sources of contamination. If sources of contamination are found during the field assessments, they are reported to the proper agency for investigation immediately. Essentially, what is reported to the public are the PSOCs for community monitoring and State monitoring, if regulated. The PSOCs may never be released to the environment, but do bear watching. Therefore, to consider PSOCs alone as a basis for listing a waterbody as impaired or threatened is inappropriate since there is no data to show a use is impaired.

• EPA states that if the listing is based on a designated use but the State has not adopted a water quality criterion for the pollutant(s) of concern, either in support of public water use or in support of a more stringent use (e.g. aquatic habitat), the State should use a reference point sufficiently below the drinking water safety standard (MCL) to prevent excursions above the safety standard at the source water intake as its starting point for developing a TMDL.

EPA's statement assumes the public is drinking untreated water. The MCL standard is for water that has been treated and about to go through the distribution system to the water tap for drinking. All surface water that is a drinking water source in Louisiana requires treatment. EPA's proposal is too stringent to be used as a starting point for developing a TMDL for a waterbody designated as a public water supply. How does EPA intend to establish a reference point "sufficiently below the MCL" to ensure that there are no excursions above the safety standard at the source water intake? Does EPA intend to design a protocol for development of such a reference point or will each State design and defend their own unique reference points?

Why can't EPA use the statewide susceptibility analysis being developed by the Source Water Assessment Program for the surface water public supply systems (which will be completed by May 6, 2003) during the development of TMDLs rather than a listing of the drinking water source assessments?

§ 130.23

• This section will significantly increases the time LDEQ to assess water quality conditions. This section requires the State to prepare a detailed description of its methodology for evaluating and ranking waterbodies for 303(d) listing. In addition, it requires LDEQ to allow at least 60 days for public review and comment on the methodology and to submit to EPA a summary of comments and State responses to the comments. This process has to be repeated every 2–5 years. After LDEQ prepares and submits its methodology, does EPA intend to review the methodology and provide comments back to the State before a new list is developed by LDEQ utilizing the new methodology? If LDEQ receives no comments from EPA concerning its new methodology, does that mean EPA finds the methodology acceptable?

• While the new regulations do not require EPA approval of the methodology, it provides EPA with a basis for disapproval of the State's 303(d) list. By that point,

LDEQ will have put a great deal of resources and time into preparing both the methodology and the new 303(d) list. EPA's proposal works against the timely development of a 303(d) list. The proposed regulations would have EPA essentially waiting until the end of months of work on the part of the State and only then alerting LDEQ to some problem EPA has with the State's listing methodology. This could mean that a State would have to start from the beginning, revise its methodology and then develop a new list. How can EPA justify and promote such an inefficient process? This process would leave LDEQ vulnerable to months of "negotiation" with EPA over a 303(d) list produced using a methodology (developed months before the list) that EPA has now decided is unacceptable. What prevents this scenario from happening? In fact, it is quite likely to occur. Does EPA intend to prepare a methodology for insuring that EPA disapproval associated with the States listing methodology is based on a consistent and equitable national evaluation of the diverse methodologies among the States? If not, how can EPA prevent arbitrary and capricious evaluations of such diverse methodologies and the eventual approval/disapproval of States' lists?

§ 130.27(a)

- The proposed regulation specifies what the § 303(d) list must include. This is inconsistent with the CWA. The CWA clearly specifies that "Each State shall identify those waters within its boundaries for which the effluent limitations required by mare not stringent enough to implement any water quality standard applicable to such waters." It does not allow EPA to tell States what waterbodies are to be included, other than those waterbodies specified as not meeting water quality standards. As mentioned in EPA's definition of "threatened waterbodies" § 130.1(n) a threatened waterbody "currently attains water quality standards . . ." (Proposed 40CFR§ 130.1(n)). How does EPA intend to justify this obvious inconsistency with the CWA?
- There needs to be some provision for de-listing waterbodies that are found to be not meeting a standard due to natural conditions, even after implementation of water-quality based controls and management measures. These proposed regulations presume that the existing water quality criteria are appropriately set, but in many cases, the criteria are not appropriate for a particular waterbody because they are based on national data. This is the case with the dissolved oxygen criterion in Louisiana. EPA has indicated that Louisiana should pursue a change in the dissolved oxygen criterion including the option of revising the designated uses of many of these streams. The process currently available to make such changes is time consuming and legitimately can require the collection of several years of field data to appropriately document and verify the true criterion. And this process has historically been done one waterbody at a time. In such cases, the State will be in a position of having to continually re-list waterbodies that fail to meet an inappropriate standard. Prior to final verification of the real criterion and then reassessing the waterbody to evaluate attainment, the State will be forced to implement more costly controls and more stringent permit limits in order to meet a standard that is naturally non-attainable. How can EPA justify such a waste of resources without any measurable improvement in water quality?

§ 130.27(a)(1)

- The proposed regulations specify that impaired and threatened waterbodies are to be on Part I of the list. By forcing States to place a waterbody on Part 1 or some other part of the list, EPA is attempting to set § 303(d) priorities. The CWA clearly specifies that "The State shall establish a priority ranking for such waters . . ." (CWA § 303(d)(1)(A)) It does not allow EPA to set the priority ranking, only approve or disapprove the list. Also, if EPA does not approve the list they "shall not later than 30 days after . . . disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards . . ." (CWA § 303(d)(2)) Congress clearly intended EPA to either approve or disapprove the § 303(d) list. If EPA disapproves a list they are required (CWA says shall) to create the list and the TMDLs themselves; not ask States to redo the list. LDEQ is certainly aware that this default scenario is unworkable for both EPA and the State of Louisiana. However, it would seem that this scenario would definitely motivate EPA to fine tune the current 303(d) listing and TMDL regulations to simplify and promote the expeditious development of TMDLs. EPA's proposed regulations do not accomplish those goals.

§ 130.27(a)(2–4)

- Establishment of Parts 2–4 by the proposed regulation again places EPA in the position of establishing priorities, when this power was clearly given to the States in the CWA. Further, the CWA makes no mention of Parts 1–4. It only specifies

that "The State shall establish a priority ranking . . ." (CWA § 303(d)(1)(A)). (See previous comments on the language of the CWA.) LDEQ feels strongly that EPA is attempting to alter the language and intent of the CWA through the regulatory process rather than revising the statute through Congress.

§ 130.28

Specifying how States are to establish priorities, "How do you prioritize the waterbodies on Part 1 of your list?" (Proposed 40 CFR § 130.28), clearly oversteps EPA's power under the CWA. As already mentioned above, the CWA clearly specifies that "The State shall establish a priority ranking for such waters . . ." (CWA § 303(d)(1)(A)). Under the CWA, EPA can only approve or disapprove the list. It cannot specify what waterbodies are to be present, or prioritize the list in any way.

§ 130.33

- The requirement for allowance for future growth is not necessary. There are already enough conservative assumptions in the water quality models that can add as much as 40–50 percent to the margin of safety, resulting in a conservative buffer in favor of the water quality. Also, a future growth requirement is not specified in the Clean Water Act. A margin of safety and consideration of seasonal variation, however, are required in the CWA. The additional requirements, such as allowance for future growth, that EPA has proposed in the regulations only add more confusion to an already difficult process and misrepresent the current processes now utilized to develop TMDLs.
- Development of an implementation plan as part of a TMDL is not required by Section 303 of the CWA. In fact, all of Section 303 is aimed at implementing point source controls; there is no mention made of nonpoint source controls. The proposed requirement for detailed implementation plans places added strain upon a State's resources. Development of plans that include identification of funding sources and costs of implementing management measures requires time and specialized personnel. Can EPA provide the States with this type of information? If the States fail to submit this information, is EPA prepared to produce this information in their TMDLs?
- The requirement to include an implementation plan as part of the TMDL will substantially slow down the rate of TMDL development. Has EPA performed an economic impact analysis for this additional requirement? In Louisiana, where low dissolved oxygen is the primary impairment, successful implementation will depend heavily on the BMPs utilized by nonpoint sources. Through the State's policy for sanitary dischargers, many existing point sources have already met advanced treatment levels to achieve dissolved oxygen standards. There needs to be a balance between the controls placed on point and nonpoint sources which can only be achieved at the community level. The watershed community surely has the right to decide how they will pay for clean waters. The TMDL can provide implementation goals, but the community should decide how they will achieve those goals. In many cases, LDEQ expects that implementation of BMPs will change the water quality so significantly, that the water chemistry and hydraulics which were the basis for the original TMDL will no longer be valid. In these cases, the original TMDLs and the point source controls that those TMDLs forced upon the regulated community may well have been more than was necessary to achieve water quality standards.
- It does not seem feasible for the TMDL submittal to require an implementation plan as one component that would have to be approved by EPA. The implementation plan seems redundant to the planning process that the States outlined within the upgraded NPS Management Plan. This plan included the 9 key elements that EPA felt were essential for a State program to demonstrate its effectiveness in meeting its short-term and long-term water quality goals (i.e. water quality standards). If EPA concurs with the State's NPS Management Plan, this should constitute reasonable assurance that the State has committed to address the load allocation portion of the TMDL. The States are also required to submit Watershed Restoration Action Strategies (WRAS) for watersheds that they prioritize to restore to their designated uses and water quality standards. The WRAS should suffice for the TMDL implementation plan. The redundancy of planning documents prevents the State from actually implementing the plan because of the time involved in creating more planning documents. Why can't EPA accept the upgraded NPS Management Plan and the WRAS as the "reasonable assurance" that the State intends to implement the load allocation portion of the TMDL?
- The requirement for demonstration that the control actions or management measures are expected to achieve the TMDL is redundant. Doesn't the TMDL model and report demonstrate that the recommended loads will meet the standard?

• These proposed regulations require a description of a process to revise TMDLs if the projected milestones for meeting standards are not being met and if progress toward meeting standards is not demonstrated. LDEQ is committed to a court-ordered schedule that incorporates a watershed approach to develop and implement TMDLs. The State does not have sufficient resources to revisit completed TMDLs during the first round of TMDL development and implementation and still meet the deadlines in the current schedule. These proposed regulations also give EPA the authority to determine what is sufficient progress. How does EPA intend to judge "sufficient progress"? In the event that EPA develops and implements TMDLs for the State, is EPA prepared to defend "sufficient progress" to the State?

• § 130.33(b)(6) clarifies that the load allocations may, if possible, contain allocations to categories, subcategories, or individual sources while emphasizing EPA's intent to require establishment of TMDLs where sufficient information is not available to allocate loads to individual nonpoint sources.

• Do the proposed regulations now require that for a TMDL within a watershed, the load allocation be made for specific land-use categories (i.e. agriculture, forestry, urban storm water runoff)? Complex watershed models with extensive pollutant loading and soil and land-use information are required to determine this type of load allocation. The additional costs, complexity and time involved in this level of analysis would significantly change the existing process that is required for completion of the TMDL. Has EPA done a cost analysis for this new requirement? The complex modeling that this new requirement would mandate will certainly be very expensive and LDEQ does not believe that EPA considered this in their cost estimates? Is that true? Certainly, EPA's contention that the average cost for development of a TMDL is only $25,000, in no way considers this type of complex modeling.

• LDEQ does not believe that an Implementation Plan is required under Section 303(d). EPA's proposed regulations require that one of the elements of that plan be an identification of the necessary "legal or regulatory controls" and development of a specific timeline to reach water quality standards. The process of implementing the TMDL and determining the timeline for attainment of water quality standards is separate from developing the TMDL and should be addressed through NPS Management Plans, the NPDES program and Watershed Restoration Action Strategies (WRAS), not the TMDL development process. Requiring that the Implementation Plan be submitted and approved with the TMDL will prevent LDEQ from meeting the court-ordered schedule that EPA has been assigned. The TMDL development and implementation process should be reviewed and approved separately and linked through the State's Water Quality Management Plan.

• On Page 46033: Column 2: Paragraph 2 EPA states that Section 303(d) does not provide any additional CWA authorities to implement nonpoint source controls, therefore, the implementation plan will provide a program to deal with nonpoint source contributions to impaired waterbodies using existing Federal, State, and local authorities and voluntary action to implement the allocations contained in TMDLs. This statement contradicts the previous statement, which requires that regulatory controls be identified as one element of the implementation plan. The description of the implementation actions that should be included in the Implementation Plan (paragraph 4) is redundant to the information contained in the NPS Management Plan and the Watershed Restoration Action Strategy (WRAS). Why would EPA encourage such duplication?

• On Page 46033: Column 3: Paragraph 3 EPA states that Reasonable Assurance is defined as NPDES permits for point source discharges. For nonpoint sources, reasonable assurance means that controls are specific to the pollutant of concern, implemented according to an expeditious schedule and supported by reliable mechanisms and adequately funded. Examples of reasonable assurance include State, Territorial or authorized Tribal regulations or local ordinances, performance bonds, memoranda of understanding, contracts or similar agreements. The States have included this type of information as a description of programs that will be utilized to implement their nonpoint source watershed projects and statewide programs in NPS Management Plans, WRAS, and work plans for Section 319 grant funds. If the States have met the 9 key elements of the upgraded NPS Management Plan and complied with the requirements for Watershed Restoration Action Strategies as the process for implementing TMDLs, hasn't the reasonable assurance component been met? An additional plan with the same type of processes identified is redundant and a waste of State and Federal resources.

• On Page 46034: Column 1: Paragraph 1 EPA states that The proposed rule states that if monitoring shows that voluntary measures are not resulting in progress toward attainment and maintenance of water quality standards envisioned when the TMDL was approved, the State, Territory, or authorized Tribe may need to establish a regulatory approach. LDEQ realizes that if a voluntary approach to

reducing and controlling nonpoint source pollution is not successful, then additional steps will be necessary to achieve water quality standards. However, EPA needs to acknowledge that watershed modeling, implementation, and management for nonpoint sources are so technically complicated and expensive, that it is estimated to take as much as 10–15 years to meet in-stream water quality standards. LDEQ is working with EPA to gather additional information on what the in-stream water quality goal should be for some of the nonpoint source pollutants that need to be reduced and controlled. The timeliness for development of the TMDLs is a serious concern presently, with many States completely revising their statewide water quality monitoring programs to meet the demands of watershed analysis and management. Analyzing these new data and understanding what they mean and how they should be allocated to the various land-uses that contribute to the pollutant load is a complicated scientific process that many States are just beginning to understand. It is important to allow sufficient time for this process to be adequately developed and properly presented to stakeholders. Only then will stakeholders understand why they are being asked or required to make changes in the type of home sewage system that they install or the farming methods that they use or how much timber they can harvest along a stream that runs by their property. LDEQ has been working on nonpoint source control programs for more than 10 years. However, much of the technology that is needed to accurately model a watershed is relatively new. Decisions made that require the public to take actions to reduce and control pollutants in their watershed need to be scientifically defensible. If not, both State and Federal Governments will suffer credibility problems because they required management practices that had not been adequately evaluated for the pollutant reduction capabilities. These are decisions that need to be made on a watershed-by-watershed basis and left to the State and its local governments to decide when regulatory actions are necessary to reach in-stream water quality standards.

- On Page 46034: Column 1: Paragraph 2 EPA states that some States, Tribes and Territories are concerned that the proposed definition of "reasonable assurance" would require adequate funding for implementation measures addressing nonpoint sources at the time that the implementation plan is developed. EPA intends that States should describe, based on best information available at the time, how adequate funding will be secured. In particular, currently available funding sources should be identified specifically. EPA requests comment on this particular provision of the reasonable assurance component of the implementation plan. States are already required to include these types of information in their upgraded NPS Management Plans and Watershed Restoration Action Strategies; therefore it should not be necessary to also include it as a component of the TMDL. Why can't the linkage between the TMDL and the implementation process for both the point sources and the nonpoint sources be explained in the State's Water Quality Management Plan?
- On Page 46034: Column 3: Paragraph 4 EPA states that the implementation plan must contain a description of the legal authorities under which implementation will occur. These authorities include, for example, NPDES, section 401 certification, Federal Land Policy and Management Programs, legal requirements associated with financial assistance agreements under the Farm Bills enacted by Congress and a broad variety of enforceable State, Territorial, and authorized Tribal laws to control nonpoint source pollution. This requirement to include a description of legal authorities under which implementation will occur implies that the TMDL would not be approved without legal authorities to control nonpoint source pollution from agriculture or forestry. Many States do not have legal authorities to enforce the implementation of best management practices such as conservation tillage and nutrient or pesticide management plans. The level of staff to inspect and enforce such a plan would far exceed the staff level that most States have. Much of the information is private information and there would be no mechanism to clearly link a water quality problem from in-stream concentration of low dissolved oxygen or high nitrogen to a specific farm or group of farms. It is unclear and unrealistic for the States to commit to this type of authority when it would be impossible to implement. Will EPA be able to determine such detail cause and effect among individual nonpoint sources? Can EPA provide a description of legal authorities that it will utilize to enforce implementation?
- On Page 46034: Column 3: Paragraph 5 EPA states that "The proposed rules require that the implementation contain an estimate of the time required to attain water quality standards. The estimates of time required to attain water quality standards must be specific to the source category, subcategory or individual source and tied to the pollutant for which the TMDL is being established". Does EPA have the ability to do what this proposal appears to require? Where is EPA's documentation for the detailed source identification and "cause and effect" relationship that this proposal would have the States provide? If EPA has this type of information,

why have they not presented it to the States already? One of the challenges that LDEQ and many other State environmental programs presently face is how to assign the nonpoint source loads to categories, subcategories or individual sources (i.e. which home sewage system, which soybean field, which pasture). The extensiveness of GIS work involved to identify each field, crop, home sewage system and the monitoring to determine the pollutant load associated with it is time-consuming and expensive and scientifically premature at this point. The States are working on these types of watershed projects through the Watershed Restoration Action Strategies. Through these projects, the accuracy, time and expense necessary to make these types of pollutant loading estimates can be documented. LDEQ will need sufficient time to implement these types of projects in different parts of the State where crops, soils and land-uses deliver pollutants differently. Once these pollutant fate and transport processes are understood, then realistic management strategies can be implemented. The State outlined this process in the upgraded NPS Management Plan and the WRAS. This is a reasonable approach to reducing nonpoint source pollution and complying with the intent of implementation of the TMDL. Enforcement should be utilized only after all of the cooperative efforts have been utilized and tested fully. It is LDEQ's decision, as to when a regulatory action is necessary.

§ 130.34

• Does EPA intend to recognize and promote the use of non-mathematical TMDLs? If so, the proposed regulations do not address how to deal with the quantification requirement. Has the amount of reduction in load resulting from channel modifications been established?

COMMENTS ON 40 CFR PART 122 ET AL

• Although the initial target population is new and expanding dischargers to impaired waters, the actual target population also includes existing dischargers to impaired waters whose expired permits have been administratively continued. This would disproportionately impact existing dischargers in Louisiana while LDEQ addresses the permits backlog and the issue of verifying the correct water quality standards (WQSs) among the waters of the State.

• EPA continues to ignore the possibility that the water quality standards (including criteria and designated uses) may be incorrect and perhaps even unattainable naturally.

• In the absence of a TMDL, will EPA be required to prove the applicability/correctness/achievability of WQSs of the waterbody before they are allowed to inflict economic hardship on the point and nonpoint sources that discharge to the waterbody?

• In the absence of a TMDL where the WQSs are shown to be correct, there should be a limit to the level of increased treatment or BMP which EPA can mandate without issuing a new permit. For example, in the case of existing point sources, the limit might be set at no more than 10 percent more stringent than the existing permit limits. Will EPA be required to establish a current permit where one has expired or simply use the authority to impose more stringent limits?

• In the absence of a TMDL, there is no mechanism for determining or justifying more stringent limits for dischargers of nonconservative pollutants such as BOD. During the development of a permit for an individual facility, a water quality screen (in effect a "mini" wasteload allocation) is used to assure that conservative constituents, such as metals, which are present in the waste stream do not violate WQSs. Other types of permitters and dischargers of nonconservative constituents are subject only to technology based or secondary treatment limits. In Louisiana, sanitary dischargers are already subject to a State policy which may be more stringent than secondary limits in the absence of a TMDL. Has EPA performed an economic impact analysis for this requirement? How can EPA know the extent of the fiscal impact of the proposal unless an economic evaluation is done?

• In the absence of a TMDL, how does EPA propose to defend a required pollutant load reduction greater than 1:1? Are there other mechanisms which can be used to develop effluent trading partners?

• EPA is in effect requiring point sources to police the non-point sources that participate in the effluent trading partnership. To force this type of confrontational relationship between stakeholders that utilize the waterways of the Nation is unproductive and will only result in delaying any benefits to the water environment. Instead, EPA should be more proactive in encouraging partnership agreements among stakeholders that will benefit all parties and more expeditiously address water quality concerns. Has EPA determined that such an alternative approach will not work?

• For the 4 targeted NPS facility types, a TMDL should be established before EPA has the authority to require a permit regardless of whether or not the State has an approved NPDES program.

• EPA's position regarding silviculture is unfounded and ignores how silviculture issues are uniquely addressed State by State. The existing regulations exempt nursery operations, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage or road construction from needing a permit. These proposed regulations remove this exemption and seem to imply that any silviculture activity for which EPA has established a TMDL can be required to obtain a permit. Is this really what EPA intended? Why has EPA targeted silviculture and what data supports EPA's position?

• 122.26(a)(1)(v)(E) says that "EPA shall only designate discharges from silvicultural activities into waters for which EPA is establishing the TMDL . . ." Can the State establish a silvicultural activity as a point source needing a permit? If the State established the TMDL for EPA approval, can EPA designate discharges from silvicultural activities as a point source needing a permit? According to the wording, EPA could not. Is this correct?

• There seems to be a contradiction between the proposed regulations and 122.3(e). 122.3(e) says that "any introduction of pollutants from nonpoint source . . . silvicultural activities, including storm water runoff from orchards, . . . range lands, and forest lands . . ." do not require NPDES permits. As stated above the proposed revisions [which do not change 122.3(e)] say that any silvicultural activity for which EPA has established a TMDL can be required to obtain a permit.

• How does EPA propose to handle an impairment due to coliforms? The proposed regulations discuss allowing a permit to be issued if the permittee can implement load reductions. The main stem of the Atchafalaya River is on the 303(d) list due to coliforms. The Atchafalaya River receives about ⅓ of the flow coming down the Mississippi River. It has a 7Q10 of about 60,000 CFS. Suppose Simmesport (a small town discharging into the Atchafalaya River) wants to expand more than 20 percent. How are EPA, the State and/or Simmesport suppose to implement a load reduction?

• LDEQ adopted the requirement to include a statement of basis in minor permits. Adoption of this part of the Federal regulations was not a requirement for assumption of the NPDES program (124.7 is not listed in 123.25). These proposed rules add to the statement of basis part of the Federal regulations the requirement to include in the statement of basis the reasons for limitations set to satisfy the offset load reduction requirements. Because the statement of basis part of the regulations was not a requirement for assumption of the NPDES program, LDEQ assumes the State will not have to modify its statement of basis regulations to include this requirement. Is that correct? Must the statement of basis prepared by States with an approved NPDES program contain the proposed requirement?

• 123.1(d) states ". . . the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program." Since EPA has no authority to issue permits in States with approved NPDES programs, what will EPA accomplish by allowing themselves the authority to designate facilities or activities as point sources in 122.23, 122.24 and 122.26?

• 122.23, 122.24 and 122.26 says that EPA can only designate facilities or activities as point sources when EPA establishes the TMDL. LDEQ assumes this means what it says and that EPA cannot designate facilities or activities as point sources when the State establishes the TMDL and submits it to EPA for approval. Is this correct?

• The proposed changes to the NPDES regulations and the Antidegradation Policy (131.12) drastically underestimate and overly simplify TMDLs. The proposed regulations refer to the TMDL or a TMDL for a waterbody as if you can develop one TMDL for a pollutant for a waterbody or a waterbody segment. The proposed TMDL definition says "TMDLs are written plans and analyses established to ensure that the waterbody will attain and maintain water quality standards (as defined in 40 CFR 131) including consideration of reasonably foreseeable increases in pollutant loads." The proposed definition appears to recognize that there can be more than one TMDL for a waterbody. Section 303(d)(1)(C) of the CWA says, "Each State shall establish for the waters identified . . . , the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) as suitable for such calculation." Here the CWA appears to recognize that for some pollutants one TMDL cannot be calculated for a given waterbody. If this is the case then the process of developing a TMDL is even more time consuming and resource intensive than EPA is willing to admit. Have EPA's cost estimates taken this into consideration?

If NPDES permits are going to be required for silvicultural activities, these permits will become subject to the same issues associated with permits for wood chip

mills. These include issues such as, the right of a person to cut and sell timber on their own land and the habitat destruction issues associated with cutting. Who will get the permit—the landowner or the company cutting the timber? Has EPA considered the cost to the regulated community to obtain these permits and the costs of the agency to issue these permits? Did the cost estimate include the cost to the regulated community and the agency to deal with issues similar to those the chip mills are facing? For example: suppose someone owns 50 acres of land and lives in a 90-year-old house on that property. Assume 40 acres of this land has an old stand of timber that has not been cut for at least 90 years. The landowner wants to sell all the timber to invest in a new house. Will the landowner need to apply for an NPDES permit or will the timber company need the permit? What kind of costs will the landowner have if he must hire a consultant to fill out the application and to address the kind of questions chip mills are getting? If these chip mill issues are bought up, will the decision be that the landowner cannot cut his timber? Has this cost to the regulated community been considered? Where these incremental costs due to the proposed regulations considered in EPA's cost analyses?

Even if EPA issues a general permit for these silviculture activities, has EPA considered the cost to the regulated community to implement the BMPs? What will the cost be to the agency to inspect each site to verify the site is complying with the BMPs in their permit and what will it cost the agency in resources to effectively enforce these permits? The man-hour costs to EPA or the States will be tremendous to issue these permits, inspect sites and take enforcement actions for violations. EPA is already being criticized for having a backlog of permit applications. How will EPA deal with the tremendously large increase in workload? Can EPA defend their position that the silviculture contribution to nonpoint sources of pollution is significant enough to warrant such a regulatory change in how the Nation addresses silviculture?

STATEMENT OF CLEAN WATER NETWORK

OPPOSE S. 2417

On April 13, Senators Michael Crapo (R-ID) and Robert Smith (R-NH) introduced a bill, S. 2417, named the "Water Pollution Program Enhancements Act of 2000." Unfortunately, this bill is anything *but* an enhancement—it is an attack on a key component of the Clean Water Act, the Total Maximum Daily Load (TMDL) program.

The main force motivating the bill appears to be to delay new TMDL regulations proposed by the Environmental Protection Agency (EPA) in August, 1999. But the real purpose of the bill is to undermine the Clean Water Act's existing TMDL program. The result if the bill passes? More delay before States are required to clean up our polluted waters.

WHAT IS AT STAKE?

Today, over 20,000 individual river segments, lakes, and estuaries across the country are polluted. The polluted waters include approximately 300,000 miles of rivers and shoreline and approximately 5 million acres of lakes. These waters are not safe for fishing, swimming, boating, as drinking water sources, or for other basic uses.

Fortunately, the Clean Water Act includes a program to clean up polluted waters, the TMDL program. For many years, this critical program was largely ignored by States and EPA. In recent years, lawsuits brought by environmental and conservation groups have begun to bring the TMDL program into effect to identify and restore impaired waters. As a result of the new attention to TMDLs, the program has come under attack by special interest industry groups. *S. 2417 is part of this attack on the Clean Water Act.*

As the Act's watershed clean-up component, the TMDL program requires States to identify their most polluted waters and develop site-specific plans to clean them up. The clean-up plans are created by the States, using watershed specific data to determine a fair way to divide up responsibility among polluters for reducing the amounts of pollution discharged into the water. It is a comprehensive approach that allows States to coordinate programs to address polluted runoff—the No. 1 cause of pollution in our waterways—as well as reduce pollution from point sources. It is a common sense, locally managed approach to cleaning up our rivers, lakes, and coastal waters. The EPA only steps in when the States fail to do the job, as required by-the Clean Water Act.

MAJOR PROBLEMS WITH S. 2417

While provisions this bill authorizing more money for State pollution control programs and requiring scientific studies might seem like good ideas on the surface, the true purpose of S. 2417 is to delay the clean-up of our rivers, lakes, and coastal waters.

One-Sided Findings Attack a Promising Clean Water Act Program

The findings in S. 2417 attack the whole approach of using TMDLs to clean up polluted waters, as required by the 1972 Clean Water Act. These findings stress the cost of watershed clean-up programs without citing the benefits of clean water; bemoan the number of waters that need pollution reductions without even acknowledging the major cause of the backlog—over two decades without action to implement TMDLs; and encourage more delay.

The findings cite one conclusion from a recent General Accounting Office (GAO) report: that only 6 States have the majority of data needed to fully assess their waters. But the bill leaves out the fact that GAO's survey found that many State officials believe that additional monitoring would reveal more, Not fewer, pollution problems.[1] This is hardly a good reason for more delay. The findings ignore the directive of Congress that TMDLs be set for impaired waters using "a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." While more monitoring data and scientific studies are always needed, Congress intended that the response to data gaps be that TMDLs be set at levels that are more protective of water quality, not that setting TMDLs be put off or ignored, as S. 2417 suggests.

The findings also assert that "many" States are implementing "regulatory and nonregulatory programs" that are "functionally equivalent" to the TMDLs program. Largely left a mystery is what these State programs are. The bill lists only one example: the Chesapeake Bay watershed protection program. But that program is not "functionally equivalent" to TMDLs for the Chesapeake Bay watershed. For example, the Bay Program does not ensure that pollution load reductions are incorporated into permits for point source polluters, and the program does not cover specific aspects of water quality that a TMDL program does, such as fecal contamination. The Chesapeake Bay Foundation (CBF) believes TMDLs are so critical to the Bay's health that it has sued EPA to compel the agency to issue TMDLs for Maryland, which is years behind schedule.

"Pilot Programs" Threaten Further Delay and Undermine Congress' Vision of a National Clean-Up Program

The bill directs the EPA to establishes five pilot programs which would allow States to try alternatives to the TMDL program. It is difficult to imagine how States could effectively clean up impaired waters without identifying the sources of pollution, setting numerical goals for pollution reductions, and allocating reductions among dischargers. Yet that is what the TMDL program requires. What is the need for an alternative to the TMDL program, if the alternative would just do the same things?

Pilot programs for State alternatives to TMDLs are unnecessary since the TMDL program is a basic, sensible watershed clean up process. States develop their own water quality standards and then develop lists of waters that are not meeting these standards. States and localities collect and analyze water quality data, models, and other information to decide what are the most efficient ways to reduce pollution. The EPA only takes over if a State fails to develop TMDLs or does an inadequate job.

Prior to 1972, States had full responsibility for cleaning up waters and they failed. That is why Congress wrote the Clean Water Act—to establish minimum national standards which all States must meet. The TMDL provisions were largely ignored by the States and EPA for over 20 years. Over two dozen lawsuits against the EPA have been settled or decided against the agency for not doing what the law required: implementing the TMDL program. Why should five States be given another opportunity to try to avoid implementing the TMDL program when courts have decided again and again that it is time to comply with the TMDL program?

Unnecessary Study Could Further Delay Action to Clean Up Waters

S. 2417 requires a National Academy of Sciences (NAS) study on the TMDL program. Like the findings and the pilot program provisions of the bill, the NAS study

[1] See "Identification and Remediation of Polluted Waters Impeded By Data Gaps," Testimony of Peter F. Guerrero, Director, Environmental Protection Issues, Resources, Community and Economic Development Division, General Accounting Office, February 12, 2000.

focuses on the scientific methodologies being used by States to identify impaired waters and set TMDLs, and on "alternative programs" that may "operate as a functional equivalent" to the TMDL program. The NAS is given 18 months to issue their report. Until the study is done, the EPA would be prohibited from finalizing their August, 1999 proposed revisions to the TMDL rules. Like the other provisions of S. 2417, States could try to use an on-going NAS study to argue for delays in fulfilling their current statutory obligations under the Clean Water Act to set and implement TMDLs. If successful, this could effectively derail progress toward cleaning up impaired waters for another 18 months, or longer, depending on how long it takes NAS to complete the study.

While a study as to whether States are using all available data and following scientific procedures for monitoring and assessing the cleanliness of waterbodies may result in more uniform and more stringent protocols for States to follow, a study should not be used as a way to put off the work of cleaning up our waters. There is enough data available to begin the task setting TMDLs. It has been asserted that some waters on TMDL lists are listed based on questionable data. Although this is contrary to the experience of State and local groups, to the extent it could be true in some cases, it does not mean that a TMDL would be developed for a water that is not actually polluted. If an assessment of a waterbody scheduled to have a TMDL developed for it showed that the water was in fact meeting water quality standards, then it would come off of the list and the State would move on to the next water. Nobody is going to waste money developing TMDLs for waters that are is shown to be clean.

New Funding is not Appropriated, Requires no Accountability, and Source of Funds Not Identified

S. 2417 would authorize $500,000,000 per year in grants through the Clean Water Act section 319 program to be used for polluted runoff controls. Increased funding to reduce polluted runoff is sorely needed. The environmental community supported EPA's efforts in the two previous fiscal years to increase the section 319 fund from $100,000,000 annually to its current level of $200,000,000. However, this bill fails to mention several key issues associated with an increase in authorization for the 319 fund.

First, the bill fails to mention in the findings the millions of dollars that have been given to States and private landowner through the Conservation Reserve Program, the Conservation Reserve Enhancement Program, the Wetlands Reserve Program and the Environmental Quality Incentives Program to assist landowners in better protecting streams and wetlands from polluted runoff. The bill would have its readers think that the Federal Government has spent little money to date on polluted runoff, when in fact millions per year are already given to States and landowners through farm programs and the EPA's 319 program.

The second problem is that the bill proposes increasing the amount authorized under section 319, but includes no requirements that the Best Management Practices activities funded with this money actually result in cleaner water. The findings of the bill point out that billions of dollars have been spent on addressing point source discharges, but fail to mention that those grants and loans to point source dischargers came with strings attached: enforceable permits. It is unfair to taxpayers to increase the amount of money—given to landowners under the 319 fund without including some provisions to ensure that they are actually cleaning up the waters with the activities funded by the money.

The final funding issue to be aware of is that this bill would authorize increased funding for section 319, but we have seen no evidence to date that Congress is interested in finding the money to increase grants to States or landowners. It is ultimately up to an appropriations committee to come up with the money from EPA's existing budget or from the general treasury to fund 319 grants. To date, no new source of money has been identified to fund this increase if it were authorized.

CONCLUSION

By finding that there is not adequate data or enough money to implement the TMDL program, or that there is some other "functional equivalent" to the approach Congress adopted 28 years ago, S. 2417 would allow States to try to argue that Congress intends that they delay implementing their legal duty to establish TMDLs for polluted waters. Rather than create more excuses for delay and weaken the Clean Water Act, Congress should provide adequate resources to States to implement this critical program to clean up our waters and should encourage States to move quickly to establish TMDLs and to restore polluted rivers, streams, lakes and coastal areas. Isn't 28 years since the Clean Water Act already too long to wait for clean and safe waters?

PROPOSED RULE CHANGES IN THE TMDL AND NPDES PERMIT PROGRAMS

MONDAY, JUNE 12, 2000

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Hot Springs, AR.

The committee met, pursuant to notice, at 6 p.m., at the Hot Springs Convention Center, Hot Springs, AR, Hon. Michael Crapo presiding.

Present: Senator Crapo.

S. 2417, WATER POLLUTION PROGRAM ENHANCEMENTS ACT OF 2000

Also present: Senator Hutchinson.

OPENING STATEMENT OF HON. MICHAEL D. CRAPO, U.S. SENATOR FROM THE STATE OF IDAHO

Senator CRAPO. This will call to order the hearing of the Senate Committee on the Environment and Public Works, in Hot Springs, AR, on the Senate bill S. 2417 as well as on the proposed rules and regulations of the Environmental Protection Agency. First of all, let me introduce myself to you. I'm Senator Mike Crapo from Idaho. It's my first time in Arkansas. I got here this morning, and I have had a wonderful, warm welcome from you. I appreciate that very much. Sitting with me, as I'm sure you recognize, is your Senator, Tim Hutchinson. Senator Hutchinson and I were elected to the House of Representatives the same year, and I appreciate being on the panel with him today. We also may be joined by Representative Jay Dickey, and look forward to him joining with us if he's able to make it here. If you see him out there, tell him we've already welcomed him to come up and join with us up at the front.

Tim, maybe we'll make our opening statements and then I'll go into the ground rules for the hearing.

So let me begin by saying that this is a formal hearing of the Senate Committee on Environment and Public Works. It is authorized by the Chairman, Senator Bob Smith, of New Hampshire, who was not able to be here with us today because of scheduling, but who is very interested in this issue. I don't know of many proposals by a Federal Agency in rulemaking that have generated more concern nationwide than this. There have been over 30,000 public comments, the majority of them against the rule, concerns being raised from across the country, north to south, east to west.

This is not a partisan issue. This is an issue of concern that people across America have spoken out against. Some of us are con-

cerned that the EPA may be and seems to be committed to proceeding with the promulgation of a rule that goes beyond its jurisdiction, that has not been properly analyzed and is going to cause not only a slow-down of water cleanup efforts around the country and States where they are already well underway in a different manner, but also cause significant cost to the States and to the private sector as the rules are promulgated. There have been six or seven hearings in Congress on this issue. I haven't seen proposed rules that have generated this kind of concern and opposition since I have been serving in Congress. The legislation that is before you was introduced by Senator Bob Smith, the chairman of the committee, and myself. It has been cosponsored by Senator Hutchinson, who was a supporter early on. I'm not going to go into detail about that legislation right now, but it will provide significant financial resources to the States in terms of the efforts they are undertaking under the current Clean Water provisions to identify the waters of the country that need attention and to provide resources to their cleanup. It will also provide for individual State pilot programs. They will determine what's working in different parts of the country and indicate what should be promulgated and facilitated. In addition, it provides for a National Academy of Sciences study to provide the kind of science and analysis of these issues that are raising so much concern nationwide.

From the hearings that were held this Congress, we have found significant disagreement on the science and on the quality of the science. The bill stops the EPA from promulgating this rule for a period of 18 months while we wait for the National Academy of Sciences study. It lets us take what I've often said is "a deep breath." Let's take a breather and start analyzing the problem in a new way. It's a complicated and a difficult issue.

I will turn the time over to Senator Hutchinson for any statement that he now wishes to make.

OPENING STATEMENT OF HON. TIM HUTCHINSON, U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator HUTCHINSON. Thank you, Mr. Chairman, and we do welcome you to Arkansas. I only regret that you couldn't be here longer. I hope that we can have you back soon.

I would say to our audience that our only difficulty has been persuading you that these really are mountains that you see around here. Being from Idaho, you might have a little different idea of what a mountain is.

We appreciate your willingness to hold this important field hearing on the EPA's TMDL proposal. Congress, as you pointed out, has already held seven hearings on this matter. I couldn't be more pleased that the State of Arkansas, which has so much at stake in this issue, could host this—possibly the final hearing before the EPA finalizes its rule as early as next month.

I'm looking forward to hearing from each of our distinguished witnesses as they comment on your bill, S. 2417, the Water Pollution Program Enhancements Act. And I also would like to welcome those of you who took time out of very busy schedules here on a Monday night to learn more about the TMDL issue, to express yourself and share your concerns about the TMDL proposal. A spe-

cial thanks to Andrea Whittaker and the Hot Springs Convention Center and their assistance and cooperation in facilitating the hearing. I'm here this evening because of the outcry from Arkansans in response to the EPA's proposal to expand and to control the Total Maximum Daily Load and the National Pollutant Discharge Elimination System programs. Mr. Chairman, I believe this proposal is a conscious effort to circumvent the Clean Water Act and legislate through regulation, directly contradicting Congress's intent when it debated legislation on nonpoint source pollution. I remember well participating in that debate when I served on the House Environment and Public Works Committee, and recall specifically that States would be—reserved the authority to define and enforce the nonpoint sources of pollution. We debated whether that should change, and we rejected the notion that that should be directed out of Washington with EPA out of Washington. As has always been the case, waters polluted by nonpoint source runoff are managed by State-run nonpoint source programs. Under the TMDL proposal, however, the EPA is required to take action if a State failed to meet its—EPA's—expectations. For example, farmers near Stuttgart may be asked to use alternative methods in their operations to prevent fertilizers and pesticides from reaching rivers. The city of Hot Springs could be required to control or treat runoff from its own streets. Chicken houses near my hometown of Bentonville or fish farms in Keo could be designated by the EPA as a point source polluter under this proposal.

Therefore those new point source polluters would need to get a permit to stay in business. Since January, three public meetings have been held in Arkansas to discuss the EPA's proposal, with more than 8,000 residents attending these various public meetings. It was clear from what was said at those meetings that farmers, foresters, private landowners and community leaders across Arkansas are deeply worried that requiring States to enforce stricter TMDL standards will stretch State, local and private resources to the breaking point. I have rarely, if ever, seen an issue or a rule promulgated by EPA that has drawn this kind of public attention, this kind of public concern. It's clear to me that one of the core issues motivating Arkansans to attend these public meetings by the thousands is trust. Ultimately the people of Arkansas do not have confidence, they don't trust the EPA. The EPA has not earned that trust, in my opinion. Clearly, the Agency has done a very poor job of communicating their proposals to those whom it will affect the most. Due to overwhelming public criticism, the EPA recently proposed additional changes to its August 1999 proposal—first on April 5, then on May 1, and again last week, when it was reported that EPA was only exempting forestry operations. Let me just say that releasing documents and announcements of substantive changes to a non-yet-final regulation constitutes unusual and, I think, not responsible behavior by a Federal Agency. It also raises the question as to whether these changes that have been proposed are based upon genuine scientific evidence or whether they firmly believe that the rules' long-term burden on States and landowners remains unchanged. If the EPA does exempt forestry—and that's a big "if," in my opinion—and the commitment that they have made in writing is that they will repropose a rule later this fall for for-

estry to be implemented next year under a new Administration. It could well be the same kind of rule would be reproposed. All they have really done is to separate the two issues and to grant a little bit of time. If, in fact, forestry is exempted, we're only halfway there—halfway to keeping the EPA out of private landowners' back yards. We still have a lot of work to do. The rule takes aim at the backbone of Arkansas' economy—agriculture.

In terms of States handling this matter, Arkansas alone has put forth a tremendous effort to implement statewide best-management practices and other water quality regulations. Mr. Chairman, our Poultry Litter Management Plan is a model for other State-level plans. Arkansas' forestry industry has reduced its impact on local watersheds by 85 percent through voluntary best-management practices. Simply put, the States are getting the job done and must continue to have the freedom to handle this matter on the State level, not from a Washington-knows-best, top-down, one-size-fits-all, unfunded-Federal-mandates approach. Mr. Chairman, that's why I was glad to cosponsor your bill, S. 2417. It's responsible; it's timely. It is an important response to EPA's rule. The funding it authorizes would provide States with greater resources to address their water quality priorities, and it's badly needed. A GAL report released in March of this year noted the financial difficulties that States face when attempting to implement nonpoint source TMDL programs. That's money the EPA isn't providing when handing States and localities costly mandates. Your bill also requires the National Academy of Sciences to study this issue. I think that's the proper approach. I think we need to have a good scientific basis for any proposed rule. To help States with their Watershed Management Programs, your bill also establishes a Joint Watershed Management Pilot Project. Finally, your bill requires the EPA to review the NAS study and take into consideration its recommendations when finalizing a TMDL rule. Mr. Chairman, thank you again for designing this common-sense legislation which assists States in meeting their own water quality needs without excessive intrusion by the EPA. We're very proud in Arkansas to call our State "The Natural State." I think we have very responsible and hard-working property owners, whether it's in poultry, in beef production, or in forestry—in this part of the State, timber production is huge—or whether it's in row-crop agriculture in eastern Arkansas. They care about the land; they care about their State; and that is why I'm frustrated when the EPA acts as though it's not accountable to Congress or to the American people. I think we're making great strides and great progress. I appreciate your legislation that will enable us to continue to do that. I'm glad to be cosponsoring it. Thank you for coming to Arkansas and holding this hearing this evening.

[Applause.]

Senator CRAPO. Thank you very much, Senator Hutchinson. Ladies and gentlemen, we are under a very tight timeframe tonight, so let me point out the rules for the operation of the hearing and encourage all of you—especially the witnesses—to try to pay as strict attention to them as you can. I will remind you if you're going overtime. We have two panels—three witnesses on the first panel and four witnesses on the second panel, and we feel it's very

important for us as the members of the Senate committee to be able to engage with the panels in questions and answers and dialog. Therefore, we like to spend as much of the panel time as possible in dialog with the panelists rather than to spend the time hearing the oral testimony. We have allocated to each of you 5 minutes to present your oral testimony. I have never been in a hearing yet where a witness has been able to say everything they want to say in 5 minutes. I can almost guarantee you that all of you who are here to be witnesses will see your time will run out before you have run out of things that you want to say. What I would like to ask you to do is to watch the lights. The green light means that you're doing all right. The yellow light means you have 1 minute to begin summing up. When the red light goes on, I ask you to please conclude your thought. I assure you that the committee members read your testimony, that we will very carefully review your statements. You will also have an opportunity during the questions and answers to get into a lot of what you may not have been able to say during your 5 minutes. So please do watch the time, and if you do start going over a little too long, I'll tap the gavel here a little bit just to remind you that it's time to wrap up. We have also allocated 30 minutes at the end for the audience, if any of the members of the audience would like to go to the open mike and say something. Now, that's a little bit risky, because if everybody here chooses that option, we're not going to have much time for each of you to use. What we will do at that time is I'll ask for a show of hands to just get a gauge of how many of you want to say something. If it's enough that we can handle in 30 minutes, we'll try to figure out how much each of you can have and then go from there. If it's far more than that, then we're going to have to just figure out a system where as many of you as possible can have a minute or so to say something and then encourage the remainder of you to submit your comments to us in writing. I will assure you that if you choose the alternative of submitting your testimony in writing, that it will be reviewed by the members of the committee, it will be reviewed carefully by staff and will become a part of the permanent record. So with that, let us begin with the first panel. Our first panel tonight consists of Mr. Gregg Cooke, the Regional Administrator for region 6 Environmental Protection Agency from Dallas, TX; Mr. Randall Mathis, director of the Arkansas Department of Environmental Quality from Little Rock; and Mr. Larry Nance, the deputy forester of the Arkansas Forestry Commission, also from Little Rock; and we will begin with you gentlemen in that order.

Mr. Cooke, you may begin.

STATEMENT OF GREGG COOKE, REGIONAL ADMINISTRATOR, REGION 6, ENVIRONMENTAL PROTECTION AGENCY, DALLAS, TX

Mr. COOKE. Thank you very much, Senator. Again, my name is Gregg Cooke, and I'm the Regional Administrator for EPA region 6, which includes Texas, Arkansas, Louisiana, Oklahoma and New Mexico. With me tonight is Bill Hathaway. He's my Division Director for Water, sitting next to me, and I have submitted the testimony for the record. In addition to that, the letter to Senator

Smith that outlines the response of the EPA regarding silviculture has also been submitted as well, which would amend my testimony. When talking to Senator Hutchinson's office, the thing that the office indicated to me was what you really wanted to hear was what this meant from a regional perspective as opposed to a Washington perspective, and I've come prepared to talk about that. And let me start my presentation—and it's going to be hard for the folks in the audience, and I've got some copies, but I want to direct you to the map that we have over here, and that map is of EPA region 6, and the red lines on that map are how each different State decided to list their stream segments on 3 or 3D list. There was so much misunderstanding of how to do listing streams and what TMDLs would all be about. In Oklahoma, apparently they determined that if they listed more streams, they might get more Federal money, whereas in Louisiana, they determined at one point that if they had listed a stream—one segment—all the streams in the entire watershed had to be listed. So as a result, you had a complete inconsistency on a State-to-State basis on what a 3 or 3D list of threatened streams would be. It is from that genesis that the determination of a new TMDL rule by this Administration began, not to do the things that—to be overburdened in terms of regulation, but to bring consistency and understanding on how we can go forward and clean up rivers, specifically in light of the litigation backdrop in which we find ourselves. Now, I don't know about other regions, but in this region we have three of the five States that are under consent decrees in relation to TMDLs, and the most recent one was Arkansas, and as a result of that, the EPA has gotten sued for failing to do these TMDLs in conjunction with the States, and as a result of that, we have determined that—we have found that we're under different timeframes under how to do the TMDLs. And so as a result from learning in the Louisiana experience, where we got the very shortest period of time and are appealing the judgment to the Court, we learned in Arkansas that maybe by working together more thoroughly with the State and coming up with a schedule that we could all live with, and not in the best of circumstances but one that we could conceivably live with, the State was by far the best way to go. As a result, the timeframes under the consent decrees, Senators, in this case in Louisiana was 7 years and Arkansas is 9 years, and New Mexico is 10 years, are still shorter than what the 15 years will provide for in this rule. So when I look at States such as Texas, which have not yet begun the litigation process, the failure to have this particular rule in place could—and I would almost assuredly indicate would ensure litigation in those States and continue to have the shortened timeframes. I have gone through many of the Senate—the hearings that you've talked about, Senator, and either Bill or I have been—Monroe, LA, El Dorado, AR, and we've certainly heard all of the comments that you've made. Now, our job is to actually with the States, manage this workload and get this workload done. That's our job. And so we have a very pragmatic problem ahead of us. And let me explain: We have to do these with our States. Now, Randall, I've had a number of meetings with the State directors in my region, and many times with Randall Mathis, as we sat down at a table with Bill and his staff and tried to work out a way of how this was going

to be accomplished. And I know I hear some of the concerns of folks about things that we want to permit under this rule, and I scarcely say that in the States in my region, that would not be necessary, and we would never reach that point, because we have to rely upon the States in order to accomplish these tasks. The best management practices that you have outlined are exactly the types of things that will be relied upon to create a TMDL. The types of programs that the forestry program has are exactly the types of programs that we would need to utilize, and without utilizing those with us, we do not have the manpower nor do we have the desire under any circumstances to have regulations which are any way punitive or don't work toward the overall desire and goal of achieving water quality. And so given the litigation backdrop that we have, given the resource backdrop that we have, our best goal and chance is to work with the States on their programs with our manpower to divide up tasks to achieve the goal. Now, I don't know exactly, really, how it appears from Washington, but I can tell you how it appears from Dallas as we try to manage this workload, and we don't have any desire or time or any desire at all to look at some of the aspects that I've heard in terms of permitting sources or taking away forestry operations. That's not what our intention is, and I think that you'll find that this rule, in my belief, actually will help forestall litigation, and without the clarity of this rule, the type of patchwork that you see on this map will continue to be pervasive, and we will not be able to move forward to achieve the mutual goals of water quality. Now, I know you have a number of questions, but I will tell you that the resource issue is an incredibly big issue and that the States and through our proposals, you know, that we do have additional resources for the States, and I do believe, I think, working with them, that those resources plus our manpower will be enough to achieve these mutual goals. Thank you very much, and I look forward to your questions.

Senator CRAPO. Thank you very much, Mr. Cooke.

Mr. Nance.

STATEMENT OF LARRY NANCE, DEPUTY STATE FORESTER, ARKANSAS FORESTRY COMMISSION, LITTLE ROCK, AR

Mr. NANCE. Mr. Chairman, I'm Larry Nance, deputy State forester with the Arkansas Forestry Commission, and the Arkansas Forestry Commission welcomes you to Arkansas.

Senator CRAPO. Thank you.

Mr. NANCE. The forestry community thanks you for supporting the Water Pollution Program Enhancements Act of 2000, S. 2417. Thank you for sponsoring that bill.

The State Forester of Arkansas also supports the bill that you have proposed. We are pleased that Arkansas Senator Hutchinson is a cosponsor, and we also are pleased for the support by Congressman Dickey. Everyone wants to protect water quality, especially our loggers, the foresters and the forest landowners. We all feel that water quality is very important—forest water quality is very important. Although EPA appears determined to install a regulatory approach, the Arkansas Forestry Commission, our Board of Commissioners, the Governor and the State Forester all support

voluntary implementation of Best Management Practices to protect forest water quality.

Mr. Chairman, we applaud the idea for EPA to contract with the National Academy of Sciences to study development of TMDLs and review other methods of achieving water quality. Arkansas' State Forester John Shannon, who couldn't be here tonight, has served on the National Academy of Sciences forestry committee. The organization does outstanding work. We hope that you will suggest to EPA and the National Academy that a southern State Forester serves as a member of the study committee. Again, as Senator Hutchinson pointed out, this is a proper step. We are pleased that your bill provides grants for water quality improvement projects and also for other alternative methods for meeting water quality standards. Last, as part of my testimony, the Arkansas Forest Commission's position is, first, that silviculture maintain the nonpoint source category; second, that forestry practices not require an NPDES permit; third, best management practices remain voluntary; and finally, the AFC—or the Arkansas Forest Commission—welcomes an EPA review of our BMP implementation monitoring program and our training. Looking at EPA's own data, everyone can see that Arkansas' forestry community has been doing a good job of protecting water quality. Mr. Chairman, Senator Hutchinson, we thank you for the support that you've given to the forestry community and the support that you got as far as sponsoring S. 2417. Thank you very much.

Senator CRAPO. Thank you very much, Mr. Nance.

Mr. Mathis.

STATEMENT OF RANDALL MATHIS, DIRECTOR, ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY, LITTLE ROCK, AR

Mr. MATHIS. Thank you, Chairman Crapo and Senator Hutchinson, and Senator Crapo, we welcome you to The Natural State in the Heartland of America. We've got the clean air and the good water, much as you have in your home State.

Senator CRAPO. Thank you very much, Mr. Mathis. And I've enjoyed my time here. It's a wonderfully warm community.

Mr. MATHIS. You know, I've always felt that each of us could say something about what we believe to be the quality of life, and it would be somewhat different. You have my prepared statements, so I will move away from them somewhat. But I believe the quality of life begins with the environment, and the quality of the environment begins with the commitment that we make to that end. Now, we know that if we are to be successful, we have to protect our water and our air and our land, but we have to do it in a common-sense way, with common-sense laws and regulations. And Mark Twain once said, "Common sense is not too common," and I believe that to be too often true in Washington's EPA development of Federal environmental regulations. I commend you, Senator Crapo, Senator Bob Smith, committee Chair, Senator Hutchinson on cosponsoring, but I think you have an excellently crafted bill in S. 2417. I think it's critical that this bill be adopted. It's a common-sense bill, and I believe its passage to be critical to the continued protection and enhancement of the environment and to the eco-

nomic well-being of all our people. Surely this bill can be embraced by Democrats, Republicans, Independents and the public. It makes sense. There is not a whole lot of difference, with the exception of two sections, in my opinion, as to what is now being said by Mr. Chuck Fox in Washington EPA. He called me in the beginning of April and said, "What can we do with this proposed regulation?" I suggested that he pull it back and make the language comport with the language in the proposed regulation. What he and Ms. Browner were saying was not what could be limited by the open-ended language in the regulation. I think, as we look at the agriculture and silviculture part of it, we know that our export of our products in those two industries help reduce the ever-increasing national debt—not national debt, but trade deficit. That's an important issue. I know, I was reared on a farm, lived on a farm a lot of my life, farmed a good number of years. We're kind of free spirits out there on the farm. We're good stewards of the land. In a voluntary program in Northwest Arkansas, Senator, where you hail from, in the Moores Creek Watershed, 95 percent of the farmers agreed and put in Best Management Practices, and we've seen a significant improvement in the watershed in the body of water that is used as a public water supply. They're good stewards of the land, and they're good stewards of the water. What is a Best Management Practice? That's going to depend on the topography of the land, the soil characteristics, the geology, any number of things that will determine what it is. When farmers understand and can participate and be a part of the process and know that there is a problem and that they might be contributing to that problem, I can tell you that they may know more about how to correct it on their particular farm, and one-size-does-not-fit everybody in a Best Management Practice plan. Now, I want to say that I think section 3 of S. 2417 is critical to the success of the TMDL program. It's true in both the 106 and 319 program, and I think the 90 percent grant that's going to be available with $200 million under the 319 program to the people who own the land is important. I would just say to you that States have to match 40 percent with the money that are available currently, and I would like for you to consider that. We see an ever-growing staff in EPA in Washington. While the State's running 70 percent of the programs in the State, we provide 75 to 80 percent of the enforcement, and 94 percent of the data that's in EPA's data base provided by the States. EPA recently erected a Chinese wall as the appropriation bills came by to make sure that ever-increasing staff in Washington was able to continue to protect the money for salaries. I would like to see that whole group up there reduced to about 500 competent people and increase the number of people out in the regions who are where the work is and closer to the people in the States.

[Applause.]

Mr. MATHIS. Mr. Chairman, it looks like my time is about gone. I had so much more I wanted to say.

Senator CRAPO. Sounds like you got the audience with you, though.

Mr. MATHIS. Thank you.

Senator CRAPO. Thank you very much, Mr. Mathis. And let me begin with the first round of questions, and I'll direct my first ques-

tions to you, Mr. Mathis. You indicated that you felt that the legislation would increase the Federal Government's share of the matching dollars from 60 percent to 90 percent, and that was a positive move. The EPA has criticized that, saying that they think that it would make less money available to be spread around the country. Do you have a comment, or do you think that criticism is valid?

Mr. MATHIS. Of course. What they are saying in that criticism is that if States put in 40 percent of the money and there is a particular amount of money available to the States and we only have to put 10 percent, then certainly that is less than what they would put in plus 40 percent. With unfunded mandates that have come down from time to time, the States are pretty well strapped in their ability to meet a 40-percent match.

Senator CRAPO. And as you know, in the legislation, we increased the Federal money that would be going to these programs.

Mr. MATHIS. That is correct. We've been operating on shoestrings and trying to come up with programs. I, as did Mr. Nance, applaud you for getting the National Academy of Science involved. I think that brings more public trust into the whole system, but I'm a little concerned about the 18 months. It seems to me like maybe it ought to be more like 24 months. EPA has had 28 years and have yet to come up with the guidelines on how the States should conduct a TMDL. So this is not going to be easy for anybody. It's a complex issue. We enjoy an excellent relationship, at least before I made my statement, with the regional office in Dallas. How much of this is going to be raked off before any of it comes to the States for any kind of match by the Administration in Washington? Most of the Administration's money should come as grants to the States through the regional offices, where the work is really done.

Senator CRAPO. Mr. Mathis, I assume that the State of Arkansas has a comprehensive approach to water cleanup in terms of nonpoint source pollution already underway; is that true?

Mr. MATHIS. That is correct. The Arkansas Soil and Water Commission. In 1990, I drafted a letter for then-Governor Clinton's signature, giving that program to them for a 3-year period. Then in 1993, I gave then-Governor Tucker a letter extending it for 3 years. They have the Rural Conservation Districts in every county. They fund some of their costs of operation. They have an excellent relationship with the farmers. Finally, we said, ''Hey, they need the program. They're doing an excellent job in it. A lot has been done since 1979.''

Senator CRAPO. By the way, I just got a note indicating that this is the tenth congressional hearing on this issue, not the seventh, as I had suggested it might have been. But one of the things we've been hearing in those hearings from State officials is just as you've testified, Mr. Mathis, that they have existing programs well underway to address these issues under the Clean Water Act and that if they are required to shift into the new proposed rule, if the EPA finalizes this rule, that it's going to cause them to have to pull resources away from their current efforts to comply with the requirements of the rule and that that could deter from the success of the efforts that are already underway; do you feel the same?

Mr. MATHIS. Yes, I do. I think it's critical that we have this legislation passed that provides some funding, but also sets up the whole mechanism that you have encompassed it. Since 1979, Arkansas has had a permitting program on Confined Animal Operations with Liquid Waste Operations, like pork, dairy farmers, laying hens. One other State, I think, in the country got there before we did, and I believe that was Kansas. But a number of other States, we've had meetings throughout a region. Six years ago we met in Colorado. On the way back, I was visiting with my counterparts from Kansas and from Minnesota and Texas, and as I talked about what our program was, they said, "Gosh, we wish we could do that. Why don't we set up a regional meeting?" So there's been about eight or nine States in the midwest and in our part of the country that have met annually to come up, and what we did in each of those was to say, "Let us first give each State what you do with your program in that regard on nonpoint source." We agreed that nobody would back off what they were doing, but everybody else would come up to speed with whatever was the best program.

Senator CRAPO. So you each pull from the best that everyone else had?

Mr. MATHIS. That is correct. And it's going to take some time. As I said, we got a lot of free spirits out there. I'm one myself. I just know that if we had said under a regulation such as was proposed, that you have to do this, that there would have been less than 95 percent of the people in Moores Creek Watershed rather than to say, "Yes, I may be part of the problem. I will put in a voluntary program." When we understand those things and we have time to work together, we can solve these problems.

Senator CRAPO. Thank you. Mr. Nance, could you take the mike for a moment? I assume from your testimony, but I wanted to be sure, that you support the position that the current Clean Water Act does not require or even authorize the EPA to impose a permit system on silviculture activities; is that correct?

Mr. NANCE. That's correct, Mr. Chairman.

Senator CRAPO. And do you believe that the current system of dealing with water quality in silviculture activities in forestry is working well in Arkansas?

Mr. NANCE. Yes, it is, Mr. Chairman. The last 2 years, the Arkansas Forest Commission has implemented an implementation survey of all harvesting operations in Arkansas. We've done that for 2 years now—implementation monitoring. And the survey results have been 80 and 85 percent. Our loggers and our forest industry are doing a great job out there. Our implementation monitoring surveys, again, says 80 to 85 percent that were following Best Management Practices.

Senator CRAPO. All right, thank you. And just one other question. The same question I asked Mr. Mathis: If the EPA does promulgate the rule as it exists and does not exempt forestry activities, do you believe that the activities that will be necessary to comply with the rule will pull resources away from current programs and make them less effective?

Mr. NANCE. Yes, Sir. The States, as Mr. Mathis pointed out, will be strapped to fulfill EPA's proposed guidelines. If we go on with

the proposed guidelines put out by EPA, we'll shut down the forest industry in Arkansas.

Senator CRAPO. That's a pretty broad statement, but you feel that strongly about it?

Mr. NANCE. Yes, Sir.

Senator CRAPO. Mr. Cooke, we appreciate you being here, and I have a whole lot of questions for you. I don't even know if I'll get to ask them all in the time that we have, but I'm going to start with just one. And I'm referring to the letter which you referred to in your testimony from Chuck Fox to Chairman Smith of the committee. In that letter—and I'm going to read from the second-to-the-last paragraph. It states: "In response to the interest in additional discussion of the forestry water quality issues," which I take it to mean in response to the uprising around the country that has taken place because of the proposed rule, "that the EPA will not include forestry provisions in the TMDL regulations that will be finalized this summer." It actually will be finalized in about 2 weeks if the EPA keeps on the schedule that it has announced. "Instead," Mr. Fox says, "I expect that the Agency will repropose provisions of the August proposal related to forestry later this fall along the lines described in the USDA-EPA Joint Statement."

I realize that this is Mr. Fox's letter, not yours—but I assume you understand what he is proposing here. As I understand it, he's saying that the EPA will not finalize the forestry provisions in the proposed rule in 2 weeks, but that they will repropose the very same proposal that they put out a few weeks ago with relation to the USDA agreement and begin the process of promulgating those rules to be finalized sometime early next year; is that correct?

Mr. COOKE. Mr. Chairman, I can answer only indirectly. I learned about this letter Friday and talked to Mr. Fox this morning, and so let me tell you my understanding. My understanding is that from the rules that we've seen in the regional office, that the silviculture provisions are not moving forward for the rule currently being examined, and that the USDA-EPA Joint Statement, which had such things as the moratorium—5-year moratorium on silviculture and those aspects—would be reformalized, but whether it would be exactly the same proposal that was taken out of the current rule and was formulated the other statement, I'm not sure. I know that Chuck indicated that EPA wanted to have some more discussions with your committee and with other stakeholders before they repropose that rule. So to answer your question, I do not know what they will propose—if indeed they do repropose it, if it will be exactly the same proposal that came out with the USDA-EPA recently.

Senator CRAPO. Well, from the other provisions of Mr. Fox's letter, I think it's safe to assume that it's going to be something pretty similar to what was put out about 2 weeks or more ago——

Mr. COOKE. Several weeks ago, yes.

Senator CRAPO [continuing]. Several weeks ago in the joint statement by the USDA and the EPA.

Mr. COOKE. Yes, I think May 1 the joint statement was issued.

Senator CRAPO. Yes. It was about 6 weeks ago, then. Why is it that only the forestry provisions are being discussed now as being pulled back? We still have the same types of impacts that are going

to occur to agriculture, and we still have the same kinds of considerations that have been raised by the Governors and by the Environmental Quality Administrators throughout the country with regard to the impacts on their water quality efforts that go to all of the other nonpoint source areas other than forestry. Why were these other areas not given the same relief?

Mr. COOKE. Well, I don't think they're—I think they were trying to be in parity, Senator, with all the areas. I don't think there's any indication that nonpoint sources are going to be in a permitting regime. I thought that the silviculture provisions actually were somewhat misunderstood as requiring a permitting regime. In my view, EPA does not intend to have a permitting regime for nonpoint sources. If it needs to be done through this procedure, it would be a good procedure. I agree with the statements that under Clean Water Act that we don't have the authority to permit nonpoint sources, nor do we intend to. And so I think any clarification that EPA could have regarding that matter should be done.

Senator CRAPO. If I understand what we've been told in our previous hearings, there is a big disagreement between the EPA and some members of this committee and others in the agriculture and forestry community as to what is a potential point source. The EPA can easily say, "We don't intend to require permits of nonpoint sources, but we do intend to redefine what are point sources."

Mr. COOKE. I understand. I've heard that——

[Applause.]

Mr. COOKE [continuing]. I've heard that concern raised, Senator, and all I can say is that in this region, that has not been our history of anything that we have done in terms of how it's actually applied in the ground. In my working with Arkansas, theirs is a very good program—their Best Management Practices are working—and I never did feel like that while that was an issue around the country, it really would ever have been much of a problem in Arkansas.

Senator CRAPO. Well, I had a lot of questions, and I'm going to ask just one more and then let Senator Hutchinson ask some questions. We may have several rounds of this. I want to ask about an issue that you just touched upon, and that is the fact that, as you indicate, it is not the intention of the EPA to impose a permit system in circumstances that it appears to some of us that was intended by this rule. We've had many occasions when officials from the EPA have testified to us that these dangers that are being perceived are not real. In fact, in your own written testimony, you indicate that same kind of thing—that it was not intended and that this is supposed to be a rule that promotes local control rather than a top-down management system from Washington.

Let me give you an experience that I've had in Idaho. Maybe it's good that I can do this, because you aren't the administrator governing Idaho. We had an issue—this wasn't a TMDL issue under this rule, it was an issue under the proposed TMDL System that we already have in place. We had an issue out in Idaho where an entire valley was being forced to adopt a certain standard. You've heard of the Gold Book Standard? In this community, it became pretty evident that none of the communities along this river system would be able to meet those standards simply because of the back-

ground nature of the water which was coming from their mountains that have metals in the mountains. There had been mining in these mountains for years. The point I'm getting at is that a proposed standard was being enforced on the States and on the local community, and when we held a hearing out in Idaho to address this, the EPA officials who took the stand before us said, "That standard is being imposed by the States, not by the EPA, and the EPA is only there as a backdrop in case the State doesn't do it right." And so the next panel had the State officials on it, and I said to the State officials, "Well, it sounds to me like you're the culprits, because somebody here is imposing this standard on these cities and counties and the communities here, and the EPA tells me it's not them, it's you." And the response I got from the State was, "Well, it is actually us, but the reason we are doing it is not because we want to, because we don't think that it's the right standard, and we think that a different standard that is more specifically focused on the needs of this community would be much better and much easier to work with, both in terms of cost and terms of effectiveness in water quality. But the EPA has told us that if we, the State, do not impose this Gold Book Standard, that they will declare our standards to be inefficient and take control of it away from us and impose it themselves."

[Applause.]

Senator CRAPO. And so the question becomes, then: When you talk to us about local control, isn't it true that even with regard to this USDA-EPA Joint Agreement, that the EPA continues to say to forestry and to agriculture that if the States control which is being granted, so to speak, by the rule does not satisfy the EPA, that the EPA can pull back unto itself control over whatever watershed or water issue is at stake there and impose its own rules.

Mr. COOKE. Senator, I can only say that in the history of region 6 that that is not—I don't know how the other regions are managed, I don't manage other regions. I can just say, and I think Randall can also—and I still believe we do have a good relationship. That's not the way that we have operated here. If you don't operate in a partnership with your States, you're never going to get anything accomplished. I think that our goal here is to have continual access to the funding, even through your legislation or the Administration's proposal recognizes additional funding requirements by the States. I think we have to help develop our local expertise in our regional office to help the States meet those demands. So I can't say that is not legally impossible under the example that you gave, but if you'll look at the history of the way we've managed programs in this region, there is no basis for that occurring here, but I certainly can't say that that's not legally possible, as you know. I think trust is the most important thing that you can develop, and I think that over a period of time, that we have worked with the States well in the implementation of these programs, and even while we've had disagreements along the way, we've been able to work through them.

Senator CRAPO. I think that part of the concern from the States that we've been hearing from is that they have said that they have been working on this. In some of those areas they've told us they've had good working relationships with the EPA, and they wonder

why the EPA needs to go to this new rule. But I'll let Senator Hutchinson have this time now.

Senator HUTCHINSON. Thank you, Mr. Chairman. Mr. Cooke, did I hear you say in your oral testimony a moment ago that you never believed that the EPA had the statutory authority to regulate nonpoint source pollution?

Mr. COOKE. Under the Clean Water Act, we do not have to have a permitting regime for nonpoint sources. And we don't. And we don't have——

Senator HUTCHINSON. Explain to me—in your written testimony, you cite the court decision in the Federal Court in California, and you say that the court's decision found that the logic section of section 303(d) required that the listing of TMDLs were required for all impaired waters and concluded that ''Excluding nonpoint source impaired waters would have left a chasm in the statute,'' and the judge found that the congressional passage of section 319 in 1987 was consistent with the view that section 303(d) covered nonpoint sources of pollution. Because TMDLs were needed for the planning required under section 319, the decision confirms EPA's long-standing interpretation of the Act.

Mr. COOKE. That's right. Let me—may I explain that?

Senator HUTCHINSON. Please.

Mr. COOKE. There's also another opinion more recently—Senator Hutchinson. I know, but I'm curious——

Mr. COOKE [continuing]. That amplifies this exact point, and here the point is that in a TMDL setting, nonpoint sources are part of the TMDL process. They are not exempt from the TMDL process. Now here is the very tricky problem—Senator Hutchinson. But you take statutory authority?

Mr. COOKE. That's right. Under the—TMDL's under the Clean Water Act, nonpoint sources are part of the TMDL process——

Senator HUTCHINSON. So do you have the authority for nonpoint or not?

Mr. COOKE. You don't have the permitting authority for nonpoint, but they are part of the TMDL process, and that's the problem. You have to rely upon the States and their programs in order to ever reach how to solve those TMDL problems, but you do not reach it under the Clean Water Act through permitting of nonpoint sources, but they are part of the Act.

Senator HUTCHINSON. By your interpretation?

Mr. COOKE. The way I understand it, that's right.

Senator HUTCHINSON. Are you, by the way, familiar with the record of the Ninth Circuit Court of Appeals on review and appeal of their decisions?

Mr. COOKE. I am not.

Senator HUTCHINSON. Well, let me just, for the record, a 1996–97 term, 28 of their cases were reviewed and 27 of them were reversed. 1997–1998, 17 cases were reviewed, 13 were reversed. 1998–1999, 18 cases were reviewed and 14 were reversed. All total, since 1996, they've had an 86 percent reversal average. Maybe that will be the case on this decision as well. That seems to be their batting average. Mr. Nance, the Fox commitment regarding pulling silviculture out of the proposed rule and then reproposing a rule this fall—do you regard that as a sufficient change in the proposed

rule? Does that solve the problem for forestry? Can you give me your opinion on that?

Mr. NANCE. Well, I think Mr. Mathis put it well in his testimony when he said that when they come back with the proposed rule, we essentially won't know what their proposed rule is until we hear it, so we don't know if we're going to be better off or not. We're confused with EPA not even understanding their own previous proposal and how it effects forestry. The forestry community in Arkansas saw a lot of confusion on EPA's proposal. At first, we understood silviculture was going to be a point source, and, that for some activities or for all forestry activities, we could be looking at a permitting process. We understand that through the permitting process, we could be looking at 2 to 6 months before a forestry operation would be approved through the permitting process. But to answer your question, Senator Hutchinson, I think that the EPA needs to drop forestry as well as other agriculture from the proposed rule altogether.

Senator HUTCHINSON. OK, they split this—so if they come back and propose what the USDA-EPA Agreement was and the guidelines in that, and then they moved forward with a forestry provision or silviculture provision later, that's not reassuring to you?

Mr. NANCE. No, Sir.

Senator HUTCHINSON. So we shouldn't declare victory for silviculture on this issue?

Mr. NANCE. Not until we hear what the proposal will be.

Senator HUTCHINSON. I know you're in forestry, but in your opinion, it would still leave agriculture still facing the same burdensome rule?

Mr. NANCE. That's the way the proposal is right now. Only forestry has been pulled out.

Senator HUTCHINSON. Mr. Cooke, Mr. Nance just mentioned that this thing seemed to be a moving target, and I can sympathize with that. There have been a number of changes, and most recently the Fox letter on Friday. Is it not unusual to change a proposed rules in the midst of the process?

Mr. COOKE. I really can't comment on that in terms of how unusual it is, this rulemaking. I really haven't been a part of rulemaking in relation to the water program before this. But I will tell you that in terms of how this region operates, I think it's consistent with the way we operate and that we have no intention of moving in any sort of permitting regime in relation to agriculture or silviculture.

Senator HUTCHINSON. Well, but that's not what I asked. The process that you've gone through—I mean, the whole process that's established on promulgating a new rule is to ensure that you have adequate public comment—that you're taking into account public concerns. But to change a proposed rule in order to diffuse public concern or whatever in the midst of the process, wouldn't that, in all fairness, require you to start over, because you have changed? I mean, how do people know what they're supposed to comment on if you have changed it this late in the game?

Mr. COOKE. Well, Senator, in any rulemaking that the region does, where you go out for public comment and you can respond to

public comment, the purpose for having public comment is to make changes to the rules. I know when I——

Senator HUTCHINSON. Not in the middle of the process, though.

Mr. COOKE. But I think you're demonstrating that you're being responsive to the concerns that have been raised. I personally have been to a number of these hearings. If you'd ask me, I wish we had gotten to this point sooner in the process, certainly, but nonetheless, I think it is appropriate that we are here and that it is responsive to public participation.

Senator HUTCHINSON. But you're going final in a few days, you have a new proposal out there now——

Mr. COOKE. It will be proposed final.

Senator HUTCHINSON [continuing]. But people in this audience tonight may well have attended earlier meetings where we were discussing a totally different proposal. Is it right, fair or within the law to now change your proposal without giving the public an opportunity to determine whether or not, in their minds, this is a satisfactory change to meet their concerns?

Mr. COOKE. In my opinion, I don't think it's so radically changed that it would require us to repost a brand-new rule—go through the process again—if that's your question. I think we're being responsive to public comment.

Senator HUTCHINSON. Well, I think if—how many were there, 30,000—if you're responsive to public comment, wouldn't it be to pull the rule entirely as opposed to slicing it in half and saying, "We're going to repropose?"

Mr. COOKE. Some 20,000 of those comments were on the provision of the rule that was being eliminated, and so I think it is proper for that proposal to be eliminated, to repropose that part of the proposal if, indeed, EPA does that, and take comment upon that again, but not the main portion of the rule. You have to understand, from my perspective, from management of TMDLs, that issue is not the driving force of why this rule is needed.

Senator HUTCHINSON. Well, could a farmer that had a confined animal operation—poultry or fish—could he, under the proposed rule, be subject to permitting in any circumstance?

Mr. COOKE. Unless they were defined as a point source under the Arkansas regulations, no. There are circumstances under the CAFO regulations where you can be large enough where you can become a point source. I'll yield to Randall for that interpretation.

Senator HUTCHINSON. Mr. Randall.

Mr. COOKE. But you have to be of a certain size.

Mr. MATHIS. I believe that there are approximately, out of all of the poultry operations and all of the other operations in the State of Arkansas, it seems like there may be three or four that fall under the category that under EPA's regulations require an——

Senator HUTCHINSON. And Mr. Cooke, you're saying that under the proposed rule, that won't change at all? There will be no new possibilities of permitting under the proposed rule?

Mr. COOKE. That's not changing. You're going to look to how you deal with the States and how the regime is set up, and that's why I don't remember exactly how Arkansas works, but you could be of a certain size where, you know, you would fall under the CAPRA

regulations of the State and would require a permit. But I don't think that's going to change from current practice.

Mr. MATHIS. Senator Hutchinson, I believe that EPA has developed the regulations for at least three of the other States, and the region Arkansas had its own regulations prior to that on permitting—general permitting process, and I believe that region 6 developed the general permit for other States in the region that did not have one.

Senator HUTCHINSON. OK, apart from our region, is it your understanding, Mr. Mathis, that there would be any change in permitting requirements under the proposed rule or the possibility of permitting?

Mr. MATHIS. Well, I think that the possibility is there, but I'd have to further review the permits in the other States.

Senator CRAPO. Senator, could I interrupt and just ask a question along this line?

Senator HUTCHINSON. Yes, Sir.

Senator CRAPO. Mr. Cooke, I'm reading your written testimony, beginning about two-thirds of the way down Page 8, and let me just read it to you. You indicate that "No permits would be issued in States that now have or develop adequate forest water quality programs. The final rule will describe basic criteria of adequate programs, including appropriate best management practices identified in consultation with the USDA." Then you go on to state, "Where a State has not developed a strong forest water quality program after 5 years, forestry operations might be asked to have a permit, but only if"—and then you list three factors—"the forestry operation resulted in a 'discharge' from a point source (diffuse runoff from silviculture operations not being subject to a permit under any circumstance)"; No. 2, "the operation contributes to a violation of a State water quality standard or is a significant contributor of pollutants to waters"; and, No. 3, "the State Clean Water Act permit authority"—which, as I understand it, in this case would be the EPA having taken control away from the State—"determined that a permit, as opposed to a voluntary or incentive-based program, was needed to assure that pollution controls would be implemented." Now, as I read what you have said here, essentially it says that if the EPA does not like what the State has done after 5 years, that the EPA can take control of the program back and begin a permit program if they define—if they can find what they define as a discharge from the point source in a silviculture operation, and we already know there's been a big debate about our disagreement with the EPA over whether they can do just that.

Mr. COOKE. Let me respond. First, this provision, of course, would be subject to the part that has been separated from the final rule, as we indicated, so that as I said, that will be a separate part.

Senator CRAPO. Yes.

Senator HUTCHINSON. Could I——

Senator CRAPO. Sure.

Senator HUTCHINSON. Is that the basis for you saying that there was no circumstances in which there would be——

Mr. COOKE. No. No, no, it's not. I was just pointing out, this is the silviculture provision that would be removed. That's not the basis for my previous comment. Second, I think, in all of our re-

gion, all of the silviculture operations and the Best Management Practice in forestry operations they have today are in very good shape and are likely to be certified very quickly. We don't find any of the programs here to be deficient.

Senator CRAPO. If everything's OK, why does the EPA continue to insist on putting this into position?

[Applause.]

Mr. COOKE. Senator, I must assume that they have problems someplace else in the United States where that causes them to give those problems, because in region 6, that's not an issue that we would be driven to do.

Senator CRAPO. I'm sorry, I interrupted you, Senator Hutchinson.

Senator HUTCHINSON. No. Thank you. I appreciate that. Feel free to do that at any point. But, Mr. Cooke, the rule, as I understand it, would allow the EPA to designate AFOs—AFOs or CAFOs in certain situations, while prior to the rule, the proposed rule, only the State with its delegated authority could designate an AFO or a CAFO.

Mr. COOKE. It depends on where the State's delegated program is. In Arkansas that would not be the case, but in Oklahoma, New Mexico and potentially Texas, it would. Now——

Senator HUTCHINSON. According to the CRS, these revisions are expected to expand the regulatory coverage of AFOs, which are defined as CAFOs and are thus subject to NPDES permitting and enforcement. So, in fact, Mr. Cooke, the proposed rule could result in permitting that heretofore could not have happened.

Mr. COOKE. I may yield to my Water Division Director. I did not think that was in this case. Bill, if you have anything to add——

Mr. HATHAWAY. The only thing I could add would be that if I understand the question, right now the Agency in a delegated State has the responsibility to only respond to permits that are proposed by the State. In other words, we don't have the ability to propose a permit. But if a State proposes a permit, then we can respond, and then if we don't like what we hear from the State, we can withdraw it and make it a Federal permit. Under these regulations, there is a possibility that we could add to that responsibility and actually propose a permit for a facility that the State had not proposed. So there is a nuance here where there could possibly be an addition of a permit. That's not really clearly defined to me, and I'm not really sure how that rule would apply in the final, because we've not had any application.

Senator HUTCHINSON. Let me quote again from the Congressional Research Service, which is, as you know, the highly respected nonpartisan branch—study research branch of Congress. They say that this proposal would apply to Animal Feeding Operations currently not designated as Concentrated Animal Feeding Operations, since CAFOs already are subject to NPDES requirements. It also would apply to aquatic animal production facilities, hatcheries or fish farms which confine aquatic stock in a man-made pond or tank system. And then in the footnote regarding the CWA regulations that govern CAFOs, these revisions, the proposed rule, are expected to expand the regulatory coverage of Animal Feeding Operations, which are defined as CAFOs, and are thus subject to NPDES permitting and enforcement. Now, if, in fact, whether in

this region or elsewhere, that such permitting resulted, what—and I will grant, because I think you will probably contend, that these would be extreme situations, but farmers aren't trained biologists or chemists, they don't have the money to hire such professionals, what kind of penalty would they face under current EPA fines?

Mr. COOKE. Let me ask Bill to help me answer that question from his experience in the region. But let me clarify your question. Is this a situation where we are requiring a permit from someone that hasn't had one, is that what you're asking? And what kind of penalty that they're required as a result of not having a permit, is that what you're——

Senator HUTCHINSON. I assume that this would be in violation. The penalty structure is for anyone found in violation, so the failure to get a permit or not granted a permit, I suspect that operation then would be considered in violation of the law. I think it's an area that there hasn't been a whole lot of attention to in the whole debate that's gone on in the last few months about what potentially these kinds of operations could face, because the fine—in fact, even imprisonment up to a year in jail is permitted, $2,500 to $25,000 per day of violation. So that we're not talking about voluntary Best Management Practices, we're talking about a very heavy-handed kind of enforcement mechanism. Mr. Hathaway. Those provisions, Senator, if I understand your question, would be once you come under the permit program, then you come under the enforcement program and are subject to the——

Senator HUTCHINSON. Right. We've already established that we're going to have expanded permitting. Mr. Hathaway. Right. I'm talking about an individual—a farmer or whatever. Once they were in the permits program and had a permit, then they are subject to the enforcement program, whereas in the Best Management Practices program, they would not be subject to the enforcement program if that's the distinction that you're asking about.

Senator HUTCHINSON. Mr. Cooke.

Mr. COOKE. I don't necessarily agree that the expansion that you described—I mean, I can't dispute what you've read from the Congressional Research Service, but in what we've seen in terms of guidance and how this is operated with region 6, I don't believe——

Senator HUTCHINSON. Well, it's disagreement here and disagreement with the Congressional Research Service. Is there any wonder that there's some bit of confusion among the public-at-large and those that are involved in silviculture and agriculture operations in Arkansas? And I guess that's one of the points I want to emphasize is that this whole process has been mismanaged; that it is no wonder that there is a lack of trust in the EPA when we have a rule that changes, is modified, retreats are made and yet the threat is issued that you're going to come back with the same rule. One last question and I'll yield to the Chairman. Mr. Cooke, your Agency reports that nearly 40 percent of surveyed water bodies remain too polluted for fishing, swimming and other designated uses. The interesting thing is that those numbers, though, represent rivers and lakes surveyed by State monitoring programs accounting for about one-third of all waters. Since States would be required to monitor, under the proposed rule, even more bodies of water under the EPA's proposal, it seems to me that that puts the States in an even

more unwinnable position, that you're giving them more to do, with the threat that, "If you don't measure up, then the EPA has the power to step in." Without providing the kind of resources, it is, in fact, an unfunded mandate?

Mr. COOKE. Well, Congressman, let me go back to my testimony earlier about the consent decrees that were already in this State. The reality is that the job that we do already outlined by those decrees is so huge in terms of negotiations between us and Randall, what we need to do, that takes precedence virtually about anything else that's going to occur in the next 7 years or 10 years under these rules. And as a practical matter of what will really occur in Arkansas, that outlines it, and we do need more resources, there's no question.

Senator HUTCHINSON. And that's exactly what Senator Crapo's bill does.

Mr. COOKE. I think it's a wonderful provision.

Senator HUTCHINSON. And do you not think that the requirement for a National Academy of Science study would be a good thing to do as well?

Mr. COOKE. I have a concern about that for this reason: That under these judicial decrees, that if that time delay inhibits the ability of the State and/or EPA in conjunction with the State to do the TMDLs pursuant to these consent decrees, I think we would have a significant problem.

Senator HUTCHINSON. It's just perplexing to me that you say, "Things are going so well, that we're getting such good compliance that we've got a great performance with Best Management Practices," it's just like Senator Crapo said, "Why, then, the urgency that you can't afford 18 months to study to provide good science and to ensure that what you do is in fact based upon science and not 30 lawsuits that may have been filed?"

[Applause.]

Mr. COOKE. Two reasons. From my perspective, two reasons: No. 1, I do think that it would inhibit our ability to meet the court-ordered mandates that we already have in Louisiana, New Mexico and Arkansas; No. 2, every single schedule that we have where we've been sued has been shorter than 15 years. I believe that I'm going to be facing litigation in the State of Texas. If I have this rule in place, it will almost assuredly give me the ability to keep that schedule longer than what we were able to get in Arkansas and Louisiana. So I see it, as a practical matter, as a bulwark for litigation to give the State more time than we would otherwise give.

Senator HUTCHINSON. Mr. Chairman.

Senator CRAPO. Thank you. We're already running over, but I do have just a couple more questions, Mr. Cooke. Are the States doing a good job right now of the Best Management Practices?

Mr. COOKE. Yes—well, States in my region. I can only speak about this region.

Senator CRAPO. I understand. So at least for your region, you don't see a reason to change the Best Management Practice approach to nonpoint source pollution activities?

Mr. COOKE. It seems to be working quite well in these States.

Senator CRAPO. You indicated that the rule was going to be "proposed final" rather than "final." Could you explain what you meant by that?

Mr. COOKE. What is the status?

Mr. HATHAWAY. As far as I know, it's a proposed final rule.

Senator CRAPO. "Proposed final," meaning if the EPA meets its deadline, it's own self-imposed deadline of June 30 and issues a proposed final rule at that time——

Mr. COOKE. It goes to OMB.

Senator CRAPO [continuing]. It goes to OMB, and then OMB has its ordinary time for review?

Mr. COOKE. "Proposed final," I meant from proposed final to go to OMB, and then it has its own time for review.

Senator CRAPO. And then once OMB signs off, the rule becomes enforceable?

Mr. COOKE. That's right.

Senator CRAPO. And is it not correct that the EPA has actually negotiated with OMB to shorten the timeframe for OMB's review?

Mr. COOKE. I can't speak to that. I don't know.

Senator CRAPO. I believe that's the case, but——

Mr. COOKE. Could be. I can't——

Senator CRAPO. I recognize that you may not be aware of that. You also indicated that, in response to Senator Hutchinson's questions, that the changes that the EPA has been making in the proposed rule over the last few months—which I might indicate coincided with the congressional hearings and the legislation imposed in Congress and the uproar around the country—these changes were not so radical that they so dramatically changed the rule that you had to go back and start all over, because it's now not what it originally was.

Mr. COOKE. Right.

Senator CRAPO. It seems to me that the EPA has a bit of a dilemma here. If it maintains that the changes it's making in the rule are not significant changes in the legal sense that would require them to go back and start over again because it's really now a new animal or a new entity, then they're admitting that they really aren't planning on changing a whole lot in the rule. Or if they are saying that "We've changed it and addressed all these concerns to the point that we are truly going to take silviculture out and we're going to deal with the other problems that have been raised," that they have made significant and substantial changes. Otherwise, the EPA's asking us to assume that all of this concern around the country can be solved with basically minor, little, insignificant changes in their rule.

Mr. COOKE. Now, I don't concur with that, for this reason: I think the majority of information that we received in region 6—obviously these comments went to headquarters——

Senator CRAPO. Right.

Mr. COOKE [continuing]. But from what we see, 95 percent of it was on the silviculture and forestry operations. It would be my view that by severing that portion of it——

Senator HUTCHINSON. Excuse me, what percentage?

Mr. COOKE. I understood like 80 percent—from what I heard, 80–90 percent of what I heard was on the silviculture and forestry

operations are the comments that I heard, I personally heard, and I didn't receive the ones in Washington. And so from my experience, it would be prudent to sever that particular provision of it, and because the remainder of the rule was not what was receiving the great deal of preponderance of comments from the public, and so therefore I think you can, through the public process, make the changes that responds to public on the main body of the rule, and I think it is well founded to severe the silviculture provisions and deal with them separately if at all.

Senator CRAPO. It seems to me that the one thing that we may be able to agree on with regard to Mr. Fox's letter, saying that he's going to separate the silviculture provision of the rule from the current rule, is that at least he's delaying that part of it and starting the process over again, as we have been asking him to do for months. The problem that I see is that he is simply taking that out and reinstituting the very same thing that is now there and is now causing all of the concern and stating that "What I'll do here is take out the part that is causing the biggest part of the problem, go ahead with the rest of it, maybe divide and conquer here, and then reinitiate it."

[Applause.]

Mr. COOKE. I can't speak to that. As far as I'm concerned, the things that I've testified to Senator Hutchinson's questions that are of most concern to me are in the main body of the rule, not the silviculture portion of it, so——

Senator CRAPO. But isn't it the case that if the EPA successfully separates out the silviculture provisions of the rule and gets the remainder of the rule enacted, that then those who are not engaged in the silviculture community have seen the rule enacted against them. There is a lot of objection to that, and those in the forestry community are now singled out. They're the only ones left. The EPA is then proceeding with them being the last ones on the chopping block, so to speak, and the rest of the people who were with them in this fight are already under the rule, and it should be a much easier time from a strategic point of view, wouldn't it be, for the EPA to then take on the forestry community without the other allies that they have?

Mr. COOKE. Again, I can't speak to that. In this region, the silviculture concerns that were raised were not a problem that we have to address in this region. Therefore, whether or not that provision of the bill or the rule is ever finalized will make no difference in how this region deals with these issues.

Senator CRAPO. But at least we can agree that what the EPA has told us that it's going to do is to separate out the silviculture provisions and immediately repropose them.

Mr. COOKE. From talking with Mr. Fox this morning, I don't know whether that's true, Senator. I know that he says he will repropose them, but he also indicated he wanted to discuss with the committee before he did that.

Senator CRAPO. All right. That's my understanding. And I realize you're having to interpret this letter as are we, but it is my understanding that that's exactly what is being proposed. One last question: You've also indicated that nonpoint sources that have to be in-

cluded in the TMDL calculations, but that they cannot be subjected to a permit requirement.

Mr. COOKE. That's correct.

Senator CRAPO. Now, here's the question that I think begs an answer: If the EPA is so intent on including the nonpoint sources in the entire calculation, as you've testified, but has no authority to do anything about it, if they find that the nonpoint sources are a source of concern in the water quality, then what is the EPA going to do? In other words, let's assume that your position prevails in court and the EPA is given the authority under the current Clean Water Act provisions to begin calculating the nonpoint source contribution to the water quality situation in our country, and it is determined by the EPA that the nonpoint source segment is a problem, does the EPA have any authority at that point to do anything?

Mr. COOKE. That's why the development of the BMPs are so important, and we have to rely upon the State using its programs to get there. That's why it's a partnership, Senator. On those issues on nonpoint, it has to go through the State programs to accomplish that. It's not going to be resolved through a Federal permitting regime.

Senator CRAPO. I understand your argument, and if it were that clean, if you will, so that at that point the EPA would then have to go to the States and say to the States, "You have jurisdiction over a piece of this problem, we'd like to work with you to try to solve it," that would be something that I think the public could probably live with. But instead, as your own written testimony states, at that point, if the EPA determines there's a problem, they can simply take control away from the States.

Mr. COOKE. Well, the 319 program that we have obviously is the way we direct dollars through the State and with the State toward nonpoint sources, but I submit to you, Senator, that the taking away a program in relation to a nonpoint source issue and the full difficulty of all the programs that we have is unrealistic. It has not occurred anywhere in this region, and I'm not aware it's ever occurred in the United States on those facts, and so while I can't deny that that is a legalistic possibility based upon, you know, what's there, I mean, it is—the revocation of a federally mandated delegated program is always a possibility if the EPA thinks that the delegation has failed. But in practical fact, it hasn't occurred.

Senator CRAPO. Well, thank you. We are well over time now, and——

Senator HUTCHINSON. Could I just make a final statement?

Senator CRAPO. Oh, yes, you definitely may.

Senator HUTCHINSON. I want to say, Mr. Mathis, that if it's a partnership, you're very much the junior partner.

[Applause.]

Senator HUTCHINSON. I caught one phrase that Mr. Cooke made in his testimony, that the justification that I heard him giving for this rule is to forestall litigation. I don't think that is adequate justification, and the idea of 18 months (applause) of scientific study and greater resources for the States, I think, makes a great deal of sense, and I applaud Senator Crapo's leadership in this legislation.

[Applause.]

Senator CRAPO. And thank you. We thank you all for being here, and Mr. Cooke, we do know that it's not fun to go through these kinds of things, but it's not fun for the folks to have to face these kinds of proposed rules, either, so we'll try to continue working together to find a solution.

Mr. COOKE. Thank you, Senator. We'll be available for more questions should you have them.

Senator CRAPO. Thank you. We excuse this panel, and now we would like to call up the second panel. While they are coming up, I will announce to the audience the makeup of this panel. First, is Mr. Hank Bates of the Sierra Club from Little Rock, AR. Second, is Mr. Christopher Hart, Senior Wildlife Biologist of The Timber Company from Brandon, MS. Third, is Mr. David Hillman, president of the Arkansas Farm Bureau from Little Rock. And fourth, is Mr. Vince Blubaugh, principal of S—I'm going to have to read this—SBMA Associates, water consulting firm, and also someone who can provide us some expertise on some of these issues that we are dealing with statutorily. If I've massacred any of your names, please excuse me—mine gets massacred a lot, too, so you can know that I sympathize with you. Gentlemen, I assume that each of you heard the instructions earlier. Please—especially now that we are already past time dramatically—I'd like to ask you to please try to limit your oral testimony to 5 minutes so that we can at least have a little bit of time for questions of you, and we'll begin immediately with Mr. Bates.

STATEMENT OF HANK BATES, SIERRA CLUB, LITTLE ROCK, AR

Mr. BATES. Thank you, Senator. My name is Hank Bates. I'm appearing on behalf of the Arkansas Chapter of the Sierra Club. Welcome to Arkansas, Senator Crapo.

Senator CRAPO. Thank you.

Mr. BATES. I'd like to thank all of you for inviting me. Senator Crapo, I know you're on a tight schedule, but if you have time, I'd recommend a detour if you're flying back through Little Rock. We have an Aerospace Education Center near the airport, and we have an Imax Theater there, and before every Imax film they show, they show a short Imax film on Arkansas, and it's about 5 minutes long—lots of beautiful shots from a plane swooping down over the Ozarks and the Ouachita, the Arkansas River Valley, the White River, the Mississippi River Valley—and I think that film exemplifies how Arkansans are proud of our natural resources. I think we all are from all walks of life, everyone in this room. We call ourselves "The Natural State," put it on our license plate, and I believe most Arkansans want to preserve those natural qualities of the State. I also believe that most Arkansans want to clean up the portions of the State that can't make the film—the ones that aren't doing well, including the thousands of miles of polluted rivers and streams. And I believe that the TMDL program is a critical component of cleaning up those streams. The EPA has called it "the technical backbone of watershed planning." It gives us the information to make long-range planning decisions, and my concern with your bill is that I'm afraid it might delay implementation of the TMDL program that has already seen too much delay. And I see your bill as part of a general opposition to the TMDL program. I'd like to-

night, with the short time I have, to step back and look at the big picture and the way that we view the TMDL program and see where we have common ground. From my perspective, there are at least two big misunderstandings and certainly within the general public on the TMDL program, and I've heard it expressed in the media and seen it at some of the earlier public meetings in Arkansas. One is that the TMDL program will affect all forestry and agriculture operations throughout the State, when in truth the program's only going to impact a small minority. It will only affect those operations that are discharging into a polluted stream—a stream not meeting water quality standards—and that are contributing to that pollution problem. So if a timber company, for example, is following Best Management Practices and is protecting that stream, the TMDL program will not affect that company. Second, there's this concern that the program will require every timber company to get a permit. I've heard it said that it's going to—for any type of activity, a permit will be required. Now, in general, the TMDL program is not about permits. It's about information, as I see it. And I understand that there was the one portion of the proposed regs, including the part on silviculture, it's now at least been proposed to be withdrawn, that did have something to do with permits in isolated situations, but other than that, the TMDL program is about a process for gaining solid scientific knowledge about what is polluting a water body and a framework for allocating the responsibility to restore it. Other than that one small portion that I now see being—as I understand, it's going to be withdrawn, so I'm basically kind of ignoring it, I mean the ground's shifting beneath our feet, but for the purpose of what I'm saying today, I'm kind of ignoring the part that you-all were referring to happened last Friday, with Mr. Fox's letter. But in general, the TMDL program doesn't provide any additional regulatory tools to ensure that once you have this information, people follow through. The State, which will be the primary enforcement entity, will have to rely on the existing NPDES regulatory program and the voluntary BMPs. But what the TMDL program will give us is a better understanding of which streams are polluted, why are they polluted, and a blueprint or a framework for all the stake holders in the watershed to come together and use that information, to use a combination of NPDES permits for those types of facilities for which there is regulatory power, and Best Management Practices for the nonpoint sources, and come up with an implementation plan to restore the health of that watershed. Now, I know there's a lot of concern about the economic burden of the TMDL program, and from my perspective, it's not the TMDL program that causes the burden, it's the pollution that causes the burden, and I believe that if we buy into a TMDL program and we run it well and if folks cooperate, in the long run it can save the State money, because it will give us a better understanding of what's happening to our watersheds so that we can use the limited resources wisely to address what are the true problems that we have in the watershed. I think—and I said Arkansans are pressing—my little red light's on, so I'll try to finish up here. I think, you know, said Arkansans are very proud of their State. I also think they believe in taking responsibility for their actions. I think that's why most—as I understand the statistics, in the tim-

ber industry, for example, most folks are following Best Management Practices. I think that we can move forward with a TMDL program that relies on a combination of the Best Management Practices with the current NPDES regulatory system. I think as we move forward in that and we get a better understanding of the watershed, I think people will take responsibility for their actions and we can distribute the burden fairly among all the contributors to the pollution problem. That's my vision, my hope for what the TMDL program could be.

Senator CRAPO. Thank you very much, Mr. Bates.

Mr. Hart.

STATEMENT OF CHRISTOPHER HART, SENIOR WILDLIFE BIOLOGIST, THE TIMBER COMPANY, BRANDON, MS

Mr. HART. Senator Crapo, Senator Hutchinson, my name is Kit Hart. I'm senior Wildlife Biologist for The Timber Company, which is responsible for the timberland assets of Georgia Pacific Corporation. I appreciate the opportunity to present my testimony today on behalf of the company and on behalf of the forestry community. I will touch on the water pollution program Enhancement Act of 2000 or S. 2417, and I will touch on EPA's August 23 proposed regulations to revise the TMDL or Total Maximum Daily Load and NPDES, National Pollutant Discharge Elimination System programs under the Clean Water Act. My comments related to August 23 proposed regulations are valid in the context of promulgating the existing rule or redevelopment or reproposal of that rule. I know that you're already intimately familiar with the August 23 proposed regulations so I won't go into detail, but it is worth reiterating that the proposed regulations amount to a reinterpretation of the Clean Water Act. EPA has proposed to eliminate silvicultural activities from categories as nonpoint sources. Instead, EPA proposed to redefine them as point sources. The proposed rule would give EPA and NPDES authorized States the authority to designate silvicultural activities as point sources requiring NPDES permits in certain situations. We firmly believe that forestry activities are nonpoint sources, and there is no legal or statutory authority for EPA to revise the regulations by eliminating the nationwide recognition of forestry as a nonpoint source. Every State with significant forest management activities has developed Forest Best Management Practices or rules and submitted them to EPA under the section 319 nonpoint source program. EPA's own data reveals that these programs are working. Silvicultural inputs are declining, and forestry is a minor cause of impairment across the country. The proposed rules would unnecessarily interrupt mutually important progress toward reaching the goals of the Clean Water Act and fishable, swimmable waters. It's plainly evident, from the reaction by the majority of stake holders—State agencies, State water quality agencies, Governors and others—that the proposed rules were formulated without the advice and input of those stake holders who would ultimately be responsible for implementing them. I would like to acknowledge that EPA and Chuck Fox letter of June 8 indicates that if the rules are reproposed that they will engage the forestry community and other stake holders extensively, and we need to hold them to that promise. Although the forestry rules

may be on hold for the time being, there are better ways to address the issues of clean water. Section 319 programs need greater support. We need greater cooperation among multiple State agencies engaged in nonpoint source activities. More partnerships with private landowners and stake holders and better dialog between EPA regional offices and States to make water quality improvements happen. This is exactly what S. 2417 does. The bill recognizes that State nonpoint source programs are underfunded and increases funding. Specifically, the bill increases funding for section 106 of the Clean Water Act in order to collect reliable monitoring data, to improve State lists, and quite frankly, to focus resources where real problems exist so that people can roll up their sleeves and go to work. Even more importantly, S. 2417 increases funding under section 319 and earmarks a portion of those dollars to be used on the ground to improve water quality by private landowners. Another important element of S. 2417 is that the National Academy of Sciences is to prepare a report on TMDL development, cost of implementation, and exploration of alternatives—another important need. And finally, the bill establishes a pilot program for EPA and States to work together to review and compare State programs to implement innovative and cooperative partnerships. This is extremely important, because there are many good examples of cooperative partnerships that are efficiently addressing and improving water quality that can serve as models for others, and I would recommend that in any such effort, there's regional diversity across the country in designing a strategy for EPA to work with States and look at programs in a variety of topography, climate, soils and geography and social-political environments. That concludes my remarks.

Senator CRAPO. Thank you very much, Mr. Hart.

Mr. Hillman.

STATEMENT OF DAVID HILLMAN, PRESIDENT, ARKANSAS FARM BUREAU, LITTLE ROCK, AR

Mr. HILLMAN. Good evening. My name is David Hillman. I'm a farmer from over in the eastern part of the State at Almyra. I'm also president of Arkansas Farm Bureau Federation, and that's the hat that I'm going to be wearing tonight when I'm here. Arkansas Farm Bureau is very interested in this program. We have over 216,000 family members in Arkansas. We've had three meetings around the State since January on the TMDL proposed regulations. Those have been attended by over 8,000 concerned citizens just in the State of Arkansas alone. In August, when EPA proposed these changes, I thought, "They can't do that. They don't have the authority to do that." And these proposed regulations have the potential to give EPA the power to take over State land use in this great State of Arkansas. EPA's TMDL proposal also enables EPA to require their review and approval or disapproval of the State's list of TMDL streams. Having reviewed the EPA's proposed regulations and the current law, we've got serious concerns over many of these proposals. Congress designed the TMDL program in section 303 to focus on waters impaired by point sources. Congress enacted section 318 to reduce the effects of nonpoint source runoff for agriculture, silviculture and other land use activities. These proposed

regulations that EPA is trying to do lists nonpoint source impaired waters. They propose to develop TMDLs for these nonpoint source waters and to establish implementation plans for nonpoint source impaired waters. In other words, the proposal provides for Federal land use regulation, plain and simple. I like questions that you can answer with ''Yes'' or ''Noes,'' and some government bureaucrats don't seem to know that there are some questions that can be answered with ''Yes'' or ''Noes.''

[Applause.]

Mr. HILLMAN. Congress designed and passed this legislation to treat point source and nonpoint source differently for a very good reason. If you stop and think about it, point source is something you can define. It is a pipe. It is something that runs into a stream. It's something that can be controlled. But nonpoint source, you can't control it. You know, farmers like to think they're good, but we can't decide when it's going to rain and how much it's going to rain. We might be doing everything we can and the Lord decide to send a 6-inch rain and it's going to mess those things up. All four components of the TMDL—Total Maximum Daily and Load—imply that there is a constant controlled way to deal with this issue. None of those exist in agriculture. None of those exist in silviculture. None of those exist in aquaculture. We depend too much on nature. But I'm getting off the point here. The proposed regulations unlawfully allow EPA to designate nonpoint sources. It's plain and simple. It's not a hard question to answer. The answer is ''Yes, it does.'' If this regulation goes into effect, it's going to affect every one of us that farm for a living. It's easy for me to see that. Over the past decades, farm and ranch families have achieved extraordinary conservation gains through voluntary incentive-based programs to conserve fragile soils, wetlands, protect water quality and wildlife habitats. We have always done the right thing—maybe not for the reasons that other people want us to, but because it's our land. It's our heritage. It's our reason for living. It's our reason to pass on to our children something that's better than it was when we got it. We're willing——

[Applause.]

Mr. HILLMAN. We're willing and able to do these things. All we ask is that you show us what the right thing to do is. Give us the opportunity and the resources to do it with, and we'll be glad to do it. And thank you.

[Applause.]

Senator CRAPO. Thank you very much, Mr. Hillman.

[Applause.]

Senator CRAPO. Mr. Blubaugh.

STATEMENT OF VINCE BLUBAUGH, G.B. & MACK AND ASSOCIATES, EL DORADO CHEMICAL COMPANY, EL DORADO, AR

Mr. BLUBAUGH. Thank you. Greatly appreciate it, Senators. My name is Vince Blubaugh, and I'm a principal with G. B. Mack & Associates, an environmental consulting firm which is located in Bryant, AR. On behalf of my client, El Dorado Chemical Company, I greatly appreciate the opportunity to present our views on S. 2417, Water Pollution Program Enhancements Act of 2000. Since the passage of the Clean Water Act, we have seen the evolution of

its programs go from the development of effluent guidelines for point sources to ensure national consistency among dischargers to the derivation of extremely stringent water quality-based limitations which require point sources to spend millions of dollars to meet new levels of treatment under their NPDES permits. Now, with the advent of the TMDL program requirements, there is a recognition that point source controls are not the only solution to water quality problems in some situations. However, the implementation of the TMDL program has often advanced the requirements beyond the knowledge and with the resources of the regulatory agencies involved in the process. Arkansas is a case in point. The Arkansas Department of Environmental Quality is recognized nationally by its peer agencies as a leader in the protection of water quality. Through such programs as development of the ECO region standards, first in the country to ever have those, toxicity testing, which they put on numerous point source dischargers, maintenance of a comprehensive ambient water quality monitoring program, which is designed to obtain real world data concerning the condition of their Arkansas' waters. The Agency's efforts are to be commended and has been very successful in addressing water quality issues in the State, especially in light of the limited resources that it has. One of the keys to PC&E or ADEQ success has been its ability to address problem areas as it has determined and in timeframes that allowed the department to development sound technical approaches. An example would be the ECO region research, which among other things completely revamped the Dissolved Oxygen Standards in the State of Arkansas, thereby resulting in real world, reasonable permitting requirements on municipal and industrial point sources, but this was a multi-year process, taking approximately 5 years from the initiation of the field studies to regulatory finalization. A whole lot of work went into it—very, very field-intensive work. Yet it provides a good parallel as to how the 303(d) or TMDL process should be conducted to ensure a technically sound cost-effective approach. The S. 2417 correctly identifies many of the problems involved in the implementation of the TMDL program across the country. Some of the noted deficiencies are insufficient State resources to manage the program and the lack of sound science and water quality monitoring data to properly implement the program. All of these are quite problematic and can result in technically unsound, unrealistic control strategies, which will not achieve better water quality throughout the Nation. The proposed legislation offers a moratorium on the finalization of EPA's final TMDL regs, pending studies by the National Academy of Sciences on many of the technical issues contained therein. This at a minimum should be done. In addition to this, we would recommend that the committee consider broadening the moratorium to address the current TMDL program requirements. This is because factors such as artificially short implementation timeframes due to court orders and budgetary considerations will result in technically unsound TMDLs being imposed on both point and nonpoint sources. We also recommend that consideration be given to adding provisions to allow the States flexibility in receiving the appropriation set out in the bill. This is because due to State budgetary timeframes, State agencies may not be able to direct their re-

sources in order to maximize the use of such funding. In addition, we have great concern that the technical tools needed to create valid TMDLs will not be available and that unsound science be utilized in order to meet artificial regulatory and fiscal considerations.

[Applause.]

Mr. BLUBAUGH. In conclusion, we appreciate the opportunity to make these comments and appreciate the work of the committee to address this extremely important issue. The TMDL program is evolving, and anything that can be done to ensure a more systematic technical evolution is warranted. S. 2417 is a very good start in that direction. Thank you very much.

Senator CRAPO. Thank you very much, Mr. Blubaugh.

[Applause.]

Senator CRAPO. We just talked up here, and we're going to try to extend this hearing for about 15 minutes beyond 8:30, so both Senator Hutchinson and I will have about 10 minutes of questioning of this panel, and Senator Hutchinson, why don't we go ahead with you first?

Senator HUTCHINSON. Thank you, Mr. Chairman. Mr. Blubaugh, do you believe the Best Management Practices in Arkansas are working well?

Mr. BLUBAUGH. Yes, I do.

Senator HUTCHINSON. Mr. Hillman.

Mr. HILLMAN. Yes, Sir.

Senator HUTCHINSON. Mr. Hart.

Mr. HART. Yes.

Senator HUTCHINSON. Mr. Bates.

Mr. BATES. In most instances.

Senator HUTCHINSON. And I think that Mr. Cooke testified earlier basically the same thing: It's working well. Mr. Bates, in your oral statement—and by the way, thank you very much for being—all of you—excellent testimony. It's been a very positive contribution, and I thank you. But you commended Arkansans for their efforts at Best Management Practices, you praised the responsibility of Arkansans, you just said you thought that they were working in general very well. Did not your organization, Sierra Club, file suit against the State of Arkansas?

Mr. BATES. I represented five different organizations in that lawsuit: Sierra Club, Arkansas Fly Fishers, International Federation of Fly Fishers, Save Our Streams, and Crooked Creek Coalition.

Senator HUTCHINSON. Did you say Sierra Club was one of them?

Mr. BATES. Right, one of them.

Senator HUTCHINSON. And technically the——

Mr. BATES. Go ahead.

Senator HUTCHINSON. Your national—the Sierra Club, the national Sierra Club organization proposes this proposed rules. Can you explain to me why?

Mr. BATES. Proposes—I'm sorry, what——

Senator HUTCHINSON. The TMDL proposed regulations.

Mr. BATES. The TMDL—the proposed regs? There's parts of the proposed regulation that the national organization likes, and there's parts they don't like. I think one of the main concerns is the strict, you know, 15-year across-the-board time line for completions of the TMDL programs.

Senator HUTCHINSON. Are you representing Sierra Club tonight?

Mr. BATES. Yes.

Senator HUTCHINSON. Are you testifying for or against the proposed rule?

Mr. BATES. I thought why I was here to talk mainly about the Senate bill, to——

Senator HUTCHINSON. I gathered from your testimony that you supported the proposed TMDL rule.

Mr. BATES. Oh, OK. I support the TMDL program. TMDL programs have been around, and regardless of whether the proposed rule is passed or not——

Senator HUTCHINSON. Do you have a position on the proposed rule?

Mr. BATES. I'm not the national spokesperson on the proposed rule, so I——

Senator HUTCHINSON. Excuse me?

Mr. BATES. I'm not the national spokesperson on the proposed TMDL rule. What I can tell you about is how I think the proposed rule would work in Arkansas and talk mainly about local Arkansas issues. I'm just more comfortable with that. I'm an Arkansas lawyer, I'm not a Washington——

Senator HUTCHINSON. It's my understanding the Sierra Club nationally opposes this rule, because they do not believe this rule goes far enough. So I think it—I don't want to be disingenuous about supporting a rule or proposing a rule. Mr. Hillman, as of Friday, we are told by Mr. Fox of the EPA that silviculture is going to be exempted from this proposed rule. As the Arkansas president of the Farm Bureau, what are your thoughts on why farmers across this State should not be given the same treatment?

Mr. HILLMAN. I guess because we took the emphasis from the timber industry because they were the ones that were going to be affected most and first, and you kind of grease the wheel that's squeaking the loudest first.

Senator HUTCHINSON. Do you think——

Mr. HILLMAN. And had we known that they were going to—once they got all this flack on the timber industry, they would just move it over to the livestock industry, then we'd have had all the livestock folks here, and we got a few poultry farmers here tonight.

Senator HUTCHINSON. They exempted silviculture. Do you think they ought to exempt farmers from this as well—aquiculture, poultry——

Mr. HILLMAN. The answer is "Yes," and let me tell you why. This country has done quite well for 200 years without this dadgummed regulation.

[Applause.]

Mr. HILLMAN. And surely we can wait another 18 months till we get some science on it whether we need it or not.

Senator HUTCHINSON. Do you think that the justification for taking silviculture out, according to Mr. Cooke earlier, was that that's where most of the comments came from—that, as you put it, they're the squeaky wheel, and that by addressing that, that you could move forward with the rest of it. So do you believe that the agriculture in Arkansas, the poultry industry in Arkansas, the con-

fined beef operations, the row crop operations, do you think that they have equal stake holder positions in this proposal?

Mr. HILLMAN. Yes, sir, I think we do.

Senator HUTCHINSON. And so do you think there might have been any—as Senator Crapo suggested earlier—divide the opposition by dropping one part of the proposal and saying, "We're going to come back to that later?"

Mr. HILLMAN. As we were driving over here tonight, we were visiting in the automobile about it, and that was exactly my statement then. I said, "This looks to me like an effort to divide and conquer."

Senator HUTCHINSON. So the Farm Bureau and those who may not directly be involved in silviculture stood by the silviculture—the timber industry—during this fight. Do you believe that they're going to continue to oppose this proposal even though they now have been, at least for the time being, left out?

Mr. HILLMAN. Well, we've had two people here tonight to testify that, yes, they're going to.

Senator HUTCHINSON. Mr. Hart, what do you think?

[Applause.]

Mr. HART. I certainly believe that to be the case, particularly since we really don't know what the proposal is at this point.

Senator HUTCHINSON. Mr. Hillman, what is the Farm Bureau doing to ensure that Arkansas quality needs are adequately addressed, absent the EPA's influence and——

Mr. HILLMAN. I didn't hear you.

Senator HUTCHINSON. What positively has the Arkansas Farm Bureau done to try to improve water quality in the State of Arkansas?

Mr. HILLMAN. One thing we've done is work with NRCS, a longstanding partnership, in getting the information out to our farmers about what they need to do. All you have to do is show us what we need to do, why we need to do it, and give us the resources to do it, and we're going to do it, and we do that in a number of ways. We have different commodity committees within the organization. We have different interests within the organization, and all of us want to have better farms than what we started out with, all of us want to improve our productivity, improve the profitability or at least maintain a profitability at this point. The Farm Bureau constantly works on conservation. We have a Youth Conservation Workshop that we sponsor every summer to try to get high school kids interested in conservation, what they can do to make things better.

Senator HUTCHINSON. So Arkansas Farm Bureau's just not trying to out-protect polluters and prevent them from——

Mr. HILLMAN. No, Sir.

Senator HUTCHINSON. I ask that facetiously. I know better. My time is up, and I want the Chairman to have sufficient time to ask questions. It has been clear tonight to me that the EPA's proposal is a reaction—they've been very honest about it—it's a reaction to lawsuits Mr. Bates has been involved in—the lawsuits against the State of Arkansas. There have been over 30 lawsuits filed against EPA over the last few years. I think that is a poor way of making public policy. I know this: That Senator Crapo's legislation would

provide additional funds for the States to implement voluntary Best Management Practices, which everybody at this table says are working. If you give them more money to do the job, I think it will work even better. In his proposal, the National Academy of Science should study this issue for 18 months, and when we move forward, that we should do so on the basis of good science—that he's not doing this to head off lawsuits. He's doing it because he believes that that is a good public policy and the way you ought to formulate good public policy. And so once again, I appreciate your testimony, appreciate Senator Crapo's leadership.

Senator CRAPO. Thank you, Senator Hutchinson. Mr. Hillman, I'll start with you, because I want to just followup a little bit on the line of questioning that Senator Hutchinson was pursuing. I want to read to you—in fact, Mr. Hart, I'll probably want to get both your and Mr. Hillman's response to this from the agriculture and from the forestry perspective. And either of the other two of you who would like to comment on this, please feel free to. The letter from Mr. Fox with regard to what he proposes to do with regard to the timber industry is a page and a half of small print, but I'm going to read the last substantive paragraph—or portions of it, which is really the operative wording. What Mr. Fox says is that:

> In response to the interest in additional discussion of forest water quality issues, EPA will not include forestry provisions in the TMDL regulations to be finalized this summer. Instead, I expect that the Agency will repropose provisions of the August proposal related to forestry later this fall along the lines described in the USDA-EPA Joint Statement,

and it does say,

> We intend to engage the stakeholders extensively in reviewing the forestry provisions prior to the reproposal this fall. Based on the comments received on this reproposed rule, the Agency will decide sometime next year how best to proceed to address this important issue.

Now, as I read that, it says,

> Sometime next year, they're going to do the timber or forestry part of the proposal that is currently before us.

I think it's pretty clear that the reason they are backing away from including the forestry provisions now is because that has been where the most uproar has taken place with regard to the proposed rule, although certainly, from my perspective, it's not 80 or 90 percent, it's probably 50 percent or whatever, but there's been a significant amount of comment from other perspectives. The question I have is: Is that adequate—in fact, I'll start with you, Mr. Hart—is that adequate, just looking at it from the perspective of the forestry industry?

Mr. HART. I guess the answer is "We really don't know."

I guess the answer is that "We really don't know at this point," because, as has been pointed out, the letter is pretty vague on what they seek to repropose and how they seek to redevelop the rules, but it certainly seems like it's just a pause to kind of let the fervor die down and then hope that next time they go around, people are worn out and they're not willing to fight it.

[Applause.]

Senator CRAPO. Are you familiar with the USDA-EPA Joint Statement of the new approach to this rule that they would have liked to impose?

Mr. HART. Yes.

Senator CRAPO. If we were to assume that that is what the EPA reproposes, which is what is stated in this letter, and if the EPA then proceeds to repropose that USDA-EPA proposal, with which we are familiar, and it seems to me that EPA has ample time, given the speed with which it has approached this rule, to start with, to get everything into place by the end of the year, and then January of next year they could simply adopt this next segment of it. They wouldn't even have to wait for a new Administration, particularly if they didn't like the outcomes of the election. And given that, if you were to assume that what was put back on the table was the USDA-EPA proposal and that there were going to then be adopted early next year, would that be a victory for the forestry industry?

Mr. HART. Absolutely not. Basically, that's just a recrafting of the same proposal and stated in a different way, and I'll give you a couple of examples of why. That May 1 Joint Statement proposes a 5-year moratorium on the enforcement of the forestry aspects, but it still includes—it still changes forestry from a nonpoint source to a point source, and we know that litigation—citizen lawsuits—can do away with the 5-year moratorium immediately, basically. And also, that Joint Statement has not provided us with any criteria on how they are going to evaluate State programs, which is one of the components of that statement, and for all we know, the criteria that they're going to use to evaluate are broader, particularly when we've been told by EPA that California, Oregon and Washington are models that we should look to when we go to evaluate State programs.

Senator CRAPO. Thank you. And Mr. Hillman, the question I was going to pose to you was if the same deal were offered to agriculture, that "We won't do it now, but we will repromulgate it and start the proposal over with and go forward and implement it next year," would that be an acceptable solution?

Mr. HILLMAN. No. And the reasons for that is right now, agriculture, silviculture, all these things are under section 319. Anytime they want to change that and put it under 303, we're going to be opposed to it, because that's against the law.

Senator CRAPO. Understood. Now, Mr. Bates, in your testimony, you talked about an understanding of how the TMDL program ought to work and how our approach to clean water in the country ought to work, which frankly I have no disagreement with in principle. In fact, I think most people in America would think that it was a pretty sensible approach. What you discussed was identifying which streams are polluted, identifying what the cause of the pollution is, and then developing a framework within which we can approach addressing the pollution. To that extent, I think that the S. 2417 that we've introduced makes some major steps forward in providing resources to achieve exactly that objective. The concerns that have been raised with regard to the proposed rule, however, as I see it, are that cloaked in those kinds of discussions of what we ought to do to approach the clean water—making sure we have clean water in this country, was a very heavily command-and-control-oriented, centrally located power structure with control over an area of the clean water actions in this country that had never

been transferred to Washington then being transferred to Washington. Now, I don't want to get engaged with you in a debate over whether that is what happened or isn't what happened in the rules. My question to you is: Is it necessary, to achieve the objectives you talked about in your testimony, to have the EPA, in addition to addressing those issues of identification and focusing of resources, to assert control over the decisionmaking?

Mr. BATES. I want to make sure I understand your question right. Do you mean—are you talking about increasing the area in which they have permitting authority?

Senator CRAPO. Yes. Let's assume, just for the sake of this question——

Mr. BATES. OK.

Senator CRAPO [continuing]. That the concerns around the country that have been raised about the EPA becoming a Federal land use manager and the EPA being able to permit forestry activities and so forth are valid. I don't want to engage in that debate with you, but let's assume they're valid. Is that necessary to achieve the objectives that you talked about that need to be achieved under the TMDL proposals and under the Clean Water Act?

Mr. BATES. I want to make two points, I guess. No. 1, as long as the way the Clean Water Act's set up and the TMDL program and throughout the program, as the State has primary enforcement authority, and EPA only steps in if the State has dropped the ball. And the State—to my knowledge, EPA has never taken away that delegation of authority, so even though Sierra Club and other folks of this panel that have disagreement at times over how well different States are doing, it's never gotten so bad that a State's authority was yanked, and I don't think we're there yet. Let's look at the Arkansas settlement. The way that the Clean Water Act works, we didn't sue the State, we actually sued EPA. The law is that EPA has the final authority. They're the ones that really have to do it, but that did not necessarily mean my clients wanted the EPA to take over. We have a lot of faith in the people over at the Arkansas Water Quality Department—or the Water Quality Department and ADEQ. So we met with not only EPA, but we had long discussions with the State. Toward the end of the lawsuit, the Arkansas Forestry Association and the American Forest and Paper Associations intervened. We did not oppose their intervention. They asked to be part of the settlement negotiations. It was a year into the lawsuit. We'd pretty much come to the end of them, but we said, "Well, you're a little late. We're about to present this to the Court as a consent decree, but we'll sit down with you and talk about it first." And we sat down with them, they made some proposals, we accepted some of them, some we didn't like, we went ahead and presented it to the Court and they didn't oppose it in the end.

Senator CRAPO. And the State remained in——

Mr. BATES. And the State——

Senator CRAPO [continuing]. And the decisionmaking was still delegated to the State?

Mr. BATES. Right. The way the consent decree is set up, the State is still the primary actor. Everyone's hope is the State will be the primary actor, but if the State doesn't do what is required under the consent decree, the EPA is required to step in.

Senator CRAPO. And that final hammer is the one that I'm asking about. Is it necessary for us to create a system of cleaning up the waters of this Nation to say that the EPA has the ability, if it decides the States aren't doing the job well enough, to step in and take control over nonpoint source pollution activities?

Mr. BATES. Well, I think the reason it came about is back in 1972, when the Clean Water Act was passed, there was a concern with the race to the bottom. Because of economic pressures, States might compete to have more lax regulations, so the idea was "We'll have a national framework so that we can have some consistency across the country, but we'll still delegate to the States within that national framework to have on-the-ground enforcement power." And I think it's a good system, because it gives you the national backstop to stop the—to alleviate the concerns about the race to the bottom. But it allows the State, which is closer to the ground, to have the primary enforcement authority. I think it does work pretty well.

Senator CRAPO. Thank you. Mr. Blubaugh.

Mr. BLUBAUGH. Yes.

Senator CRAPO. We've heard a lot today, beginning with Mr. Cooke in the first panel, about the threat that litigation poses to the whole system of clean water in the United States. Now, is that threat primarily litigation relating to point sources?

Mr. BLUBAUGH. In this particular case, I was talking about the TMDL litigation, which it basically has resulted as an extremely artificial timeframe when developing TMDLs, often on a statewide basis.

Senator CRAPO. Right. And those are point sources?

Mr. BLUBAUGH. Both.

Senator CRAPO. Both?

Mr. BLUBAUGH. Both, yes.

Senator CRAPO. So you're talking about just the development of the TMDL?

Mr. BLUBAUGH. TMDL, which can include both point and nonpoint. I mean, depending on the specific TMDL, but it can——

Senator CRAPO. So the time deadlines or the time pressures that Mr. Cooke was talking about are time pressures that he expects courts to impose on the timeframe within which States have to create the TMDLs?

Mr. BLUBAUGH. Create the TMDLs, right. And then the resulting control strategies after those, you know. The TMDL breaks up the pie, and then you have to decide how you're going to control each of those——

Senator CRAPO. And so if we were going to try to solve that, in the legislation we are talking about here, we've addressed the number of the issues that we need to address—getting resources to the States, getting resources to identifying and addressing TMDLs. If getting the resources there isn't sufficient, wouldn't the solution be to simply have a congressional moratorium supported by the EPA that would create a timeframe which was workable within which the States could operate with the increased resources that we're talking about providing to them instead of rushing to impose a new rule such as this one?

Mr. BLUBAUGH. Exactly right. And that was the basis of the statement where I said, you know, the 18-month moratorium is a start, and in the statement we said we felt that that should be expanded.

Senator CRAPO. Expanded to include point source issues as well as nonpoint source issues?

Mr. BLUBAUGH. Well, yes, timeframes. Because the TMDLs, depending on the specific situation, may be both point source and nonpoint source. I mean, it just depends on the specific watershed and what the——

Senator CRAPO. Thank you. I see that my time's up. You want to have the last word——

Senator HUTCHINSON. No, Mr. Chairman.

Senator CRAPO [continuing]. Senator Hutchinson? All right. We thank this panel for coming today, and we appreciate your attention to these issues.

[Applause.]

Senator CRAPO. Now we've come to what was going to be the last half-hour. It's really 15 minutes, but we'll extend it for the full half-hour as we said.

Senator HUTCHINSON. If necessary.

Senator CRAPO. If necessary. Let me ask, just by a show of hands, how many here are here who would like to take an opportunity right now to say something at a mike if you had time? I'm counting about 1, help me count here, 2, 3—I'd say 10 or 15.

Senator HUTCHINSON. Fifteen, yes.

Senator CRAPO. OK, I'll tell you what we'll do. Would those of you who raised your hands please come up and just form a line here at the mike, and we'll ask you to keep your comments to 2 minutes. And I will rap the gavel to remind you. Two minutes is going to come a lot faster than you think it does. In fact, can we set these lights for 2 minutes?

Senator HUTCHINSON. And "15" is expanding.

Senator CRAPO. And "15" is now expanding. So we may have to—let's see how big the line gets, and then we'll see whether you get a minute or 2 minutes. OK, who's standing high enough so they can count the number in the line? OK, we got 15 in the line. Time's up. Is there anybody heading for the line that isn't there yet? OK. Everyone, please keep it to 2 minutes. We'll have the—is that yellow light 2 minutes?

The yellow light will tell you you have 1 minute, and I'll just kind of rap it if you go too much over. And please state your name for the record. Yes, sir, go ahead.

Mr. MOBLEY. I note the yellow light's on already—oh, there it is.

Senator CRAPO. There we go.

Mr. MOBLEY. My name is Zack Mobley. I'm an architect from Batesville and general partner of the Mobley Lumber Company. Welcome to Arkansas, Senator Crapo.

Senator CRAPO. Thank you.

Mr. MOBLEY. I'm a graduate of the University of Idaho Architecture School, and I have to say that it was a great experience and a great education.

Senator CRAPO. We had some timber there, too.

Mr. MOBLEY. Absolutely. My concern at this point is—and I hate to say this, but I can't support your bill for this reason: It sounds a lot like a lot of government responses to problems in that we spend a lot of money, put in a lot more studies and hire a bunch more bureaucrats and give more money to the States to go ahead and do what the Federal Government would do if they were—you know, if they were able to. I'll be perfectly honest with you, no matter what the National Academy of Sciences says, I do not want to be tormented by Federal bureaucrats or by State bureaucrats who are being financed by Federal bureaucrats. We have our own property, and it doesn't belong to the State, it doesn't belong to the Federal Government, and we'd like to have the opportunity to do like free men would and manage it ourselves.

[Applause.]

My experience with dealing with the Federal Government when I was in Idaho and had an opportunity to see what they were doing is that they're extremely incompetent at this kind of thing, and the individual managers are much—owners are much better at it, because they have a real stake in it, and to be perfectly honest with you, I think this is a moral matter and that we either protect our freedom or we give it up. And foresters in California and in Maryland right now have to beg the States for the right to cut their own timber, and this is what we object to—or at least I object to it.

[Applause.]

Senator CRAPO. Some very valid points. Mr. Mobley. Thank you very much.

Senator CRAPO. Yes, sir.

Mr. REDMAN. Thank you, Senator, for being here. I hope your efforts come to fruit. I'm Bill Redman. I'm a general partner in the Mobley Lumber Company. I think it's clear to everyone that we're being held hostage by unelected bureaucracy that's out of control and has no respect for our elected representatives and is gradually trying to take our freedoms away. And there's a whole lot of unrest in this country right now, and it's not just about that, but everybody's going to have to stand up and let these people know that they can't sit up here and not answer questions that are being asked and think they can get away with it. And I just want to thank you-all for being here, and everybody ought to stand up and tell it like it is, now.

[Applause.]

Senator CRAPO. Thank you. You did it in 60 seconds, too. All right. Yes, sir.

Mr. SNYDER. Excuse me. My name is John Snyder. I'm president of Arkansas Face, a small woodworking company in Benton.

Senator CRAPO. Speak a little more right into the microphone.

Mr. SNYDER. OK, excuse me. My name is John Snyder, and I'm president of Arkansas Face, a small woodworking company in Benton, Arkansas. I'm here speaking as an individual, not as a representative of our company or any of the trade organizations I'm affiliated with. But in hearing everybody on the various boards speaking, it kind of came to me that there's some things that are taking place here that make me very uncomfortable. There are agendas that everybody's bringing to the table versus some common-sense approaches. The air is cleaner than it's been in 20 years,

the water's cleaner than it's been in 20 years, Best Management Practices are working. These are our initiatives that weren't forced down our throats by a bunch of bureaucrats from Washington, DC. These are things the industry individuals have done on their own because they needed to be done. I appreciate very much Mr. Mathis' comments. He indicated that it was his belief we ought to pull back, eliminate the open-ended language in this TMDL regulation and use common-sense approaches such as Best Management Practices. I also appreciate David Hillman's comments. He mentioned conservation. I'm in the woodworking industry, but I also consider myself to be a conservationist. I consider myself to be an environmentalist. I am not a preservationist, because I don't think it's practical, in light of growing world populations and demands on farm products and wood products, to go back a thousand years. I do think that it's incumbent on us to conserve our natural resources for future generations and to leave things better than the way we found them, and I don't think that this is going to be done by passing legislation that gives anybody with a bad attitude and a 36-cent stamp the ability to put an injunction in place that prevents decent, law-abiding citizens from exercising their rights on their land.

[Applause.]

Mr. SNYDER. We've talked about funding this evening. Just recently, the Government passed a $45 billion bill over 15 years in the Carroll Land Act that took taxes from offshore drilling to allow the Government, who already owns one-third of the United States, to buy more acreage. Now, on this acreage, when they build an outhouse, the average cost is over $200,000. The forestry that's being practiced—not by the foresters, the government foresters—this has been forced upon them by policy that's outside of—I'm also a forester by vocation. These things have been forced upon them from administrative levels, and good forestry is no longer able to be practiced. The forests are overmature, they're subject to insect infestation, wildfires and disease. The United States is a net importer of all wood products. We consume more wood products per capita than we do all plastics, all Portland cement, all metals. It's incumbent on us to provide for future generations—not to export our problems overseas to countries who don't have the resources to deal with these issues. So those are my comments. Thank you.

Senator CRAPO. Thank you very much.

[Applause.]

Senator CRAPO. Yes, sir.

Mr. BLACKALL. Mr. Chairman, Senator Hutchinson, my name is Bruce Blackall. I am the executive director of the Arkansas Home Builders Association. We've heard a lot tonight from—and rightly so—from agricultural interests, silviculture and so forth, and we would not want you to forget, as I think you don't, that my industry—the residential construction industry—has a great stake in what's going to go on in these proposed TMDL regulations. At stake, as far as we're concerned, is the cost of housing, affordability of housing, and our ability to cope with a heavy-handed set of regulations that's going to make our jobs much more difficult. We strongly support your bill S. 2417, will do anything we can to support you in this, and we appreciate your efforts. I have a prepared

remark on behalf of our organization, and we'd request that they be entered into the record of this hearing.

Senator CRAPO. Without objection, they will be. In fact, let me take a brief moment here before the next speaker and indicate that anyone here who would like to can send written testimony to the committee, and how will we get the address to them? We will have the address posted. I was about ready to have you send it to Senator Hutchinson, but that may not be fair to him. We will get the address posted here right afterwards for anyone who would like to have that address, and you can send it to us. Thank you.

[Applause.]

Mr. DUDAK. I'm Mr. R.F. Dudak from Heber Springs, AR. I don't represent any organization. I am a tree farmer, and my family makes our sole living from the tree farm, and these proposed regulations, even though the EPA is supposed to postpone them, I think these are going to be more detrimental to the small landowner than they will be to the big corporations, because once you have to go after all these permits, the small landowner is going to spend most of his money trying to get the permits, and then you're going to end up in lawsuits if some environmental group decides they don't want you to cut your timber, and then you'll be paying all your money to the lawyers rather than trying to take care of your land. And I support your bill. I think it's a good approach, and I appreciate you coming to Arkansas to hear our input. Thank you very much.

Senator CRAPO. Thank you.

[Applause.]

Mr. ROGERS. My name's Ray Rogers, and I'm kind of in trouble here tonight, Senator. I have a 2,500-head hog operation, and I'm also a logger, and I've been in the timber business for 26 years. So I'm kind of regulated to death, to start with, on the hog side of it, and I have no confidence in more regulations coming out of Washington to benefit anything that I do.

[Applause.]

Mr. ROGERS. I also chair the Arkansas Farm Bureau Forestry Committee, and I belong to that organization, because I feel like I'm at my wit's end here, and I need as much help as I can to combat any kind of regulation that comes down from Washington. I have three small logging operations, I employ about 20 men, and they all take care and feed their family from these logging operations, and I've been in the business for 26 years. And I'd just like to say, I think we have a private property issue here, and I think anybody that has 40 acres of timber or 10 acres of timber and they want to cut it and send their kid to college or something, that they should be left alone and be able to do that.

[Applause.]

Mr. ROGERS. And we need your help to slow down this regulation that's coming down that I have no control of. I'm not a lawyer, I've never sued anybody, and, you know, I don't know how to go about even doing that, to start with, but, you know, we need your help—the small landowners and the small businesses, and I thank you for your time.

Senator CRAPO. Thank you.

[Applause.]

Mr. CLEVELAND. Good evening, and I want to thank the Senators for their support of this, because I'm glad to see somebody trying to inject some rationality into the process. My name is Bill Cleveland. I've come all the way from Shreveport, LA, to be here with y'all tonight, and I appreciate you-all traveling the distance you have. I'm an employee of the International Paper Company, and we've long been supporting data in this process. And I'm glad to see tonight that EPA region 6 is truly recognizing the resource constraints that the TMDL program is going to be imposing on them. As they've mentioned, there's been three consent decrees within their region in Arkansas, Louisiana and New Mexico. In Arkansas, it doesn't appear to be any substantial change in the TMDL program, but in my home State of Louisiana, the list of impaired water bayous has increased from 195 water bayous to 345, and 1,700 TMDLs over 7 years needed to be developed. I'm glad to see that the EPA is making some moves to appeal that, because the State of Louisiana has estimated that that's going to be, at a minimum, $50,000 per TMDL to develop, and much more likely an order of magnitude more than that. Quick math, $85 million just for the State of Louisiana, up to close to a billion dollars just to do the paper work before you have one iota of environmental improvement, and that's kind of a scary proposition to all the other States within region 6. I don't understand why EPA's opposing the Crapo bill. This whole TMDL proposal is the largest water quality improvement proposal that EPA has come out within 25 years. What's another 18 months to look at this and inject some real science and not just knee-jerk reaction against lawsuits into the program. I think that we need to look at the fact that Louisiana has recognized publicly that while their metals data is flawed, and in the current TMDL proposed rule, if there's a water impairment in one State, they can look at a neighboring State that might potentially be contributing to that. So this rule could very much have a potential on Arkansas. We need to be looking at that, because it could really hurt some people in, say, the Ouachita River Watershed or the Red River Watershed. Also, if we engage more people in this, we'll engage more stake holders who would be a part of the solution and not engage in more lawsuits, and I think by discussing this, it's going to help stave off some feared litigation. And I just want to remind Mr. Hathaway—he probably remembers this pretty vividly—that when they announce the EPA settlement—and he said in the letter that's posted on the Internet site in region 6 that:

> With the timeframes expected in Louisiana, they're going to have to use default models, and any TMDL that's developed in Louisiana is going to be subject to further litigation.

So why don't we study water quality, let's figure out where the problems are, and let's put the resources there and rather than putting the resources at fighting lawsuits. Thank you.

Senator CRAPO. Thank you.

[Applause.]

Mr. ALIVACK. My name's Roger Alivack. I'm a practicing forester. I've been practicing forestry in North Arkansas for 20 years now—almost 21 years. Ever since I started, I've seen BMPs from day one being implemented and being improved year after year after year, and it doesn't come cheap. It costs money to do that. And we're

willing to do that to improve the water quality in this State. And I think we've done a good job, and I think we're continuously improving our forestry practices as years go by. But don't take my word for it. I have here in my hands the Ozark-Ouachita-Highlands Assessment, the Aquatics Condition Book, and on page 198, they state—this is the Forest Service, they spent a lot of money on this, by the way, coming up with this, and I was fortunate to get a copy from it and I appreciate them sending it to me. And I did read this, but in 1990—they state right here on page 198:

> In a 1994 study of regional BMPs for the South, investigators conclude that, as a whole, forestry represents a relatively minor source of nonpoint source pollution compared to other sources.

Why are we trying to regulate something that is a small—a minor source of nonpoint pollution? I don't understand that. There are other things that we can do rather than spend our money on TMDL police to come around the woods and come back behind us, who have been trained. They list in this same book "Other aquatic restoration programs, bring back the natives, Challenge 21," the list goes on—some that I've been involved with—FIB and SIB, but yet the funding for those kind of goes downhill, and yet they want to raise the funding for regulations on something that's a minor source of nonpoint pollution. And that's all I've got to say.

Senator CRAPO. Thank you.

[Applause.]

UNIDENTIFIED AUDIENCE MEMBER. Good evening, Mr. Chairman, Senator Hutchinson. I want to—on behalf of my company, Georgia Pacific, I want to thank you for the interest that both of you have shown in this issue as it's been promulgated and your committee coming here and showing the attention to these individuals—these citizens of this State, and this issue is to be commended. Thank you very much. I'm going to try to articulate just a couple of small points that I think that were illustrated greatly here tonight and enhanced. Confusion is plentiful here. There's a great deal of confusion, and that creates apprehension, and I think you're able to hear that in the remarks of every person here—with that apprehension comes a great gap of distrust, and if all the stake holders can be brought together, such as your committee's trying to do, and through this S. 2417 legislation, then maybe these citizens can feel some of the protection that the Congress is obligated to provide for them to keep bureaucracies from running amok and running over each and every one of them.

And I think that's what they're trying to articulate here, and hopefully that message is coming through. I want to say that you are obligated to protect the citizens of the State of Arkansas, Idaho and the rest of the country, and your conduct here tonight and your presence here tonight shows that you take that obligation seriously, and you're resolute in your activities to try to protect each and every citizen here in this State and in the country. And as Ronald Reagan said, "If not who—if not you, then who; if not when, then now." So now is your time, and thank you for your time here tonight. Senator Crapo. Thank you.

[Applause.]

Mr. FRANCIS. Senator Crapo, Senator Hutchinson, thanks for being here. I'd like to commend all of your constituents who voted

for you and elected you, and hope they keep on doing what they're doing. My name is Jim Francis, I live in Little Rock. Since 1961 I've been a small-time, part-time, weekend tree farmer. We have three small tracts of timber in Clark and Nevada Counties totaling less than 600 acres. I'm a PNIFLO—P-N-I-F-L-O—Private, Non-Industrial, Forest Landowner. This sector owns 57 percent of the commercial forest land in Arkansas. Mr. Hillman's got us beat. He's got 280,000 members, and there are only about 150,000 of us. I think the engine that runs this—we didn't talk about who was suing the EPA, but I go back to 1980 when the anti-forestry advocates attempted to achieve legislated regulation of forest practices in Arkansas. There were a number of public hearings. I testified at a couple. I toured Weyerhaeuser's lands in Oklahoma with the Blue Ribbon Panel which Governor Clinton appointed. Same old people running the whole thing. Fortunately, reason prevailed and there was no such legislation. Back at that time, the Sierra Club was telling us about the Ouachita National Forest. Now, they were against clearcutting, you know. They were in favor of good forest management and harvesting, but finally the truth came out and they finally admitted from headquarters that they're opposed to any type of forest management—any harvesting on any Federal lands. Couple of years ago, the anti-forestry advocates attempted a back-door approach again to getting some kind of regulation through the legislature. They wanted to require that the State Forester provide certain educational material to every landowner before he or she could sell their timber. State Forester Shannon made it very clear that that was preposterous. That was as preposterous as is the idea of calling silviculture a point source of pollution. How preposterous! So hang in there. You're on the right track and we're behind you, and may I leave this up here somewhere where you can get it?

Senator CRAPO. You may.

[Applause.]

Mr. WESSON. Senator Crapo, Senator Hutchinson, I want to thank both of you-all for holding this informational hearing here tonight here in Hot Springs, AR. My name is Don Wesson. I'm the vice chairman of the Pulp Paper Workers' Resource Council. I'm also the vice president of the Paper Allied Industrial Chemical Energy Workers' Union in McGehee, AR. Our group, the PPRC, represents over a million and a half members throughout the Nation, and I would like to reassure the farmers—the brethren of the farmers—that we are behind you. Just because they pulled it out of—silviculture out, we'll be there for you.

[Applause.]

Mr. WESSON. Senator Crapo, I'd like to remind you of something. With you being from Idaho, you're aware of the hundreds of thousands of jobs that's been lost in the Pacific Northwest due to regulations. Well, I heard Larry Nance while ago speak that if, indeed, the TMDL goes on as proposed, it would shut logging down here in Arkansas. I'm a third-generation paper worker. It's been in my family for 75 years. I'm not ready to quit. I'm not ready to give up. I'm too young to retire, and I'm not going to quit. Also heard the region 6 Mr. Cooke say that should the TMDL come get regulated, that his region would not change one bit. Well, Mr. Cooke, if you

believe that, you're a bigger fool than I am, because if you will not change one bit, you'll be fired, because they want you—they want to manage in Washington, DC, what you're doing in Dallas. Thank you-all. We will have a demonstration on the steps of the Nation's capitol in July. I will be in touch with both you-all and ask for your assistance. Thank you.

Senator CRAPO. We look forward to seeing you there.

[Applause.]

Senator CRAPO. Yes, sir.

Mr. ROWE. My name is Lynn Rowe. I'm a local architect and tree farmer. I appreciate the evening that we're having here, this Town Hall meeting, and one of the gentlemen earlier said that he thought the quality of life began with the environment, and I would like to propose that our quality of life is defined by our freedom.

[Applause.]

Mr. ROWE. These agencies that you gentlemen are privileged to create in Washington have a way of growing on their own, such as a cancer on the land, and I'd hope that you would always be aware of this, and we look to you to control these matters as well as create them. Thank you very much.

Senator CRAPO. Thank you, sir.

[Applause.]

Mr. NIX. Senator, my name's Joe Nix. I'm from Arkadelphia. I'm a chemist. Here in the watershed of the Ouachita River here in 1804, Thomas Jefferson dispatched a party up the Ouachita River. They poled the boat up—William Dunbar and a chemist, strangely enough in 1804, named George Hunter. If you read their journals, when it rained the river got muddy.

[Applause.]

Senator CRAPO. That sounds like some common sense, Mr. Nix. Well, that tells us a good bit about the river. I haven't been at it quite that long, but I have been studying rivers and lakes in Arkansas most of my professional life. I have done loading studies on many streams, I know what's involved. It is not easy. You do not go out and take one sample and draw the conclusion that a stream is impaired. It takes a very systemic set of samples under a variety of conditions in order to, as you put it earlier, Senator, make sure that the impact from some land-disturbing activity is not lost in the background of what nature is already doing. We must be careful. I urge you to please, please do not let anyone talk you out of taking your provision dealing with the National Academy of Science out of your legislation. I believe I heard Mr. Cooke say that he opposed that particular provision, and I do not think that is appropriate in any sense of the word. I would refer you to a report of 1991, entitled "Credible Science, Credible Decisions, the State of Science at EPA." It's a very thin document. We must study these streams. We must understand them before we regulate—not after. Thank you.

Senator CRAPO. Thank you.

[Applause.]

UNIDENTIFIED AUDIENCE SPEAKER. I appreciate the opportunity to express myself here for a minute or two, and we have this you might say open forum here, and I'm a land surveyor in Glenwood,

AR. Many of my clients own small tracts of timber, and many are farmers, so I have an interest in them. But I also have a fundamental interest in the moral values of our State and of our Nation, and over a period of time, I have grown suspicious of Federal agencies in general. The reason that the Constitution was written was to limit the powers of the Federal Government, and the States should have, I believe, control of these matters rather than delegating it to the Federal Government.

The question arises if the EPA becomes the last authority, to whom is the EPA accountable? And when we see there is oftentimes a political agenda when it comes to applying the rules, that there isn't always a uniform application of rules, but these things can become a political agenda, and so I'm just kind of suspicious. And when we talk about environmental protection, I believe that there is a moral at issue here that's involved of integrity and that the real source of pollution should be more directed, if there is going to be some investigation, toward the gross immorality that has deluged our country through the media and poses a far greater threat to our children and to the future generations here with a total breakdown of our traditional moral values that are rooted in the Bible and Christianity than there is—and if the EPA is going to become the Lone Ranger riding in on Silver, you know, with Tonto helping and deliver us from the pollution that's involved, I think they're down the wrong track if they want to really deal with pollution and restoring integrity and morality in our Nation and in our State, and I think the State is better qualified. I trust those in the State much better than I do in Federal agencies, and that's what I have to say. Thank you.

Senator CRAPO. Thank you, sir.

[Applause.]

Mr. FARLEY. Hello. My name is Allen Farley, and I'm a landowner assistance forester with Green Bay Packaging in Morrilton, AR. I first came to Arkansas professionally in January 1997. When I asked my future boss at that time what my job description would be, he said, "You're to help private landowners. You're to assist them with every forestry operation that they need to have done except for logging." So therefore, I don't have any specific company financial stake in the decisions, I tell these people. And I work with—in our program, we have approximately 700 landowners representing over 100,000 acres. About 50,000 acres of that is in pine plantation. And of all those landowners, I've never met one of them that said, "I would like to have my stream muddied when you leave, please. I'd like to pay for that as well." I've never heard anybody say anything like that. Anytime we say that we always follow Best Management Practices, maintain streamside management zones, and our company does comply with all SFI standards. The people are thrilled to death to have somebody like that on their property helping them out. Another point I'd like to make is I work with all the State government agencies—the Arkansas Forestry Commission and the NRCS to help these private landowners maybe get some government funding for some of the forestry projects that they're doing. Just in my short 3 years here, that funding has dwindled almost to nothing. Counties that got maybe $50,000 to help people, now it's $1,500 to do the forestry work, and

here we're trying to spend millions if not billions of dollars to fix a problem that doesn't exist, you know.

There's a lot of analogies I was thinking of as I was standing in line, but, of course, when you get up to the microphone, you forget a lot of what you want to say. So I guess the best one is, you know, if I don't have a flat on my truck, I don't go to the garage and pay to have the flat fixed. I wait until it gets flat and then I have it fixed. So hopefully with that last bit of remote common sense, you know, we'll maybe make a better decision here. Thank you.

Senator CRAPO. Thank you, sir.

[Applause.]

Senator CRAPO. One more? We'll let one more go, and then we'll wrap it up.

Mr. RUTHERFORD. My name's Claude Rutherford, and I'm in the poultry business. I work for a poultry company. I have a poultry farm. I also have a beef cattle farm. And I wanted to talk, because all the forestry people have talked, and I appreciate very much what they've said. I agree with what they're saying, but I want you to know that animal agriculture is very much concerned. I served on Governor Clinton's Animal Waste Task Force back in the early 1990's, and we set up some Best Management Practices. We encouraged our producers to get farm management plans. The State Legislature gave funding. We've got almost 40 technicians in the State writing Best Management Plans for our farmers, and the farmers are following them. And examples, I think we heard earlier about the improvement of water quality at Moores Creek. I live just down the creek from Moores Creek. I live on the Muddy Fork. The water quality is the State line of Arkansas and Oklahoma, as far as phosphorus was one of the hot buttons now, from the mid-1980's to the middle 1990's after we implemented those Best Management Practices was reduced. The phosphorus level went down by like almost 20 percent, and I will have that data to you in a report. Those issues today, our growers are going through educational training—not just here in Arkansas, but in Oklahoma and Missouri, the areas that I work, the Extension people, the NRCS people and others are involved with the university on putting together programs on Best Management Practices, how to handle litter, and they have gone through training. We have got another set of training that they're going to go through this year. It's a voluntary program, and yet we're getting 70 and 80 percent of the growers to go through that training, to go to meetings. They don't get paid. They go to the meetings and they set there and they go back and apply those. I think voluntary approach is working. It works in forestry, it works in animal agriculture. If somebody teaches me that it's a good practice, it's good for the environment around me, I'll do it. If somebody comes and says, "You do it or else," I'm going to try every way in the world to get around it. Thank you.

Senator CRAPO. We hear you. Thank you.

[Applause.]

Senator CRAPO. Well, ladies and gentlemen, I'm going to give Senator Hutchinson and myself both 2 minutes as well to wrap it up, but before I do that, I'm going to go first and you can have the last word of the whole hearing, Senator Hutchinson. But before I

do that, let me indicate that for those of you who would like to submit written testimony, you may send it to—OK, you can send it to the Committee on Environment & Public Works at 505 Hart Senate Office Building—H-a-r-t—505 Hart Senate Office Building, Washington, DC. 20510. That's the Committee on Environment & Public Works, 505 Hart Senate Office Building, Washington, DC. 20510. And you may be interested to know that—oh, first of all, I'd like to ask you to have your testimony postmarked by June 26, if you possibly can. That should give you ample time to prepare it. And you also might be interested in knowing that the written testimony of the panels, of the witnesses who were on the panels today, will be available on the committee's web page. That web page can be viewed at www.—and I don't even know what that sign is——

AUDIENCE MEMBER. It's a tilde.

Senator CRAPO. Tilde?

AUDIENCE MEMBER. Yes. It's the Spanish——

Senator CRAPO. It's the little thing that goes like this, OK? It's a tilde. www.senate.gov/~epw/—g-o-v. So that is www.senate.gov/~epw/. And now let me just take my 2 minutes and wrap up here. And I wanted to take my time to tell you that I am really glad that we had this last half-hour with the open mike, because it gave me a feel—one additional feel for the people of Arkansas, and I can tell you that ever since I got here, I've just had the feeling that the folks here in Arkansas are just like the folks in Idaho, and it was absolutely ironclad confirmed to me when we had the open mike session, because I'm telling you we could have been in Idaho and had the same kind of good, common-sense testimony coming right from the people without having to have all of the wisdom flow from Washington. To the first speaker who said that you didn't like the bill, he was strumming at my heartstrings there a little bit, because there are things that I'd like to do differently as well, but this may be the best step that we can take right now in this effort, and I do appreciate the support that has been expressed here tonight for our efforts to try to steer this issue in another direction, and I want to reassure that gentleman as well as all of you that we are going to be trying to address the real issues that were so well brought out here. As was said in so many different ways and so powerfully by you, the issue still is freedom, and the 10th amendment to the Constitution said that the powers that were not specifically given to the Federal Government were reserved to the States and to the people, respectively.

And one way or another, ladies and gentlemen, one of you said, "Don't give up." Believe me, I know that I won't, and Tim and I were elected to the Congress at the same time, as I said, and we've stood side by side in battle after battle for what's been going on 8 years now. And I know that we will keep fighting, and we will start winning more and more with the support of people like you around the country who stand up. So thank you for coming tonight. Your attendance here I hope was beneficial to you, but I can assure you that it was beneficial to us and to America. Thank you very much.

[Applause.]

Senator CRAPO. Senator Hutchinson.

Senator HUTCHINSON. Well, I'll just take my 2 minutes to thank you for coming. You've been very generous with your time, and we're glad to have your wonderful wife, Susie, here and——

Senator CRAPO. I should have introduced her.

Senator HUTCHINSON [continuing]. We just want you to be back here and see Arkansas again. I know we had a number of State Legislators here, but I saw Senator Jodie Mahony out here, and we're just glad to have you, Jodie, and it's the first time I've ever seen you sit through a whole meeting and not say a word. But I don't want to tempt fate. That's OK. But we're glad you're here. And, Mike, I just want you to know, I'm very proud of my constituents, that I felt a lot of pride as they lined up there, and frankly I thought, as you did, that what we heard in the public comment section in that 30 minutes was far more meaningful than—as good as the Panels were, they were a lot better. And it was clear to me as we heard them speak that they love their land, and they love their freedom even more.

[Applause.]

Senator HUTCHINSON. One of my friends is in the Senate from New Hampshire, and I always like the New Hampshire State motto: "Live Free or Die." And I think that would be just as good for the State of Idaho or the State of Arkansas. Mike, thanks for being here. We really appreciate the hearing this evening, and I know for both of us, this will be very valuable. Thank you.

Senator CRAPO. And thank you very much.

[Applause.]

Senator CRAPO. And this hearing is now adjourned.

[Whereupon, at 9:05 p.m., the committee was adjourned, to reconvene at the call of the chair.]

[Additional statements submitted for the record follow:]

STATEMENT OF GREGG A. COOKE, REGIONAL ADMINISTRATOR, REGION VI, ENVIRONMENTAL PROTECTION AGENCY

INTRODUCTION

Good afternoon Mr. Chairman. I am Gregg Cooke, Regional Administrator for Region VI of the Environmental Protection Agency (EPA). I appreciate the opportunity to testify before this committee on the work we are doing—in cooperation with other Federal agencies, States, and local communities—to identify polluted waters around the country and restore their health.

In previous testimony to your committee Chuck Fox, EPA's Assistant Administrator for Water, described in some detail the key elements of the Clean Water Act program for restoring polluted waters—generally known as the "Total Maximum Daily Load" or TMDL program. His testimony described the over 20,000 waterbodies identified by States as polluted in 1998. It also described our effort, begun almost 3 years ago, to work with a diverse Federal Advisory Committee to review the TMDL program and identify needed improvements in existing regulations. And, the testimony described the changes to the current TMDL regulations that EPA proposed in August of last year.

Rather than review these topics again today, I would like to focus on work we have done since February with a range of interested parties to discuss the important issues raised in the proposed regulations.

As a result of these discussions, I am confident that we can develop a final regulation that addresses many of the suggestions we have heard while still providing for a strong, common-sense program—led by the States and local communities—to identify and restore the Nation's polluted waters.

I will also review some recent developments related to the TMDL program. For example, a Federal court in California recently confirmed the EPA's long-standing view that the Clean Water Act calls for polluted runoff from nonpoint sources to be accounted for in the identification of polluted waters and in the development of

TMDLs. Finally, Mr. Chairman, I will describe the Administration's strong opposition to the legislation (S. 2417) you recently introduced with Senator Crapo calling for a delay of several years in finalizing revisions to the TMDL program regulations.

CONSULTATION WITH PARTIES INTERESTED IN TMDLS

Over the past several months, EPA has worked closely with many groups and organizations interested in the TMDL program and in the proposed revisions to the current TMDL regulations. We have also made a special effort to review the many public comments we received on the proposed regulations.

Consultation with States

As indicated in earlier EPA testimony, the Clean Water Act provides that States have the lead in the identifying polluted waters and developing TMDLs.

It is critical that States stay in this leadership role and that they are partners in developing and implementing the program for restoring polluted waters described in our final regulations.

In developing the proposed revisions to the TMDL regulations, we worked closely with State officials, including a group set up by the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) and the Environmental Council of the States (ECOS). In addition, four senior State officials were members of the Federal Advisory Committee on the TMDL program.

Consultation with the U.S. Department of Agriculture

For the past several years, EPA and the United States Department of Agriculture (USDA) have worked in close cooperation to design and implement programs to protect water quality.

EPA and USDA worked together in developing the Clean Water Action Plan several years ago, developed the EPA/USDA Animal Feeding Operation Strategy issued last year, and worked with other agencies to draft the Unified Federal Policy for Management of Water Quality on a Watershed Basis proposed earlier this year.

When the proposed TMDL rule was published last August, concerns were raised in comments by the USDA. In response to these concerns, Chuck Fox met with Under Secretary for Natural Resources and the Environment, James Lyons, and established a joint EPA/USDA workgroup to review concerns of USDA with the TMDL proposal.

The USDA/EPA workgroup has been meeting on a regular basis over the past 3 months and these meetings have involved several dozen staff from different parts of both agencies. These intensive discussions have helped both agencies think through how our programs can best be coordinated.

EPA and USDA recently released a Joint Statement describing areas of agreement on the TMDL rule. Mr. Chairman, I ask that a copy of the Joint Statement be included in the record.

Some of the key elements of this Joint Statement describe changes EPA expects to include in the final TMDL rule on topics of interest to the USDA. For example, the Joint Statement outlines how EPA and USDA propose to address the problem of restoring polluted waters that are impaired as a result of forestry operations. The USDA/EPA forestry proposal is discussed in more detail later in my testimony.

In addition, the Joint Statement addresses the treatment of diffuse runoff in our August TMDL proposal. EPA remains committed to voluntary and financial incentive approaches to reduce runoff from diffuse sources of pollution where there is reasonable assurance that these controls will be implemented. The proposed rule would not require Clean Water Act permits for runoff from these sources.

The President's fiscal year 2001 Budget backs up this commitment to voluntary and incentive-based programs with proposals that State grants for polluted runoff programs be increased from $200 to $250 million and that funding for conservation assistance programs at the U.S. Department of Agriculture be increased by $1.3 billion. The benefits that result from these and other assistance programs will be given due credit in the TMDL process.

Since the majority of polluted waters are polluted in whole or in part by runoff from diffuse sources, a management framework that does not address them cannot succeed in meeting our clean water goals. As I discuss in more detail later in this testimony, this view was recently endorsed by a Federal court in California.

Review of Comments on the Proposed Regulations

I want to assure the committee that EPA is fully, and carefully, reviewing the public comments on the proposed regulations.

The Agency received over 34,000 comments on the proposed TMDL regulation.

The comments fall into three general groups:

• We received some 30,546 postcards addressing control of water pollution from forestry operations. Many of these comments are virtually identical.
• We received 2,747 comments from diverse individuals and organizations expressing a view on one or two elements of the proposal.
• We received 781 comments from groups or individuals expressing comments on multiple parts of the proposal.

We view each and every comment as important. In anticipation of extensive comment, EPA began working to organize and evaluate comments received even before the close of the comment period. Since the comment period closed, we have reassigned staff as needed to review and summarize comments.

This is an important effort begun over 3 years ago with the convening of a Federal Advisory Committee. EPA has made every effort to assure a full and careful review of public comments. If anything, the high level of interest in the regulation has given us an extra measure of determination to assure that the final TMDL rule is based on a careful consideration of the record.

EXPECTED CHANGES TO PROPOSED TMDL REGULATIONS

I want to outline our current thoughts on how to change the proposed revisions to the TMDL regulations and proceed with the important work of restoring America's polluted waters.

Delivering the Promise of the 1972 Clean Water Act

The final rule will provide a common-sense, cost-effective framework for making decisions on how to restore polluted waters. EPA expects that the final rule will:
• *Tell the Full Story.*—Provide for a comprehensive listing of all the Nation's polluted waters;
• *Meet Clean Water Goals.*—Identify pollution reduction needed to meet the clean water goals established by States in water quality standards;
• *Encourage Cost-Effective Clean-Up.*—Assure that all sources of pollution to a waterbody are considered in the development of plans to restore the waterbody;
• *Rely on Local Communities.*—Foster local level, community involvement in making decisions about how best to meet clean water goals;
• *Foster On-the-Ground Action.*—Call for an implementation plan that identifies specific pollution controls for the waterbody that will attain clean water goals;
• *Commit to Environmental Results.*—Require a "reasonable assurance" that the needed pollution reductions will be implemented; and
• *Assure a Strong Program Nationwide.*—EPA will establish lists of polluted waters and TMDLs where a State fails to do so.

Enhancing State Flexibility in Managing Polluted Waters

States will have the lead to identify and clean up polluted waters through the TMDL program. The final regulation will expand the flexibility that States have to tailor programs to the specific needs and conditions that they face. EPA expects that the final rule will:
• *Give States More Time.*—Allow States 4 years to develop lists of polluted waters, rather than 2 years as under current regulations;
• *Give States More Time.*—Allow States to develop TMDLs over a period of up to 15 years, rather the 8–13 year timeframe of the current program;
• *Tailor to Local Conditions.*—Tailor implementation plan requirements and add flexibility to account for different types of sources causing the water quality problem; and
• *Endorse Voluntary Programs.*—Give full credit to voluntary or incentive-based programs for reducing polluted runoff through diverse control measures, including best management practices (BMPs).

Streamlining the Regulatory Framework

In response to comments from many interested parties, the final rule will be streamlined and focused on what is needed for effective TMDL programs. EPA expects that the final rule will:
• *Drop Threatened Waters.*—Drop the requirement that polluted water lists include "threatened" waters expected to become polluted in the future;
• *Allow More Flexibility in Setting Priorities.*—Drop the proposed requirement that States give top priority to addressing polluted waters that are a source of drinking water or that support endangered species;
• *Drop Petition Process.*—Drop the proposal to provide a public petition process for review of lists of impaired waters or TMDL program implementation;

• *Drop Requirements for Offsets of New Pollution.*—Drop proposals to require offsets before new pollution can be discharged to polluted waters prior to the development of a TMDL; and

• *Phase-In Implementation.*—New requirements for polluted waters lists become effective in 2002 and new requirements for TMDLs will be phased in over an 18-month period.

USDA/EPA Forestry Approach

In finding a common view of the best approach to reducing forestry impacts on water quality, EPA and USDA agreed that a number of States are doing an outstanding job of managing forest operations and preventing water pollution. We want to recognize and rely on these strong State programs to both prevent water pollution and to fix those pollution problems that do occur.

Not all States, however, currently have strong forest management programs. Many of these States are working hard to upgrade programs over the next several years. These efforts need to be encouraged and supported.

Finally, some State forestry programs may not be adequate to prevent water pollution problems for the foreseeable future. In situations where States choose not to develop approvable programs within 5 years, EPA and USDA recognize the need to have a "safety net" for water quality. The safety net that we envision is to empower State environmental agencies to issue Clean Water Act permits for discharges of stormwater from forestry operations, in very limited circumstances.

Let me be clear that, under our approach, no Clean Water Act permits would be issued for at least 5 years from the date of the final TMDL rule. And, no permits would be issued in States that now have, or that develop, adequate forest water quality programs. The final rule will describe basic criteria of adequate programs, including appropriate best management practices identified in consultation with USDA.

Where a State has not developed a strong forest water quality program after 5 years, forestry operations might be asked to have a permit, but only if:

• The forestry operation resulted in a "discharge" from a point source (diffuse runoff from a silviculture operation will not be subject to a permit under any circumstances);

• The operation contributes to a violation of a State water quality standard or is a significant contributor of pollutants to waters; and

• The State Clean Water Act permit authority determined that a permit, as opposed to a voluntary or incentive-based program, was needed to assure that pollution controls would be implemented.

EPA may also designate forestry operations as needing a permit, but our ability to do so is even more limited than that of the State. In addition to meeting the conditions mentioned above, the EPA would need to be establishing a TMDL where a State did not do so.

EPA agrees that, where a State finds that a permit is needed, best management practices, rather than numeric effluent limits, are appropriate as permit conditions.

In addition, because States have the discretion to issue permits, forest operators that have not been told by the permit authority that they need a permit will not be subject to government or citizen enforcement for failure to have a permit.

IMPORTANT RECENT DEVELOPMENTS RELATING TO TMDLS

I want to briefly review some recent, important developments related to the TMDL program.

Reducing Workload and Assuring Adequate Resources

State officials have expressed concern over the workload and costs of the TMDL program. EPA is making every effort to respond to this concern. Last month, EPA issued a regulation eliminating the requirement that States submit lists of polluted waters this year; new lists will not be due until 2002. The decision to eliminate the 2000 listing process has saved States and others hours of work and has allowed us all to concentrate on the important job of developing TMDLs for the over 20,000 waterbodies already identified as polluted.

States are also concerned about the costs of administering the TMDL program. The annual appropriation available to States to administer and directly implement TMDLs and the clean water program has steadily increased from $131 million in 1993 to a proposed $410 million in the Administration's proposed 2001 budget.

The President's fiscal year 2001 Budget increases State grant funding for TMDLs by $45 million in fiscal year 2001 alone. When States match this new funding, about $70 million in new funding will be available for implementing the TMDL program.

In addition, EPA has provided States with the discretion to use up to 20 percent of funding under section 319 to develop TMDLs and for related work. The President's request for 319 funding in fiscal year 2001 is $250 million and thus provides up to $50 million in additional TMDL funding.

And, EPA expects that the final rule will support more cost-effective development of TMDLs by specifically encouraging States to develop TMDLs for groups of polluted waterbodies on a watershed scale.

EPA has worked with States to develop detailed assessments of the costs of key elements of the clean water program. Based on this analysis, and in consultation with the Office of Management and Budget, EPA projects that the funding proposed in the President's budget would be sufficient for States to administer the TMDL program in 2001 under the final TMDL regulations expected to be promulgated this summer.

Garcia River Decision

A Federal court in California, reviewing a challenge to a TMDL developed for the Garcia River, concluded last month that the Clean Water Act authorizes EPA to establish TMDLs for waters "polluted only by logging and agricultural runoff and/or other nonpoint sources rather than by any municipal sewer and/or industrial point sources."

The court noted that the Supreme Court has consistently referred to the Clean Water Act as establishing a "comprehensive and all-compassing" program of water pollution regulation. The court found that the logic of section 303(d) required that listing and TMDLs were required for all impaired waters, and concluded that excluding nonpoint source impaired waters would have left a "chasm" in the statute. And, the judge found that Congress' passage of section 319 in 1987 was consistent with the view that section 303(d) covered nonpoint sources of pollution because TMDLs were needed for the planning required under Section 319.

This decision confirms EPA's long-standing interpretation of the Act. It also makes clear that the requirement to list waters polluted by diffuse or nonpoint sources, and develop TMDLs for these waters, is based on the Clean Water Act rather than the existing or proposed TMDL regulation.

GAO Report on Water Quality Monitoring

Also in March, the General Accounting Office released a report critical of data used by States and EPA to make water quality decisions.

EPA has responded to the report in detail, agreeing with some conclusions and disagreeing with others.

EPA agrees with the GAO conclusion that some States lack the data that they need to fully assess the water pollution problems in their State. In many States, the lack of an extensive, and expensive, monitoring network prevents the State from evaluating all waters on a regular basis. Given limited resources, however, knowledgeable State managers focus monitoring resources on the most likely problem areas. The GAO report recognizes this approach and reports "State officials we interviewed said they feel confident that they have identified most of their serious water quality problems."

The GAO report suggests that the polluted waters identified from this monitoring may not be all of the polluted waters in the State. It does not indicate that the polluted waters that are identified as polluted are improperly identified as polluted. In other words, the TMDL program may not be focused on enough waters, but it is not focused on the wrong waters. In addition, if a waterbody is listed as polluted by mistake, it can be removed from the list.

Some observers have incorrectly concluded that the report found that States do not have the data that they need to develop TMDLs. There are several problems with this conclusion.

First, GAO generally found that States do have the data they need to develop TMDLs for point sources.

Second, while most States now lack detailed data to develop a TMDL for waters polluted by nonpoint sources, the development of these site-specific data has not been a priority of State monitoring programs. EPA and States recognize and expect that, once the process of developing a TMDL is begun, sometimes, several years later, States will need to supplement the initial screening data used to identify the problem with more detailed assessments needed to develop a TMDL. The lack of these data today is not a reason to delay a TMDL.

Third, GAO concludes that the lack of detailed nonpoint source related data makes it "difficult to directly measure pollutant contributions from individual nonpoint sources and, therefore, assign specific loadings to sources in order to develop TMDLs." This would be a concern if EPA's existing or proposed TMDL regula-

tions required that States have data to assign specific loadings to individual sources, but they do not. Rather, EPA's proposed regulation specifically provided that allocations to nonpoint sources may include "gross allotments" to "categories or subcategories of sources" where more detailed allocations are not possible.

Atlas of America's Polluted Waters

States submitted lists of polluted waters in 1998. Over 20,000 waterbodies across the country are identified as not meeting water quality standards. These waterbodies include over 300,000 river and shore miles and 5 million lake acres. The overwhelming majority of Americans—218 million—live within 10 miles of a polluted waterbody.

A key feature of the 1998 lists of polluted waters is that, for the first time, all States provided computer-based "geo-referencing" data that allow consistent mapping of these polluted waters. In order to better illustrate the extent and seriousness of water pollution problems around the country, EPA prepared, in April of this year, an atlas of State maps that identify the polluted waters in each State. The maps are color coded to indicate the type of pollutant causing the pollution problem. And, bar charts show the types of pollutants impairing stream/river/coastal miles and lake/estuary/wetland acres.

Mr. Chairman, I ask that a copy of the Atlas of America's Polluted Waters be included in the hearing record.

Economic Analysis

Several Members of Congress have suggested that EPA did not conduct an adequate assessment of the cost of the TMDL regulation. As you know, Mr. Chairman, cost assessments of proposed regulations are strictly governed by statute and by Executive Order.

In compliance with these requirements, EPA described the incremental costs of the proposed regulation. We did this work carefully and fully, in compliance with applicable guidelines. EPA is working with States and others to define the overall costs of administering the TMDL program, including both the base program costs and the incremental costs of the new regulations. EPA is committed to providing an estimate of these costs prior to promulgation of the final TMDL regulations.

Many commenters on the proposed revisions to the TMDL regulations indicated an interest in EPA's estimate of the overall costs of implementing the TMDL program and restoring the Nation's polluted waters.

It is important to note that several provisions of the Clean Water Act call for attainment of water quality standards adopted by States. Notably section 301(b)(1)(C) of the Act requires that all discharge permits include limits as necessary to meet water quality standards. The TMDL process does not drive the commitment to meet water quality standards. Rather, it provides a comprehensive framework for identifying problem areas and allocating pollution reductions necessary to fix problem among a wider range of pollution sources (i.e. not just point sources).

EPA recognizes that the TMDL process imposes some administrative costs for States, communities and pollution sources. We believe, however, that these administrative costs could be largely offset by the significant savings to be achieved over the next decade as a result of the TMDL process. By bringing all sources of pollution in a watershed together, the local community and the State can work together to evaluate various approaches to achieving needed pollution reductions. For example, the cost to remove a pound of a given pollutant may be high for some sources and low for others.

The TMDL process lays out these considerations and lets the local community decide how to meet its clean water goals. EPA expects many communities to opt for cost-effective approaches, many of which rely on low cost controls over nonpoint sources.

Under the final revisions to the TMDL rules to be published this summer, opportunities for shifting pollution control responsibility from high cost point source controls to lower cost controls over nonpoint sources will be greatly enhanced. Under the new rules, States and EPA will be able to defend point source permits that alone will not result in attainment of water quality standards because the TMDL must provide a "reasonable assurance" of implementation of other needed pollution reductions.

Under the TMDL rules in effect today, "reasonable assurance" is not a necessary element of a TMDL and cost effective sharing of pollution reductions is much less likely. As I have testified, "reasonable assurance" of implementation can be established based on voluntary and incentive-based programs.

EPA is developing rough estimates of the costs of attaining clean water goals using the TMDL model and not using the TMDL model (i.e. relying on point source

controls only to meet water quality standards) and will make this estimate available in conjunction with promulgation of the TMDL regulation.

OPPOSITION TO S. 2417

Mr. Chairman, the legislation you introduced with Senator Crapo, S. 2417, includes some important provisions expanding authorizations for State clean water grants. But the Administration must strongly oppose the bill because it would delay final TMDL regulations by at least 3 years, and perhaps much longer.

The bill would expand authorizations for several key State grant programs, including the clean water program management grants under section 106 of the Clean Water Act and the nonpoint pollution control grants under section 319 of the Act. The Administration believe that adequate State grant funding for clean water programs is critical to effective operation of the Nation's clean water program. We have proposed an increase of $150 million over the past 2 years in funding for State nonpoint control programs and an increase of $45 million in fiscal year 2001 for State water program grants. However, the Congressional Budget Resolution limits domestic discretionary spending such that it will be very difficult to meet the Administrations's proposed increases. Given the Congressional Budget Resolution, the funding levels proposed in the bill are unrealistic. One of the unintended consequences could be to divert funding from other valuable water quality efforts. The Administration stands ready to work with Congress to achieve our ambitious goals of substantially increased funding for important water quality work.

The section 106 grant authorization would increase to $250 million with $50 million of this amount reserved for implementation of TMDLs. The President's fiscal year 2001 budget provides an increase of $45 million in the section 106 grant that is reserved for TMDL development with an appropriate State match. This $45 million increase would bring the total amount of the section 106 grant to $160.5 million in fiscal year 2001.

The bill would authorize $500 million for the section 319 grant program, which is double the President's fiscal year 2001 request. Some $200 million of this amount would be reserved for grants to implement nonpoint pollution control projects. Further, the bill would significantly lower the current non-Federal matching requirement. The Administration recommends maintaining the current non-Federal match, which is a more appropriate rate of 60 percent Federal funds with the remaining project costs provided by non-Federal funds. For any given level of available Federal funding, the bill's proposal of a 90 percent Federal matching requirement would result in fewer projects funded, and fewer areas and people being served.

Provisions of S. 2147 call for a study of the scientific basis for the TMDL program. While there are technical issues associated with the development of TMDLs, many of the essential scientific bases for developing TMDLs and restoring polluted waters are already available. There is no need for a review of this science by the National Academy of Sciences. In addition, other objectives of the study, such as assessments of total costs of meeting water quality standards, are questions that the National Academy of Sciences is not best suited to answer.

Section 5 of the bill provides for the funding of five watershed management pilot projects. States and EPA already have extensive experience in the development and implementation of watershed management projects at several geographic scales. For example, the National Estuary Program has invested tens of millions of dollars in watershed management projects on over 28 estuaries around the country. Numerous other watershed management projects have been completed or are underway. It would be a mistake to divert $2 million to these five projects when this funding is badly needed to support broader State efforts to develop TMDLs.

Finally, section 6 of S. 2147 would prevent the finalization of TMDL regulations until the completion of the study by the National Academy of Sciences. The Administration is strongly opposed to this provision of the bill.

Enactment of this proposal could result in the effective shut-down of the TMDL program in many States as they and other parties defer work on TMDLs until the comprehensive studies mandated by Congress are completed. Sadly, Congress would be telling thousands of communities across the country that are eager to get to work restoring the over 20,000 polluted waters to stand down—to pack up their clean water plans and put them into the deep-freeze for the foreseeable future while a panel of scientists meets here in Washington, behind closed doors, for almost 2 years, to write a report.

Many States have strong public confidence in their TMDL programs and expect to work cooperatively with the public in listing polluted waters and developing TMDLs. State efforts to meet commitments to the public to run effective TMDL programs would be hampered because many affected pollution sources could cite the

Congressionally mandated national study as a reason to delay any action on TMDLs before release of the study and subsequent revision of the rules. Public confidence in the TMDL process could be seriously eroded.

Citizens may step-up efforts to seek court orders to complete lists of polluted waters and TMDLs. Without final regulations to guide EPA and State efforts to implement the TMDL program, courts could issue detailed judicial guidance for the TMDL program.

I hope, Mr. Chairman, that I can convince you and other Members of Congress that we do not need to postpone any longer these important improvements to the TMDL program. We have a solid legislative foundation in the Clean Water Act. We have a good TMDL program that will be even better with the revisions to the program regulations that we will finalize this summer. Most importantly, people all over the country want to get to work restoring polluted rivers, lakes, and coastal waters, and they want to start now.

CONCLUSION

The 1972 Clean Water Act set the ambitious—some thought impossible—national goal of "fishable and swimmable" waters for all Americans. At the turn of the new millennium, we are closer than ever to that goal. Today, we are able to list, and put on a map, each of the 20,000 polluted waters in the country. And, we have a process in place to define the specific steps to restore the health of these polluted waters and to meet our clean water goals within the foreseeable future.

It is critical that we, as a Nation, re-dedicate ourselves to attaining the Clean Water Act goals that have inspired us for the past 25 years. The final revisions to the TMDL regulations will draw on the core authorities of the Clean Water Act, and refine and strengthen the existing program for identifying and restoring polluted waters.

Mr. Chairman, I consistently hear from critics of the TMDL program that it is more of the old, top-down, command-and-control, one-size-fits-all approach to environmental protection. In fact, the TMDL program offers a vision of a dramatically new approach to clean water programs.

This new approach focuses attention on pollution sources in proven problem areas, rather than all sources. It is managed by the States rather than EPA. It is designed to attain the water quality goals that the States set, and to use measures that are tailored to fit each specific waterbody, rather than imposing a nationally applicable requirement. And, it identifies needed pollution reductions based on input from the grassroots, waterbody level, rather than with a single, national, regulatory answer. In sum, we think we are on the right track to restoring the Nation's polluted waters.

The final revisions to the existing TMDL regulations will support and improve the existing TMDL program and they will be responsive to many of the comments we have heard from interested parties.

Thank you, for this opportunity to testify on EPA's efforts, in cooperation with States and other Federal agencies such as the Department of Agriculture, to restore the Nation's polluted waters. I will be happy to answer any questions.

STATEMENT OF RANDALL MATHIS, DIRECTOR, ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY

Chairman Smith, Senator Baucus, honorable members of the committee on Environment and Public Works it is indeed an honor to appear before you and to testify on the content of Senate Bill S. 2417.

I know it would have been much more convenient to have held all committee meetings on this important piece of legislation in Washington, DC. I am most appreciative of you for bringing this committee hearing to the Natural State in the heartland of America, reaching out to receive testimony from many who would not otherwise have the opportunity to be heard by the full committee. This is government at its best. I believe your being here expresses your keen interest in the quality of life of all Americans to the benefit of present and future generations. I believe you and I share the view that the quality of life begins with the quality of the environment, and the quality of the environment depends on the commitment we individually and collectively have to that end. Economic growth is important and very necessary if we are to continue to be a great Nation and provide meaningful job opportunities for generations to come. We can have a good, clean environment and continued strong economic growth only through common-sense laws and regulations. Mark Twain once said, "Common-sense is not too common." I believe that to be too often true in the development of Federal environmental regulations. I commend Senator Michael Crapo and Senator Bob Smith, committee Chair, for an excellently crafted

common-sense bill, S. 2417. I believe passage of S. 2417 to be critical to the continued protection and enhancement of the environment and to the economic well-being of our people. This bill must surely be one that can be embraced by Republicans, Democrats, independents, and the public. You, as no other elected body, recognize the urgency in addressing the critical issue of nonpoint source pollutant contributions to the waters of our nation. We must also recognize that agriculture and silviculture are not the only sources contributing to the sedimentation of our streams. Construction of highways, streets, roads, bridges, mining, and economic and housing development projects are major contributors of siltation. However, these sources can be controlled by stormwater permit requirements. Stormwater is covered in Federal laws that allow the issuance of National Pollutant Discharge Elimination System (NPDES) permits for these activities.

Section 3 of S. 2417. This section is critical to the success of the TMDL program. This is true in both the 106 and 319 programs. The 90 percent grant to eligible landowners is appropriate. We, the States, currently have to match the small amount of 106 Federal money currently dedicated to the TMDL program with 40 percent State money. The States will be doing 90 percent or more of the TMDL work. Therefore, I recommend that the match for both 106 and 319 Federal dollars require 10 percent cash match. State programs have matured. A recent study shows that States now have received authority to run 70 percent of the delegable environmental programs; States provide 75 percent to 80 percent of all enforcement of environmental laws and regulations and provide greater than 94 percent of all the data in the EPA data base. Even though the States are faced with rapidly growing environmental workloads and responsibility, the EPA continues to unnecessarily increase the number of staff in the Washington office. In light of EPA's isolating its salary and administrative costs in its appropriation behind a "Chinese wall," I am concerned about how much of the appropriation envisioned in Section 3 of the bill will be available to States.

Section 4 of S. 2417. I am pleased to see the requirement that the Administrator of the Environmental Protection Agency contract with the National Academy of Sciences (NAS) to carry out the provisions of Section 4. Limiting NAS to 18 months to complete its work and report to Congress may be optimistic. EPA has had 28 years to accomplish this and is still working on the guidelines for conducting TMDLs. The NAS involvement will instill a greater public trust in the process.

When the bill first came to my attention, I assumed it would be prescriptive and for that reason would not be able to support it. However, after poring over it this past weekend, I support it. It has dawned on me that the current EPA Administrator has given interpretations to Federal law that was never intended by the Congress. Many of those interpretations wrongly favor the EPA regulations. In view of EPA's dismal record of losing, in court, significantly over 50 percent of the challenges to such interpretation, I must concur with the prescriptiveness encompassed in S. 2417.

I strongly urge bipartisan support of S. 2417.

ADDITIONAL COMMENTS

Mr. Chuck Fox, Assistant Administrator for Water, EPA, Washington, called me in early April. He asked what course I would recommend he take to address concerns raised about the proposed regulations that addressed TMDL and NPDES for agriculture and silviculture. My advice to Mr. Fox was that EPA should pull back the regulation and change the language to compost with what he and Administrator Carol Browner were saying about the regulation. Most of the concerns were addressed in an EPA send USDA meeting convened in April, which resulted in the issuance of a joint statement May 1, 2000, by the EPA and USDA. The changes they proposed, in my view, make the regulation supportable. However, I have a major concern with the joint report. It appears that EPA accepts part of the ruling by a U.S. District Court Judge on its authority concerning the TMDL initiative while ignoring the second part.

The court ruled that the EPA has the authority to include non-point pollution sources in a TMDL process. EPA agrees, as do I. However, the U.S. District Judge ruled that although TMDLs are part of the Clean Water Act, the TMDLs should only be advisory to the States. EPA tends to interpret its guidelines as a fact of law, even though many are adopted without having public input. District Judge Alsup also ruled that nonpoint sources of pollution should not be subject to mandatory regulations under the Clean Water Act. Apparently, the EPA disagrees. The joint statement continues the discussion of requiring permits under certain circumstances. In my opinion, permits could only be required if the EPA changes the definition of

which activities require a point source NPDES) permit. The EPA has lost a significant majority of its legal challenges arising over its interpretation, rather its misinterpretation, of the environmental laws enacted by the U.S. Congress. It seems to me Hat He EPA would have to declare sheet runoff from rainfall to be a point source of pollution. Example, a section of land being farmed or having a silviculture activity carried out would have rainfall runoff for a distance of one mile. The EPA must not be allowed to circumvent the laws and intent of the U.S. Congress by defining such nonpoint source activities to be point source discharges.

I have every confidence in Mr. Chuck Fox's integrity and fully believe he will keep his commitments to honor the agreement EPA made with the USDA if he is allowed to do so.

STATEMENT OF LARRY D. NANCE, DEPUTY STATE FORESTER, ARKANSAS FORESTRY COMMISSION

Senator Crapo, the Arkansas Forestry Commission welcomes you to Arkansas. The forestry community thanks you for sponsoring the Water Pollution Program Enhancements Act of 2000. The State Forester of Arkansas supports the bill. We are pleased that Arkansas Senator Hutchison is a cosponsor and for the support of Congressman Dickey.

Everyone wants to protect water quality especially loggers, foresters, and the forest landowners. Although EPA appears determined to install a regulatory approach, the Arkansas Forestry Commission-Board of Commissioners, the Governor, and the State Forester support voluntary implementation of Best Management Practices to protect forest water quality.

We applaud the idea for EPA to contract with the National Academy of Sciences to study the development of TMDLs and review other methods of achieving water quality. Arkansas' State Forester John Shannon has served on the National Academy forestry committee. The organization does outstanding work. We hope that you will suggest to EPA and the National Academy that a southern State Forester serves as a member of the study committee.

Lastly, the AFC position is (1) that silviculture maintain the Nonpoint Source category, (2) that forestry practices not require a NPDES permit (National Pollution Discharge Elimination System), (3) best management practice remain voluntary and (4) the AFC welcomes an EPA review of our BMP implementation monitoring and training. Looking at EPA's own data everyone can see that Arkansas' forestry community has been doing a good job of protecting water quality.

Senator Crapo, Senator Hutchison, and Congressman Dickey we thank you for your support of the forestry community.

ARKANSAS FORESTRY COMMISSION,
Little Rock, AR, June 1, 2000.

Hon. MICHAEL D. CRAPO,
U.S. Senate,
Washington, DC.

DEAR SENATOR CRAPO: Thank you for sponsoring S. 2417, the Water Pollution Program Enhancements Act of 2000. I support the bill and am pleased that Arkansas Senator Tim Hutchinson is one of the co-sponsors.

Everybody wants to protect forest water quality. Although the EPA appears determined to install a regulatory approach, my Commissioners, my Governor, and I support the voluntary implementation of Best Management Practices to protect forest water quality. Accordingly, I am pleased your bill will provide grants to private landowners for water quality improvement projects.

Finally, I think it is a great idea for the EPA to contract with the National Academy of Sciences to study the scientific basis of the development of TMDLs and to review the availability of other methods of achieving water quality standards. I have served on a National Academy forestry committee; the organization does outstanding work. I hope you will suggest to EPA and the National Academy that a southern State Forester should serve as a member of the study committee.

Thank you for visiting Arkansas on June 12th; you are a very welcomed guest.

Respectfully yours,

JOHN T. SHANNON,
Arkansas Forestry Commission.

STATEMENT OF KIT HART, SENIOR WILDLIFE BIOLOGIST, THE TIMBER COMPANY GEORGIA-PACIFIC CORPORATION

INTRODUCTION

Mr. Chairman, members of the committee, my name is Kit Hart and I am Senior Wildlife Biologist for the Timber Company, which represents the timberland assets of Georgia-Pacific Corporation. I appreciate the opportunity to present my testimony today on behalf of the company and the forestry community on the Water Pollution Program Enhancement Act of 2000 (Senate Bill 2417) and on EPA's August 23 proposed regulations to revise the Total Maximum Daily Load (TMDL) program under Section 202(d) and modifications to the National Pollutant Discharge Elimination System (NPDES) permit program under Section 402 of the Clean Water Act.

Since most of you are already aware of EPA's August 23 proposed regulations, and the unnecessary regulatory burdens which they will impose on 8 million non-industrial private landowners, as well as industry and State agencies, I will not take much time to discuss the proposal. It is worth reiterating, however, that the proposed regulations amount to a reinterpretation of the Clean Water Act (CWA). EPA has proposed to eliminate silvicultural activities from categorization as nonpoint sources. Instead EPA has proposed to redefine them as point sources. The proposed rule would give EPA and NPDES-authorized States the authority to designate silvicultural activities as point sources requiring NPDES permits. We believe forestry activities are "nonpoint" sources and there is no legal or statutory authority for EPA to revise the regulations by eliminating the nationwide recognition of forestry as a nonpoint source activity merely to address some unidentified last resort situations on an individual basis. Every State with significant forest management activities has developed forestry best management practices or rules and submitted them to the Agency as part of the Section 319 nonpoint source program. EPA's own data reveals these programs are working, silvicultural inputs are declining and that forestry is a relatively minor cause of water quality impairment across the country. The proposed rules will unnecessarily interrupt mutually important progress toward reaching the goals of the CWA and fishable swimmable waters.

A BETTER WAY

It is plainly evident from the reaction by the majority of State agencies, State water quality agencies, Governors and others that the proposed rules were formulated without the advice and input from those stakeholder groups who will be ultimately responsible for implementing the regulations. Mr. Chairman and members of the committee, there is a better way. It requires additional funding of the Section 319 program, greater cooperation among multiple State agencies engaged is nonpoint activities, more partnerships with private landowners and stakeholders and better dialog between EPA Regional Offices and the States to make improvements to water quality happen. This is exactly what S. 2417 does. The bill recognizes that State nonpoint source programs are underfunded and increases funding. Specifically, the Bill increases funding of section 106 of the CWA to allow collection of reliable monitoring data, improve State lists, and focus resources where real problems exist so that people can roll up their sleeves and go to work. Even more importantly, Mr. Chairman, S. 2417 increases funding under section 319 and earmarks a portion of these dollars for State grants to private landowners to implement projects that will improve water quality. In addition the bill directs EPA to have the National Academy of Sciences prepare a report on TMDL development, costs of implementation and exploration of alternatives to protect water quality, another important need. Finally, the bill establishes a pilot program for EPA and States to work together to review and compare State programs that implement innovative and cooperative strategies to improve water quality. This is important because there are many good examples of cooperative partnerships that are efficiently addressing and improving water quality that can serve as models for others.

Mr. Chairman, we support S. 2417. This concludes my remarks and I would welcome any questions you or members of the committee may have.

STATEMENT OF DAVID HILLMAN, PRESIDENT, ARKANSAS FARM BUREAU FEDERATION

The Arkansas Farm Bureau Federation appreciates this opportunity to provide comments on the Water Pollution Enhancements Act of 2000, which addresses the Clean Water Act's Total Maximum Daily Load (TMDL) program. Arkansas Farm Bureau is the largest farm organization in the State with a membership of over 216,000 families. Our membership and others in the agricultural community are

highly concerned with the potential impacts on EPA's proposed TMDL rules. This interest has been demonstrated already this year by producer attendance of over 8,000 across three meetings held in the State on this subject.

On August 23, 1999, EPA proposed sweeping changes to the current regulatory requirements for establishing TMDLs under the CWA. The proposed regulation has the potential to allow EPA to take over State land use and economic growth decisions under the pretext of reducing nonpoint source pollution. Thus far, State law and regulatory authority have always had primacy over Federal law and EPA's regulatory authority under the CWA.

EPA's TMDL proposal enables EPA to override existing State law and regulatory process by mandating TMDLs that States must achieve. This removes the authority of the State to decide the best approach for dealing with water quality.

The TMDL "process" proposed by EPA requires their review and approval and/or disapproval of a State's lists and TMDLs within 30 days of the date of submittal. If EPA disapproves a list or a TMDL, EPA must establish the list or TMDL for the State. Lee power to do this, to dictate load limits for nonpoint sources, is the power to dictate the land use to achieve those loads.

Having reviewed the EPA's proposed regulation and current law, we have serious concerns over many of EPA's proposals. Congress designed the TMDL program in Section 303(d) to focus on waters impaired by point sources, as a means to calculate acceptable pollutant loads to assist State efforts to effectively regulate point source industrial activities, and to provide States the flexibility to achieve these water quality goals Congress enacted Section 319 to reduce the effects of nonpoint source (NPS) runoff for agricultural, silvicultural and other land use activities.

Many of the provisions generate unnecessary controversy and confusion, and actually undermine successful Federal and State NPS water quality programs. EPA also has misjudged key determinants, such as the likely costs to State and Federal agencies and the private sector and the likely impacts of the proposed changes.

The proposed regulations permit EPA to list nonpoint-source-unpaired waters, to develop TMDLs for nonpoint-source-impaired waters and to establish implementation plans for nonpoint-source-impaired waters. In other words, the proposal provides for Federal land use regulation. EPA apparently believes they know how to require States to tell farmers and ranchers how to manage their crops and use their land.

Congress elected to treat point and nonpoint sources differently for good cause. Congress realized that because of its diffuse and complicated nature, nonpoint source pollution did not lend itself to rigid point source-type controls. Rather, nonpoint source pollution had to be managed through flexible standards Watershed managers and nonpoint source professionals are well aware of this problem. Farmers and ranchers can't control the rain! But nonpoint source TMDLs expect them to. All four components of the term—Total, Maximum, Daily, and Load—imply a constant, engineered and controllable environment. For agriculture, this means that farmers are in jeopardy of breaking the law any time a significant rainfall event occurs. Such an outcome is preposterous.

Congress recognized in 1972, while nonpoint sources can be managed "to the extent feasible," they can not, and should not be expected to meet any quantifiable daily load limitations. Section 319 Nonpoint Source Program merely encourages States to reduce pollution "to the maximum extent practicable" through best management practices.

Compliance with Section 303(d) is not achieved until water quality standards are attained. For nonpoint source runoff, this raises the not-so-hypothetical possibility that a source would have to be eliminated from a watershed in the event that best management practices (BMPs) and modified BMPs ultimately prove ineffective in attaining water quality standards This does not make sense to reasonable people who understand the vagaries of weather. The TMDL Federal Advisory Committee reached a consensus agreement that BMPs implemented to achieve TMDLs would have to pass the bar of practicability (economically achievable) as established in Section 319. EPA has failed to introduce the concept of practicability in either the preamble or the proposed TMDL regulation.

The proposed regulations do not adequately address data issues—successful TMDL development and implementation will occur when States have attainable Water Quality Standards, when they have 303(d) lists which are derived by an ambient monitoring program, and not by drive-by assessments or "windshield monitoring." States will need to devote sufficient resources to the TMDL development process in order to provide scientifically adequate input parameters and robust stakeholder involvement in the entire process. The TMDL program fail if environmental extremists are permitted to highjack the process to their agenda of Federal watershed zoning.

EPA should revise its standard for data and require only the use of reliable data, e.g., to require the use of "all reliable and credible existing and readily available water quality-related data and information."

The proposed regulations unlawfully allow EPA to designate nonpoint sources as point sources. They propose to regulate nonpoint sources, private forestry and livestock activities for such practices as harvesting, site-preparation, road construction, thinning, prescribed burning, pest and fire control, land application of organic nutrients, and nutrient utilization plans, by requiring landowners to obtain point source discharge permits for these land use activities. This proposed action is an unjustifiable expansion of the EPA's authority, constitutes significant Federal intrusion into private activities, and overrides State arid private control of land-use decisions.

Agriculture is willing to be a part of reasonable and lawful water quality management programs. Farmers and ranchers are ready to become engaged, active stakeholders in the water quality management process, but the process must be reasonable This new cooperative public policy structure will not be easy, it will take a long time to develop successful stakeholder consensus, the interpersonal relationships, and trust in the Agency for the process to succeed. Experience dictates that the only workable solution to watershed management is the "bottoms up" approach as opposed to the "command and control" EPA has proposed.

The provisions set forth in S.B. 2417 represents a reasoned approach to developing a program that meets the concerns expressed above. Accurate data upon which difficult rulemaking is based, additional resources for States address their rightful responsibilities, and a critical review of this complicated and confusing issue are all called for in the bill and are needed to assure landowners of fair and equitable regulatory action Additional time is needed to evaluate and, possibly rethink the TMDL concept. *It is more important to get the rules done right than to get them done quickly.*

Over the decades farm and ranch families have achieved extraordinary conservation gains through voluntary, incentive-based programs to conserve fragile soils, wetlands, protect water quality and wildlife habitats.

The nonpoint source issues outlined in EPA's TMDL proposal are best addressed through incentive-driven programs, implemented by those with the most interest in the environmental quality of America's land and water resources. That is, the people who own and work with those resources on a daily basis—America's farmers and ranchers.

We applaud your efforts in developing S. B. 2417 as we do others in the Congress who have offered legislative remedies to the TMDL problem.

STATEMENT OF VINCE BLUBAUGH, G.B. MACK & ASSOCIATES, EL DORADO CHEMICAL COMPANY

Mr. Chairman and members of the committee: My name is Vince Blubaugh, I am a principal with G.B. Mack & Associates, an environmental consulting firm located in Bryant, AR. On behalf of my client, El Dorado Chemical Company, I greatly appreciate the opportunity to present our views on S. 2417, the Water Pollution Program Enhancements Act of 2000.

Since the passage of the Clean Water Act, we have seen the evolution of its programs go from the development of effluent guidelines for point sources (to ensure national consistency among dischargers) to the derivation of extremely stringent water quality-based effluent limitations which require point sources to spend millions of dollars to meet new levels of treatment under their NPDES permits. Now, with the advent of the 303(d)/TMDL program requirements, there is a recognition that point source controls are not the only solution to water quality problems in many situations. However, the implementation of the 303(d)/TMDL program has often advanced the requirements beyond the knowledge and/or resources of the regulatory agencies involved in the process. Arkansas is a case in point.

The Arkansas Department of Environmental Quality is recognized nationally by its peer agencies as a leader in the protection of water quality through such programs as the development of ecoregion-based water quality standards, implementation of toxicity testing and maintenance of a comprehensive ambient water quality monitoring program designed to obtain real world data concerning the conditions of the State's waters. The agency's efforts are to be commended as it has been very successful in addressing water quality issues in the State, especially in light of the limited resources at its disposal.

One of the keys to the ADEQ's success has been its ability to address problem areas as it determined and in timeframes that allowed it to develop sound technical approaches. An example would be the ecoregion research which, among other things,

completely revamped the dissolved oxygen standards in the State, thereby resulting in real world, reasonable permitting requirements on municipal and industrial point sources. But this was a multiyear process, taking approximately 5 years from the initiation of the field studies to regulatory finalization. Yet, it provides a great parallel to how the 303(d)/TMDL process should be conducted to ensure a technically sound, cost-effective process.

S. 2417 correctly identifies many of the problems involved in the implementation of the 303(d)/TMDL program across the nation. Some of the noted deficiencies are insufficient State resources to manage the program and the lack of sound science and water quality monitoring data to properly implement the program. All of these are quite problematic and can result in technically unsound, unrealistic control strategies which will not achieve better water quality throughout the nation.

The proposed legislation offers a moratorium on the finalization of the USEPA's final TMDL regulations pending studies by the National Academy of Sciences on many of the technical issues listed above. This at a minimum should be done. In addition to this, we would recommend that the committee consider broadening the moratorium to address the current TMDL program requirements. This is because factors such as artificially short implementation timeframes due to court orders and budgetary considerations will result in technically unsound TMDLs being imposed on both point and nonpoint sources.

We also recommend that consideration be given to adding provisions to allow the States flexibility in receiving the appropriations set out in the bill. This is because, due to State budgetary timeframes, State agencies may not be able to direct their resources in order to maximize the use of such funding. In addition, we have great concern that the technical tools needed to create valid TMDLs will not be available and the unsound science will be utilized in order to meet artifical regulatory and fiscal considerations.

In conclusion, we appreciate the opportunity to make these comments and appreciate the work of the committee to address this extremely important issue. The 303(d)/TMDL program is evolving, and anything that can be done to ensure a more systematic, technical evolution is warranted. S. 2417 is a good start in that direction.

STATEMENT OF ARKANSAS HOME BUILDERS ASSOCIATION

The 2,000 member firms of the Arkansas Home Builders Association (AHBA) are currently on record as being strongly opposed to the recent initiative of the U.S. Environmental Protection Agency (EPA) to make significant changes in the Federal Clean Water Act, through its Total Maximum Daily Load (TMDL) rulemaking authority.

The proposed changes not only will impact how each State runs its TMDL Program, but they also would place restrictions on new "point" discharges—including construction activities in areas where the water supply has been deemed to be "impaired". While the AHBA supports the need for programs to protect the nation's waters, we believe the proposed changes place a disproportionate burden on construction activities. In addition it is our feeling that the proposed changes to the rule have been made without the benefit of a clear and comprehensive study of the subject. States in particular, would be asked to change their TMDL programs without the benefit of high quality data regarding how best to make such changes. While EPA has been somewhat unclear as to what improvements will come to the environment, as a result of these changes, the construction industry has a very good idea as to the negative impacts that will occur if the TMDL rule is finalized, as proposed. It is reasonable to expect that the cost of buying a new home will escalate, creating a further strain on housing affordability; due to increased permitting costs, the need to use more stringent best management practices, unnecessary delays, and the creation of new mechanisms that can be used by special agenda groups to further thwart legitimate and sustained residential development.

S. 2417 provides the resources that States such as Arkansas need to improve their ability to collect high quality water monitoring data, to develop their "impaired waters" list, and to expand watershed management strategies to address the remaining water quality concerns. In addition, this legislation will give the National Academy of Sciences an opportunity to study the scientific basis underlying the changes to the rule before they go into effect.

It would seem to our organization to be only right and proper that EPA have the benefit of more comprehensive scientific information before they finalize the proposed TMDL regulations. S. 2417 establishes a common sense and scientifically

grounded approach to this most difficult and important issue, and we strongly support its passage.

These remarks prepared and submitted on behalf of the Arkansas Home Builders Association by Bruce E. Blackall, Executive Director.

RESOLUTION SUBMITTED BY FRED TOWSE, USNR-HEMCO DIVISION

RESOLUTION NO. R–98–1

Be it Resolved by the Quorum Court of Garland County, State of Arkansas, a Resolution to be Entitled:

"A Resolution expressing a desire to be included in any discussions, before any policies or laws are enacted by the Federal Government, the State of Arkansas or their Agencies."

Whereas, Federal and State lands make up a substantial part of Garland County; and,

Whereas, Garland County is directly affected by State and Federal planning decisions; and,

Whereas, Garland County's economy is dependent on business activities on Federal and State lands; and,

Whereas, land is essential to local industry and residents, it shall be the desire of this County that the design and development of all Federal and State land disposals, including land adjustments and exchanges, be carried out to the benefit of the citizens of Garland County; and,

Whereas, it is essential to protect the custom and culture associated with forest and forestry production in Garland County by protecting economic opportunity and a free enterprise system; and,

Whereas, the people of Garland County, State of Arkansas, accept support and sustain the Constitutions of the United States and the State of Arkansas; and,

Whereas, the people are best served when government affairs are conducted as close to the people as possible (i.e., at the County level); and,

Whereas, it is a primary goal of Garland County government to protect the customs and culture of county citizens through the protection of private property rights, the facilitation of free enterprise system, and the establishment of a process to encourage self-determination by local communities and individuals.

Now, Therefore, be it Resolved by the Quorum Court of Garland County, Arkansas;

SECTION I. That all natural resource decisions affecting Garland County should be guided by four basic principles:

1. Protecting private property rights.
2. Protecting local custom and culture.
3. Maintaining traditional economic structures through self-determination.
4. Protecting new economic opportunities through reliance on a free enterprise system.

SECTION II. It is the desire of Garland County that Federal and State agencies shall inform the county of all pending actions affecting Garland County and its citizens and coordinate with them in the planning and implementation of those actions.

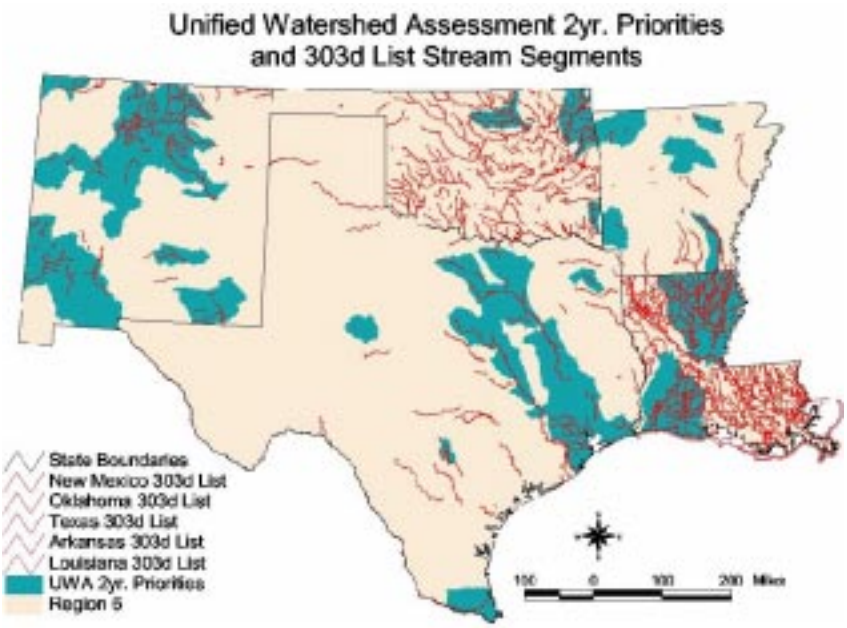
SECTION III. It is the desire of Garland County that Federal and State agencies proposing actions that will impact Garland County prepare and submit in writing, and in a timely manner, report(s) on the purposes, objectives and estimated impacts of such actions (including economic) to the Garland County Quorum Court. Said report(s) should be provided to the Garland County Quorum Court for review and coordination prior to Federal or State passage of any action.

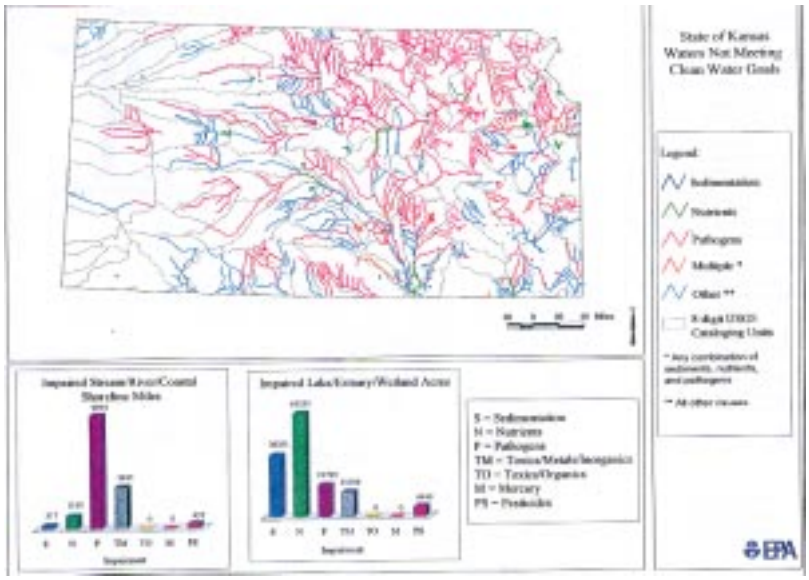
Attest: Nancy Johnson, *Garland County Clerk.*

Approved: Larry Williams, *Garland County Judge.*

Sponsor: Mickey Gates, *Justice of the Peace.*

Date: March 9, 1998.





YOUR LAND, YOUR OPTIONS: WHAT YOU SHOULD KNOW BEFORE YOU SELL YOUR TIMBER

This guide provides a brief overview for landowners who want to know more about the range of options for managing forests. No matter which approach you take, whether it be long-range timber management, conversion to other uses, or doing nothing after a harvest, there are certain steps you should take before you decide to sell your timber.

1. *Develop a management plan before you harvest.*—Don't make the mistake of selling your timber without first giving serious thought as to what you'd like to do with your land in the future. Because what and how you harvest today has a big impact on what you can do with your land tomorrow.

A management plan outlines how and when to reach your goals and objectives on a piece of property. A plan also helps guarantee that the decisions you make are not sacrificed due to haste or lack of information. Your goals should be prioritized to reflect what resources you have and what you desire to achieve. Unlike a signed contract, a plan is subject to revision to meet changing needs, concerns or conditions. A well-developed plan helps you predict expenses and incomes related to the property, and serves as a system for organizing financial information for tax purposes. Furthermore, a management plan is often required for financial assistance from many government programs.

2. *Become knowledgeable about your land, your timber and your options.*—You can't manage something if you don't know what you have to begin with. Knowing as much as possible about your property and its history can save considerable expense in developing and implementing a management plan. For example, is your land best suited for forest or for pasture? What are the natural and man-made features of the property that can impact forest management activities? Which tree species are most suited for the property, and are they marketable?

If you are considering selling your timber, it's important to take an inventory of your current timber resources. What is the current distribution of timber species? How old are the trees and how large? Are they marketable? How much are they worth? Should you sell all of them now, or would you be better off keeping the best growing and best quality trees for a future sale? How much will it cost to regenerate your forestland?

If you aren't confident that you can make these decisions without some help, you're not alone. Trained forestry professionals can help you get the most from your timber sales and can assist you in long-term management planning as well. Consult the Directory on the reverse side of this publication for additional assistance or call the Arkansas Forestry Association toll free at 1–888-MYTREES (1–888–698–7337) for a list of assistance in your area.

3. *Make sure the forestry professionals you work with are reputable and understand your needs.*—The following are a number of sources from which you can obtain forestry management and related assistance: (1) a private forestry consultant who can assist you with a wide range of activities including managing sales and harvest operations; (2) a county forester through the Arkansas Forestry Commission or another natural resource agency; (3) a procurement forester who is employed by a forest products company with which you are contracting or considering contracting a sale; or (4) a professional forester employed by a forest products company's Landowner or Management Assistance Program (LAP or MAP).

When considering working with any of these forestry professionals, it is important that their views match your own. Does he or she have a clear understanding of your needs and objectives? How much will it cost for consulting services and harvesting operations? Does he or she provide a written contract with a protection clause against unwanted damage? How will he or she conduct the sale of your timber? What is a reasonable monetary range of bids for harvesting contracts? What written plans, inventories and site quality assessments will be generated? You can ensure much of this to the best extent possible by insisting on the use of a written contract.

Also ensure that prospective forestry professionals have a clear understanding of the regeneration method you wish to use and make sure that those objectives are incorporated into the harvesting operation. Specifically mark any areas that you do not want cut, and require that the sales contract States that these areas are excluded from the site.

If you are unable to find a forestry professional in your local area who is willing to implement your management ideas, you can create your own plan and contract with loggers directly during a timber sale. This is not recommended for landowners who may lack the necessary technical expertise.

The same guidelines outlined above apply when considering prospective logging contractors. Insist on visiting sites where the logger has previously harvested that are similar in type to yours. Ask to speak to the owners and others who can serve as a reference for his or her work. Ideally, you should work with a logging contractor and crew that have participated in Arkansas' Logger Training and Education Program, one of the nation's leading professional education programs for loggers. The Arkansas Timber Producers Association maintains a list of all loggers who have participated in this program. Consult the Directory on the reverse side of this publication for additional information.

4. *Protect soil and water during a harvest and as part of long-term forest management.*—In light of Federal water law, it is essential that you make a positive effort to control or minimize the release of pollutants into lakes and streams as a result of harvesting and intensive forest management activities. Forest landowners, forest products companies, forestry consultants and logging crews in Arkansas are asked to adhere to a set of voluntary guidelines referred to as Best Management Practices (BMPs), which are designed specifically to protect water quality and, more broadly, to enhance the land and environment.

Arkansas' voluntary BMPs are a set of suggested techniques that have been found to be appropriate for the control of nonpoint sources of pollution, such as soil erosion and stream sedimentation, at a given site. The voluntary nature of these guidelines reflects the public's confidence that Arkansas' forestry community is committed on paper and in practice to protecting soil and water.

Specific consideration should be given to managing lands adjacent to streams and drainage courses in various ways to protect their integrity and encourage wildlife use. These streamside management zones, composed primarily of hardwood trees, help protect water quality, preserve natural diversity and make harvesting more aesthetically pleasing.

In an effort to protect soil and water quality and to avoid unreasonable government regulations in the future, make a commitment to using BMPs during a harvest and as part of long-term forest management. Insist that the consultants and loggers you work with do so as well. Include a BMP clause in your sales and harvesting contracts if possible. You can obtain a complete copy of Arkansas' Best Management Practices (BMP) Guidelines for Forestry free of charge through the Arkansas Forestry Commission. Consult the Directory on the reverse side of this publication for more detailed information or complete and return the postcard on this page.

5. *Consider sustainable forestry as an option.*—From Ozark Region hardwoods to southern pines and bottomlands, Arkansas' forests are abundant thanks to hard work and proper management. Not only do forests help ensure clean water, stable soil and enhanced air quality, but they supply an increasing global population with thousands of products each day. Best of all, forests are renewable.

To that end, Arkansas' forestry community is committed to practices that promote sustainable forestry. This includes growing more timber than it harvests, protecting fish and wildlife habitat and adhering to Best Management Practices. It also includes being a "good neighbor" by limiting the visual impacts of harvesting and encouraging others to do so. In short, the forestry community is working to ensure that Arkansas' forests are growing for the future. With sound information, commitment and long-range planning, you too can be a part of this legacy.

To obtain more information and assistance on sustainable forestry including reforestation, forest management planning, wildlife habitat enhancement, BMPs, harvesting methods, Arkansas' Tree Farm Program and educational opportunities, please fill out the postcard below. Or call the Arkansas Forestry Association toll free at 1–888-MY TREES (1–888–698–7337).

JIM AND BILLIE PRATT, ARKANSAS TREE FARMERS OF THE YEAR—1995

ALL IN THE FAMILY—AS TOLD BY BILLIE PRATT

Sustainable forestry wasn't visible on the horizon in the 1920's and 1930's when my father, W.L. Kirby, bought 11 tracts of tax-delinquent land in the southern flanks of the Ouachita Mountains. Yet he appreciated the land for all of its values and passed it on to his family in undivided interests.

Up until the early 1980's, our tracts were managed like most of the rest of the region. Site preparation and tree planting was almost unheard of during this time. Diameter limit harvests—where all trees greater than 12 inches in diameter at the stump were cut—were a common procedure. This commonly used system was considered the best in the mid-1950's, but because it took the biggest trees and left the smaller and less vigorous, forest growth and quality began to decline.

ENLISTING PROFESSIONAL ASSISTANCE

Forestry techniques changed when we began working with Georgia-Pacific's (which was then Nekoosa Corporation) Forest Management Assistance Program in the Eighties. On their advice, a structured plan was set up for harvesting, then replanting sections with genetically improved loblolly pine seedlings.

We continue to work with G-P foresters and Arkansas' Tree Farm Program to harvest, replant and maintain our forests year after year. The plan that guides our Tree Farm includes a variety of environmental measures to protect soil and other

natural systems. We ensure the use of wide streamside management zones (SMZs), composed of hardwood trees to protect water quality, and also manage for fish and wildlife habitat.

ON SUSTAINABLE FORESTRY

Our ultimate goal is a sustained growth of trees returning regular income that will allow us to retain and maintain the land. We also plan for sustained family ownership. We have two grandsons who will be coming into the partnership, and we hope to try to instill in them a sincere love for the land. Because trees have been planted and worked over intervals for many years, we're certain that there will always be some areas in mature forests, some being harvested, some being thinned and some being planted. We are committed to sustainable forestry—cycling over many acres and many years.

JIM FRANCIS, ARKANSAS TREE FARMER OF THE YEAR—1999; SOUTHERN REGIONAL OUTSTANDING TREE FARMER—1980

A WEEKEND TREE FARMER

While I have earned our family's living for the past 45 years as a life insurance agent, I am by avocation a "PNIFLO"—a Private Non-Industrial Forest Landowner, and have been a "small-time, part-time weekend tree farmer" since 1961.

Our woodlands consist of three tracts, two in Nevada County and one in Clark County, comprising somewhat less than 600 acres. My management plan for these woodlands has as its principal objective the production and sale of forest products—primarily pine sawtimber, pine poles and pine pulpwood. I practice "multiple use management" with selective harvests at intervals (cutting cycles) of approximately 10 years, stand by stand. Through this type of selective, continuous yield harvesting, I try to produce timber sale revenue at fairly regular intervals.

A secondary but extremely important objective is the maintenance and enhancement of wildlife habitat for both game and non-game species. This provides hunting opportunities for my family and friends, and adds to our enjoyment of the wonders and beauty of nature as we visit our woodlands at all times of the year.

ENLISTING PROFESSIONAL ASSISTANCE

Although I have been involved in the management activities on our Tree Farm other than commercial harvesting, I have relied upon the advice and assistance of forestry professionals throughout the years to assure attainment of my management goals and objectives. I have participated in the landowner assistance programs of two forest industry companies, have engaged the services of consulting foresters, have contracted for prescribed burning by the Arkansas Forestry Commission, and received assistance from the USDA Soil Conservation Service.

ON SUSTAINABLE FORESTRY

Practicing sustainable forestry ensures that my two sons and future generations have all of the benefits that forests provide, including essential forest products plus the amenities such as recreation, aesthetic experiences and the essentials of clean air and pure water. I hope that my efforts, together with those of all members of the forestry community in our State and nationwide, will continue to assure that private landowners and their progeny have the right to actively manage their woodlands for these benefits forever.

DR. ROBERT PARKES, ARKANSAS TREE FARMER OF THE YEAR—1991; SOUTHERN REGIONAL OUTSTANDING TREE FARMER—1992

MANAGEMENT GOALS REFLECT FAMILY VALUES

My parents and I started buying the land that now makes up our family Tree Farm nearly 25-years ago. It is located in the foothills of the Ozark Mountains in Northwest Arkansas, bordering the Ozark National Forest. When we first started, the land had been cut over—without being reforested. Some of the trees were cut all the way to the edge of two mountain rivers that come together on our property. The top soil was washing away and erosion was scarring the landscape.

We discussed our goals and objectives and tried to visualize what we wanted this land to be. My father and I could see the long term financial rewards of reforesting the lands. Keeping the rivers clean by controlling erosion and sediment run-off was

also a big priority for me. My mother, an amateur naturalist, wanted diversity in plants, tree species and wildlife.

ENLISTING PROFESSIONAL ASSISTANCE

We contacted and received assistance from a number of forestry professionals including local foresters at the Arkansas Forestry Commission, Game and Fish Commission, and the Soil and Water Commission, among others. We also received assistance through Green Bay Packaging, a forest products company in our area that maintains a Landowner Assistance Program. These forestry professionals helped us realize our goals and management objectives for the property.

We worked extensively on setting up streamside management zones next to our pastures and controlling erosion on steeper land. Much of this was done by planting fast-growing pines. We also concentrated on establishing wildlife habitat, especially for the bobwhite quail. At my mother's request, we left buffer zones to reduce the visual impact of a harvest. Most recently, we initiated a number of wetlands enhancement activities on our properties. As a result of these efforts, our Tree Farm is healthy, productive, diverse and beautiful.

ON SUSTAINABLE FORESTRY

My twin daughters share the enthusiasm and are learning to be self-sufficient while making a wonderful contribution to the environment. At the same time, our Tree Farm provides income for me and my family and serves as a reminder of how proper management can meet a wide range of needs for generations to come.

DIRECTORY OF ASSISTANCE

FORESTRY AND WILDLIFE CONSULTANTS

Private consultants provide services ranging from development and management plans to implementation of on-the-ground practices. For a listing of forestry professionals in your area contact the Arkansas Forestry Association toll free at 1–888-MY TREES, fill out the attached postcard, or consult the following additional sources: listings in telephone directories; advertisements in publications such as Tree Farmer Magazine, Forest Farmer and the Journal of Forestry, among others; Tree Farm representatives of the Arkansas Forestry Association and the personnel of public agencies listed in this publication; or forest products companies that maintain Landowner or Management Assistance Programs.

ARKANSAS FORESTRY COMMISSION (AFC), 3821 W. ROOSEVELT ROAD, LITTLE ROCK, AR 72214, (501) 664–2531

The Arkansas Forestry Commission is a State agency dedicated to supporting and enhancing forestry-related economic development opportunities in Arkansas.

The AFC will provide free of charge a range of technical assistance such as woodland examinations, preparation of forest management plans, regeneration recommendations, marketing information, forest health information and other pertinent information related to the management of individual tracts of land. It also provides assistance through a number of government sponsored cost-share and incentive programs such as the Forestry Incentives Program and the Forest Stewardship Program.

The AFC will provide a number of technical services for a fee including timber marking, tree planting (on a limited basis), firelane construction and prescribed burning.

It owns and operates a tree improvement complex and a tree seedling nursery for production of pine and hardwood seedlings for sale to private landowners.

Forestry assistance can be obtained by contacting the nearest AFC office in your county or by contacting the State office headquarters in Little Rock.

ARKANSAS TIMBER PRODUCERS ASSOCIATION (ATPA) 2311 BISCAYNE DRIVE, SUITE 115, LITTLE ROCK, AR 72227, (501) 224–2232

The Arkansas Timber Producers Association is a nonprofit membership organization that represents and promotes the interests of Arkansas' professional logging and timber producing industry. ATPA administers a professional logger training and education program and maintains a list of all participants enrolled in training. ATPA will make this information available to landowners who are seeking to verify the credentials of prospective logging contractors. In addition, landowners are encouraged to attend training sessions in their area.

UNIVERSITY OF ARKANSAS COOPERATIVE EXTENSION SERVICE (CES), P.O. BOX 391, LITTLE ROCK, AR 72203, (501) 671–2000

The Cooperative Extension Service maintains a network of county offices that provide information and educational services. Services include onsite evaluations of management practices, timber marketing information, forestry budgets, diagnostic services such as soil samples and disease identification, and assistance with wildlife management plans. The CES also informs landowners of any costsharing programs that are available. For assistance, contact the county extension office nearest you or call the number listed above.

ARKANSAS GAME & FISH COMMISSION (AGFC), 2 NATURAL RESOURCES DRIVE, LITTLE ROCK, AR 72205, (501) 223–6300

The Arkansas Game & Fish Commission is responsible for managing the State's fish and wildlife resources to provide sustainable public hunting and fishing opportunities. AGFC's Wildlife Management Division provides technical advice for wildlife management on private lands, assistance for the control of nuisance animal problems, and information on how to apply for cost-sharing programs that benefit wildlife. The AGFC's Informational and Educational Services provide landowners with a variety of information through magazines, leaflets, brochures and other materials. Landowners should contact the local AGFC office in their county listed in the government pages of the telephone directory or contact the main number listed above for additional information.

UNITED STATES DEPARTMENT OF AGRICULTURE NATURAL RESOURCES CONSERVATION SERVICE (NRCS), ROOM 5404, FEDERAL BUILDING, 700 W. CAPITOL AVE., LITTLE ROCK, AR 72201, (501) 324–5418

The Natural Resources Conservation Service provides national leadership in the conservation and wise use of soil, water and related natural resources through landowner assistance programs that provide technical and financial assistance (Forestry Incentives Program, Wetland Reserve Program, Waterbank Program and others). Landowner assistance is available in soil and water management, conservation work in woodlands, pond construction and improvement of fish and wildlife habitats. Assistance from NRCS can be obtained through the local conservation districts or call the number listed above.

ARKANSAS ASSOCIATION OF CONSERVATION DISTRICTS (AACD), 101 EAST CAPITOL, SUITE 350, LITTLE ROCK, AR 72201, (501) 682–2915

The Arkansas Association of Conservation Districts is a nonprofit, non-governmental organization representing the 76 natural resource conservation districts across the State. Member districts are local units of State government that work with Federal and State resource management agencies and local landowners to promote the conservation and wise use of the nation's natural resources.

FARM SERVICES AGENCY (FSA), 700 W. CAPITOL, ROOM 5416, LITTLE ROCK, AR 72201, (501) 324–6271

The Farm Services Agency, formerly the Agricultural Stabilization and Conservation Service, is an agency in the U.S. Department of Agriculture (USDA). It administers several programs for landowners including the Conservation Reserve Program designed to enhance environmental and wildlife benefits by converting eligible cropland to trees or other permanent vegetative cover. The Agricultural Conservation Program shares the cost of conservation practices with farmers and ranchers and helps protect soil, water, wildlife and woodland resources. FSA also maintains a number of other program responsibilities that were formerly performed by the Farmers Home Administration. Contact the local Farm Services Agency office nearest you by consulting the phone directory under the government listings or by calling the number listed above.

U.S. FISH AND WILDLIFE SERVICE (USFWS) WILDLIFE AND HABITAT MANAGEMENT OFFICE, P.O. BOX 396, ST. CHARLES, AR 72140, (501) 282–3213

"The mission of the United States Wildlife Service is to conserve, protect, and enhance the Nation's fish and wildlife and their habitats for the continuing benefit of the American people." The USFWS administers the Partners for Wildlife Program, which offers financial and technical assistance to landowners who wish to restore wetland habitats on lands that are currently degraded or converted wetlands, especially prior converted or farmed wetlands, or are riparian, stream or other critical

habitats. The USFWS also administers a Challenge Cost Share Program that is similar to the Partners for Wildlife Program except that it can be used to a greater extent to fund enhancement and other projects which do not necessarily involve taking land out of production, or restoring native self-sustaining vegetation.

ARKANSAS SOIL AND WATER CONSERVATION COMMISSION (ASWCC), 101 E. CAPITOL, SUITE 350, LITTLE ROCK, ARKANSAS 72201, (501) 682–3954

The mission of the Arkansas Soil and Water Conservation Commission is to "manage and protect our water and land resources for the health, safety and economic benefit of the State of Arkansas." The ASWCC also administers the Wetland and Riparian Zone Creation Tax Credit Program, which provides financial incentives (certificate of tax credits and other incentives) to private landowners for the restoration and enhancement of wetlands and riparian zones, and the creation of new wetlands and riparian zones when possible.

ARKANSAS NATURAL HERITAGE COMMISSION (ANHC), 1500 TOWER BUILDING, 323 CENTER STREET, LITTLE ROCK, AR 72201, (501) 324–9150

The Arkansas Natural Heritage Commission is responsible for identifying rare species and exemplary plant communities (natural areas) in Arkansas and working to protect them through the State environmental review process, cooperative management with landowners and acquisition of fee title or partial interest in land. For additional information on ANHC's Wetland Inventory Program, Land Acquisition Program and Wetland Easement Program, please call the number listed above.

THE NATURE CONSERVANCY ARKANSAS FIELD OFFICE, 601 NORTH UNIVERSITY AVE., LITTLE ROCK, AR 72205, 501–663–6699

The Nature Conservancy offers a variety of conservation arrangements for landowners: management agreements, acquisition (including partial interests and fee title); land exchanges; conservation easements retained life estates (donate home or farm for tax benefits while retaining lifetime use); bargain sales; donations; technical assistance for identification and management of natural resources through information transfers and site visits; and restoration and enhancement of bottomland hardwoods.

DUCKS UNLIMITED ROUTE 2, BOX 104A, DEWITT, AR 72042, (501) 282–3788

The mission of Ducks Unlimited is to fulfill the annual life cycle needs of North American waterfowl by protecting, enhancing, restoring and managing important wetlands and associated uplands. Ducks Unlimited works with the Arkansas Partners Project, a cooperative effort that offers free technical assistance, water control structures, and reforestation equipment/cost-sharing to restore and enhance selected wetlands and agricultural fields for waterfowl during winter. This project applies to landowners who own land in 32 designated Arkansas counties.

OTHER HELPFUL NUMBERS

Arkansas Tree Farm Program, Toll free (888) MY TREES; Arkansas Farm Bureau, (501) 224–4400; Arkansas Cattleman's Association, (501) 224–2114

[From the Little Rock (AR) Arkansas Democrat Gazette, December 30, 1999]

TREE FARMERS FEAR EPA'S BITE

FORESTS MAY SEE CLEAN-WATER RULES

(By Chuck Plunket)

Come January, forget Y2K, says tree farmer Jim Francis. He worries about the EPA.

For years the Environmental Protection Agency has left him alone but by late January the agency could decide whether to implement some bold new regulations for the timber industry—a stringent permitting process to protect streams and other waterways.

It's a prospect that has left the longtime independent tree farmer worried that the end of his world is surely at hand.

"This is scary," Francis says. "This is preposterous."

Francis, 77, first got into tree farming in 1964, a few years after he settled in Little Rock as a life insurance salesman. He eventually bought about 600 acres in Clark and Nevada counties and got hooked on growing trees.

Like a fisherman or hunter would show off a mounted trophy, or an athlete his medals, Francis shows off cross sections of trees he has harvested over the years. Some he has lovingly sanded smooth, others laminated.

To watch Francis holding one of the sections, counting through its age rings, getting excited about the wide-ringed good-growth years, is to watch a man obsessed.

"Forestry is a beautiful gem," Francis says.

Today that gem has become one of the most powerful employers in Arkansas. It's an industry that environmentalists say has enjoyed almost complete freedom from regulation far too long.

Francis is not alone. In Arkansas there are more than 120,000 small, private landowners with 20 acres or more who engage in the forest industry in some capacity. And the number is growing.

Joined by a powerful group of industrial participants like Georgia Pacific, Green Bay Packaging, International Paper and Weyerhaeuser, the forest industry in Arkansas accounts for 43,000 jobs at 2,500 timber harvesting operations and wood product manufacturing plants.

In the Natural State people are planting trees by the millions, and they would plant more if they could.

The popular notion is that dominance in tree farming resides at the corporate level, but in reality, small independents account for most of the activity.

Private owners control 58 percent of the State's forests, compared with corporate growers' 24 percent. Public lands make up the remaining 18 percent. The independents' trees account for 48 percent of annual growth, corporate growers' trees for 37 percent. At the U.S. Forest Service's last count in 1995, timberland in the State increased 7 percent since 1988. The increase meant that more than half, or 55 percent, of Arkansas' 33.2 million acres are now forested.

Most of that is coming from the independents.

This year, nurseries in Arkansas planted at, near or exceeding capacity. The nurseries' managers say they could easily have sold more seedlings if they had them.

At the International Paper nursery in Bluff City, manager Ron Campbell says he's breaking a rule of thumb by planting in soil he normally would leave unused to allow it to replenish its nutrients. Nurseries usually let beds rest for 2 years after 2 years of use.

The Bluff City nursery capacity is 56 million pine trees and half a million hardwoods. Campbell says that in stretching the limits of some beds by working them an extra year, he'll grow an extra 7 million pines.

"Right now, the demand is clearly there," Campbell says.

Weyerhaeuser's Magnolia nursery planted its capacity of 60 million pines and 4 million hardwoods this spring.

The State Forestry Commission's Baucum Nursery in east Pulaski County planted 11.25 million pines and 6 million hardwoods this year. Next year the nursery will increase planting to 15 million pines and 7 million hardwoods.

Managers at the commercial nurseries say they will push capacity again, and it would surprise no one to see more nurseries going into business or present nurseries expanding.

Many of those responsible for the extra demand are private landowners, the nursery managers say.

Bill Boeckman, manager at the Weyerhaeuser nursery, explains that corporate growers are usually in the practice of growing at capacity on their Arkansas holdings, so their need for seedlings is flat.

"All of the [soaring] demand that we're seeing is coming from the private grower," Boeckman says.

All this growth and enthusiastic land management, especially among the independent owners, would be seriously curtailed if the proposed EPA regulations are implemented, Francis and Forestry Commission officials say.

"The big industrial growers have a lot more resources, and attorneys, to deal with these issues," says John Shannon, commission director. "The private grower is less able to plan for the future and would have a harder time" coping with the regulation process.

Not that the corporate players don't care about the proposals as well.

"We're taking it as an extremely big deal," says Richard Stich, a wildlife biologist and environmental coordinator with The Timber Company-Georgia Pacific in Crossett.

"[The proposed rules] have the potential to really impact us, requiring us to get permits for just about every practice that we do," Stich says.

Private growers would likely have to hire experts to draft management plans to gain permits, which could make the cost of harvesting smaller plantations too expensive, Stich says.

And all those growers, both corporate and private, applying for permits to plant or build roads or harvest trees would surely overwhelm the State's regulators, Stich says.

"It could mean hundreds of thousands of permits, and the EPA and the State don't have that kind of manpower," Stich says. "It would demand an army of folks to manage this program the way that they want it. The environmental agency wants to revise the Clean Water Act of 1973 to allow the agency to require tree farmers to gain permits case by case before engaging in a host of activities on plantations near endangered streams or waterways. Livestock and poultry operations would also feel the effects.

The agency says the measures would protect the quality of streams and waterways from runoff that can occur after lands are prepared for planting or after trees are harvested, especially by clearcutting.

"We think that the new regulations should affect [the forest industry]. That is a big, fat yes," says Tom McKinney, a leader in the Arkansas Sierra Club.

The organization has teamed with other environmental groups in the past to study the impact of U.S. Forestry Service logging in the Ozark National Forest near the headwaters of the Buffalo National River.

The study showed that damage to the forest caused by building logging roads and harvesting trees causes large amounts of dirt and debris to wash into streams, McKinney says.

The dirt clouds the streams can kill oxygen-producing vegetation that needs sunlight. When the dirt settles, it smothers gravel beds where fish lay eggs and fills pools that dry up in summer, McKinney says.

The combination can kill fish and reduce their ability to reproduce, McKinney says.

"[Forest industry's] effect is not benign, it does cause massive amounts of erosion, and so far, over the years, they have escaped any responsibility for the damage they have caused," McKinney says.

When the EPA first introduced regulations under the Clean Water Act, it exempted the forest industry from obtaining National Pollutant Discharge Elimination System permits except when operations involved washing, sorting and storing logs.

The industry was exempt because the EPA made a distinction between "point source" and "nonpoint source" discharges into waterways.

The agency required permits from those who directly discharged—as from a pipe or ditch—pollutants into waterways, but didn't require permits from industry that indirectly discharged pollutants into waterways—as timberland can when rain washes sediment into a stream.

Forest industry contributes 3 percent to 9 percent of the nonpoint-source pollution to the nation's water; the agency says.

But the EPA stresses that the new regulations, if adopted, would only be employed on a case-by-case basis and would rarely require industry to seek the permits.

The agency has set Jan. 20 as a deadline for public comment on the proposals. Several attempts to reach EPA officials during the past week were unsuccessful.

Shannon says the Forestry Commission is dead set against the proposed regulations.

Recent Forestry Commission surveys have shown that more than 85 percent of those involved in the State's forestry industry are voluntarily following a set of "best management practices" adopted by the State after the 1973 introduction of the Clean Water Act.

So Shannon questions why the EPA would want to interfere with a system that is already regulating itself.

"Frankly, it's pretty nutty," he says. "The proposals are absolutely unnecessary."

The State forester also says that most National Pollutant Discharge Elimination System permits take 6 to 8 months to obtain and the wait could mean real trouble for a grower who needs to act quickly to harvest pest-damaged timber or build an emergency firebreak during a dry season.

Further, though the EPA says the impact of the new regulations would be minimal, Shannon says he worries that there are forces in place that could quickly increase the impact of the proposed rules.

Nationally, forest industry official worry that long-standing lawsuits filed against the EPA by numerous environmental groups will lead the agency to add more streams and waterways to its endangered list.

In Arkansas, the forest industry fears that a lawsuit filed by the Sierra! Club, Arkansas Fly Fishers. the Crooked Creek Coalition, Save Our Streams and the Federation of Fly Fishers will force the EPA to increase: the number of streams identified as endangered from 52 to almost 200.

"We need to keep up with water quality standards because that's why Arkansas is known as the Natural State," says the environmentalists' attorney, Hank Bates of Little Rock. "Clean waterways are an important factor in generating tourism."

Any increase in the endangered list would translate to an increase of growers who would be required to gain National Pollutant Discharge Elimination System permits, Shannon says.

Which is anathema to Francis who is convinced the proposed regulations are really a plot by environmentalists to gain new power over the forest industry.

Francis says he worries that National Pollutant Discharge Elimination System applications would be delayed by "radical environmentalists" who might protest the permit simply to prevent the tree farmer from harvesting his crop.

"This is a slick move by the anti-forestry advocates to find some way to stop forest management and timber harvesting," Francis says. "And it's not necessary. This business of claiming that forests are a point pollution source is a bunch of BS."

Driving back from one of his tree farms earlier this month, Francis waves his hands and raises his voice whenever he comes to the subject of environmentalists. A staunch believer in the State's best management practices, Francis says his farms are environmentally sound and responsible—something he says most forestry industry opponents don't realize.

He worries that the forest industry is still paying for the sins of its fathers—those turn-of-the-century days when lumber companies were driven by "Cut out and get out" mentalities that denuded vast tracks of virgin timberland.

"But no one farms that way anymore," Francis says.

Now the rule of thumb is to re-plant quickly and keep the land going. It's the only profitable way to stay in the business, he says.

"So people see trees coming down and they think it looks ugly and they don't realize the farmer is going. to plant them back," Francis says.

"People don't get mad when a row crop farmer harvests his land," Francis says. "But they want to tell me I can't harvest my crop.

"They want to tell me what to do on my own land."

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