Written Testimony
by

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before the

House Committee on Small Business

addressing

"Meeting the Needs of Small Business and Family Farmers in Regulating our Nation's Waters"

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Madam Chair, Ranking Member Graves and honorable members of the Committee, my name is Lyle Schellenberg. I am the president of Armadillo Underground, Inc. in Salem, Oregon. We have 15 employees who engage in trenchless excavation, auger boring and tunneling activities on water, sewer and other infrastructure projects throughout the state.

I appreciate the opportunity to participate in this hearing on behalf of the National Utility Contractors Association (NUCA), which is a family of construction companies, manufacturers and suppliers from across the nation that builds, repairs and maintains underground water, wastewater, gas, electric and telecommunications systems.

NUCA is pleased to be able to offer the perspective of small construction companies, a large number of which would be harmed if the Clean Water Restoration Act (CWRA) in its present form were to pass into law and be implemented.

VAST EXPANSION OF CLEAN WATER ACT JURISDICTION

As currently written, the CWRA (S. 787) would remove the term "navigable" from the Clean Water Act and allow the Army Corps or Engineers (Corps) and Environmental Protection Agency (EPA) to regulate all "waters of the United States." NUCA's fundamental concern with this legislation is that instead of providing greater clarity, it will lead to: bigger government, increased permitting requirements for wet areas with little or no impact on the nation's waters, higher compliance costs, and inevitably, significant increases in litigation. At the same time, desperately needed water and wastewater infrastructure projects could be delayed by increased permitting requirements, even if they had no link to rivers, streams or other "navigable" water bodies.

Under current law, if a potential jobsite is considered a wetland under federal jurisdiction, a contractor must obtain not only a federal wetlands permit (also known as a Section 404 permit), but also protection—in the form of contract clauses and insurance—against any potential environmental problems. Giving the Corps and the EPA additional jurisdiction over all wet areas and activities affecting those waters—potentially including construction jobsites themselves—will undoubtedly increase the time and cost required to complete every construction project requiring a Section 404 permit. Many in the regulated community have indicated that passage of the CWRA would be the largest expansion of the CWA since it was enacted in 1972.

Frankly, the potential ramifications of this bill are alarming. As written, boundaries of CWA jurisdiction would be removed. Enactment would immediately subject to federal CWA permitting requirements ditches, water and sewer pipes, streets, gutters, man-made ponds, storm water basins, streets and gutters, even puddles of rainwater. For the first time in the 37-year history of the CWA, activities that have no impact on legitimate American waters would be subject to full federal regulation. Indeed, by applying the Act to "all interstate and intrastate waters," S. 787 leaves no water unregulated, not even dry land with standing water following a wet weather event. Consequently, the bill would greatly complicate the range and number of activities that require permits – affecting a broad range of small businesses, farmers and ranchers, builders of homes, roads, highways, and our environmental infrastructure. Commercial development, energy

development, and a broad range of those who engage in manufacturing would also be subject to these unnecessary and harmful new requirements.

Indeed, expanding CWA authority in this manner would delay and increase the cost of the projects needed to improve the nation's public and private infrastructure and by extension the American economy. Improvements to drinking water and wastewater infrastructure, highways, bridges, mass transit facilities, airports, schools, and other imperative infrastructure would be delayed or possibly eliminated at a time when we simply can't afford it.

BOTH "WATERS" AND "ACTIVITIES" UNDER THE MICROSCOPE

The crux of our opposition to the CWRA is that it would provide for a vast expansion, not "restoration," of the jurisdiction provided in Clean Water Act. The legislation would grant sweeping new authority to the federal government with little deference to state and/or local governments. While some are touting the current legislation as a "compromise," it in fact falls far short of an acceptable solution.

In its current form, S 787 would not just adopt the current definition of "waters of the United States" in existing regulations. The bill would expand the scope of federal jurisdiction under the Clean Water Act to *all* waters, and *all* activities affecting those waters. Neither current law nor existing EPA and/or Army Corps regulations provide for this.

In brief, the legislation seeks to eliminate the traditional basis for federal jurisdiction under the CWA by deleting the term "navigable" from the statute. Because the limits of federal jurisdiction have not been defined by Congress, exactly what the limits in authority might be under the legislation is unknown. Inevitably, the only winners in this scenario would be the countless attorneys who would inevitably engage in endless litigation as all stakeholders seek to make their case in court.

The Senate legislation provides that all interstate and intrastate waters, including "intermittent streams" and "tributaries," would be covered. Because nothing in current law or regulations (before landmark legal challenges) provides for "all waters" to be subject to CWA requirements, these terms allow regulators and third parties to declare jurisdiction over ditches, municipal storm drains, groundwater and desert washes that carry water only a few hours a year. Let me say that again, but with a slightly different twist. Since the term "waters" itself remains undefined and without limitation, virtually *any* wet area could be found to meet the definition of a jurisdictional water. A court case involving jurisdiction over a puddle sounds ridiculous, but is theoretically possible under the proposed legislation. The point I'm making is that if the legislation does not define its terms with precision and clarity, the courts will be forced to at the taxpayer's expense.

Additionally, the so-called "compromise" would most certainly disrupt the balance between federal and state authority that is expressly provided for in the CWA. The CWA's recognition that states should retain the authority to make decisions about their own water resources would be completely upended by the current legislation.

And finally, the so-called "compromise" would grant EPA and the Corps authority over all "activities affecting these waters," without any reference to whether the activities were public or private and whether or not they actually add pollutants to the water.

ECONOMIC BENEFITS COME WITH UNDERGROUND UTILITY CONSTRUCTION

Since the economic downturn, the water infrastructure market has gone from bad to worse. In addition to cuts in federal funding to refurbish America's water and wastewater infrastructure, state budgets have been hit hard because of the downturn in the housing market, which in turn has lowered revenues from property taxes. The most recent job-loss numbers released by the U.S. Department of Labor's Bureau of Labor Statistics (BLS) in June indicated that 1.6 million construction workers are out of work and that the current unemployment rate for the construction industry is more than 17 percent. In June alone, 79,000 construction jobs were lost, marking the 24th consecutive month with significant job loss in the construction industry. In all, 1.3 million construction jobs have been lost since the start of the recession. In light of those statistics, a "do no harm" approach to water regulation would be sound public policy.

NUCA serves as managing member of the Clean Water Council (CWC), a coalition of 35 national and international construction organizations that work collectively to expand the water, wastewater and storm water infrastructure markets. The CWC recently released the findings of a study on the economic impacts that accompany funding for water and wastewater infrastructure projects. The study, *Sudden Impact: Assessment of Short-Term Economic Impacts of Water and Wastewater Projects in the United States*, conclusively demonstrates that the construction of these projects creates significant, immediate economic benefits, including considerable job creation, increased demand for goods and services, rise in personal income and the generation of state and local tax revenue.

Specifically, the study shows that a $1 billion investment in water and wastewater infrastructure results in the creation of up to some 27,000 new jobs (with average annual earnings for the construction portion of the jobs at more than $50,000), total national output (i.e., demand for products and services in all industries) of between $2.87 and $3.46 billion, and generation of personal or household income of between $1.01 and $1.06 billion. Each $1 billion invested also generates approximately $82.4 million in state and local tax revenue.

The study also underscores the "ripple effect"—that is, how this investment impacts industry sectors outside of construction. Each $1 billion invested in water and sewer projects generates measurable national employment in 325 other standard industry classifications. In fact, a $1 billion investment results in the hiring of at least 100 workers in 25 industry segments outside of construction, including retail markets, wholesale trade, real estate, insurance carriers, health care, food services, and accounting, just to name a few.

Recognizing the potential for recovery in the underground environmental infrastructure industry, Congress should be looking to expand market opportunities, not stifle them.

Impacts on State / Local Governments

The harmful impacts on passage of the current CWRA do not end with the construction industry. In fact, they extend from the private to the public sector. The expansion of the CWA's jurisdiction would unnecessarily burden local, state and even the federal government. For example, it is clear that the legislation would impose new and burdensome administrative responsibilities. As always, new federal requirements without the necessary resources to implement and comply with them constitute little more than additional unfunded mandates on states and localities at a time when revenues are scarce and infrastructure needs are skyrocketing.

As an example, states would be required to adopt water quality standards, monitor and report on the quality of those waters and ensure compliance with those standards, including compliance with new requirements for "activities affecting these waters." While all the specific consequences might be difficult to determine, there is no doubt that they would be dramatic in the negative sense. At the very least, a large number of public infrastructure projects would suddenly be at risk of delay. Nothing in the bill suggests that this or any of the other factors I've enumerated have been adequately considered.

CONCLUSION

Any public works contractor will tell you that the current process for obtaining a federal Sec. 404 permit is no cake walk. A significant backlog of permit requests already exists—15,000 to 20,000 such requests, each with an expected wait time of two- to three-years to obtain one. At the very least, the proposed legislation would require big increases in the resources needed to comply with the federal permitting process just to keep up with the increase in demand, much less get rid of the backlog. No such resources are provided for in the legislation. Again, this will only serve to delay critical infrastructure projects, increase costs and stifle economic growth. Local government officials are in fact already saying that there simply are no funds available to comply with another complex, ambiguous and invasive regulation.

NUCA looks forward to continuing its long tradition of working with Congress to find ways to protect waters and wetlands for the benefit of the environment and future generations and, at the same time, not unduly hinder the utility construction industry from providing the essential infrastructure that helps sustain our quality of life. A better definition of "waters" is needed, along with a more thorough evaluation of what activities should to be regulated. Without such definition and evaluation, the consequences of the CWRA as currently written will be disastrous, even if unintended.

I thank you for the opportunity to appear before the Committee today, and I look forward to answering any questions you may have.