

Written Testimony of
Ron Curry
Secretary of the New Mexico Environment Department

Before the

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Transportation and Infrastructure Committee
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Introduction

My name is Ron Curry and I am the Cabinet Secretary of the New Mexico Environment Department in the administration of Governor Bill Richardson. Thank you for the opportunity to provide testimony regarding the importance of restoring Clean Water Act protections to many of America's rivers, lakes and streams.

The Clean Water Act has been our nation's main tool in ensuring the continued protection of the water we drink, enjoy for recreation and that wildlife communities rely upon. Unfortunately, the effectiveness of this tool has been blunted by two recent Supreme Court decisions. The court's rulings in *Solid Waste Agency of Northern Cook County v. US Army Corps of Engineers* (SWANCC) in 2001 and *Rapanos v. US* (Rapanos) in 2006 severely limited waters that receive protection under the Clean Water Act. This is especially troubling in New Mexico, an arid state that has relied on the Clean Water Act to help us protect our limited but precious water resources.

It is important for us to remember that the passing of the Clean Water Act is one of our nation's successes. Waters that thirty years ago were thick with waste discharges now support thriving recreational and economic activities. The U.S. Environmental Protection Agency's broad policy of ensuring protection for nearly all waters was a benefit to us all. Our quality of life improved and so too has the sustainability of aquatic species and wildlife. But now those protections are mired in widespread confusion and bureaucratic gridlock because it is no longer clear what waters will continue to be protected. My objective today is to urge your support for a solution that clears waters that have been muddied and encourage you to join Governor Bill Richardson in supporting the Clean Water Restoration Act (HR 2421).

The Problem

Prior to those Supreme Court decisions, the scope of the Clean Water Act was interpreted broadly to provide protection for of all of the nation's water bodies. Those bodies include small upland streams that flow intermittently in response to storm events and numerous wetlands that provide shelter for wildlife and create a natural filtration system for our aquifers. Those waters were valued, just as we place value on the large rivers that are conduits for commerce and industry. First in 2001, and again last year, the courts scaled back those broad protections, defining "navigable waters" narrowly. Those decisions have created great uncertainty regarding what waters are protected for federal, state and local officials as well as communities and landowners.

In effect, the Supreme Court ruled that there are two classes of water, one that is tied directly to "navigability" and deserves federal protection from pollution, and a second class that is completely abandoned or must undergo a case by case "significant nexus" test. That test requires that tributaries or wetlands would be dropped from protection if the government cannot directly prove they empty into navigable waters.

As the man charged by Governor Richardson with protecting New Mexico's limited water supply from pollution, I can tell you that basing the decision on what water deserves to be clean on whether you can float a boat on it is an extremely limited view. Quite simply, it's lunacy. There are times during summer months when you can't even float a boat down the mighty Rio Grande, New Mexico's main surface water resource.

To put it another way, many of you today have glasses of water before you. As an analogy, imagine that those glasses collectively made up the waters of the United States. Before the 2001 SWANCC decision, the water in those glasses was protected by the Clean Water Act. However, today, because of the SWANCC and Rapanos decisions, as much as half of those glasses may no longer be protected.

I want you to have good, clean water in those glasses but if those Supreme Court decisions stand, I just can't say for sure.

The Clean Water Restoration Act solves this problem by replacing the term "navigable waters of the United States" with "waters of the United States." That fix simply restores protections that were in place for three decades when the quality of America's rivers, lakes, wetlands and streams improved dramatically. The Act also restores Congress' original intent when it passed the Clean Water Act in 1972. That intent was to protect our nation's water resources for future generations.

Local Impact

Nowhere have the limitations created by these two recent Supreme Court decisions been felt more acutely than in the desert Southwest. We simply have no water to waste. The water we do have — and its quality — is of utmost importance to the continued health of our citizens and the future economic development of our region. By excluding isolated, intrastate, non-navigable waters from protections previously guaranteed under the Clean Water Act, those decisions could remove federal protections from more than 90 percent of our state's waterbodies because they flow only intermittently. Additionally, waters within closed basins that cover up to one fifth of New Mexico would also be left vulnerable to pollution. That includes 84 miles of perennial streams, 3,900 miles of intermittent waters, 4,000 playa wetlands, and numerous headwaters, springs, cienegas and isolated wetlands. Threatened basins include the Tularosa, Mimbres, San Augustine, Estancia and Salt in central, south central and southwestern New Mexico.

Those misguided court rulings also threaten New Mexico's precious, limited groundwater resources — the source of 90 percent of our clean drinking water. Surface water bodies are often directly linked to groundwater resources. Unregulated, damaging surface dumping will therefore ultimately lead to pollution in the aquifer. We cannot allow this to happen. The water beneath just one of those basins — the Salt Basin — has been estimated by the U.S. Geological Survey to contain as much as 57 million acre feet of water, including 15 million acre feet that is potable. That could prove to be a vital and needed future water supply for the rapidly growing City of Las Cruces in southern New

Mexico. However, if this aquifer is allowed to be polluted by surface dumping, its benefits for future New Mexicans will be severely curtailed.

Finally, the Southwest is currently in the grips of a years-long drought, putting our already limited water resources at an even higher premium. To weaken environmental oversight now is to invite disaster. That is why Governor Richardson has taken an aggressive leadership position on this issue.

State Actions

Governor Richardson has fought to restore protections to New Mexico's waters. In March 2003, he filed formal comments with the EPA petitioning that New Mexico's closed basins and other imperiled waters remain protected under the federal Clean Water Act. He also strongly supported the Clean Water Authority Restoration Act of 2003, a precursor to the legislation before you today.

More recently, Governor Richardson successfully opposed oil and gas drilling in the Valle Vidal or Northern New Mexico, and in order to protect its world class trout streams, he had this area's streams listed as Outstanding National Resource Waters. He is also fighting to protect the Salt Basin Aquifer, whose untapped water resources I mentioned before, from energy development at Otero Mesa. Finally, Governor Richardson recently launched a multi-million dollar effort — the first in state history — to provide a state funding source for river ecosystem restoration. But without lasting federal Clean Water Act protection, the state's efforts to restore and defend its waters could be severely eroded.

Clean Water Restoration Act

To remove protection afforded by the Clean Water Act from critical portions of our Nation's aquatic systems and to protect only selected reaches of our waters will result in real costs for our citizens — costs to the economy, the environment and to our quality of life.

The Clean Water Authority Restoration Act of 2007 provides a logical and practical solution by restoring the traditional scope of the Clean Water Act and clarifying the purpose of the Act based on long-standing regulatory definitions. This is not an expansion of federal authority but a return to a clear and comprehensive common goal enjoyed during the previous thirty years. This action will also allow continued state-federal partnerships to provide streamlined and efficient regulatory programs such as those that had been in operation prior to the recent Supreme Court cases.

The Citizens of New Mexico depend on the protection of a clean environment and sustainable water supply. If we are to ensure that New Mexico's and the Nation's waters are protected now and for future generations, we must act together to restore the purpose, scope, clarity and predictability of the Clean Water Act so that it will once again serve as the primary and comprehensive protection of our Nation's waters.

Thank you for inviting me here today to testify on this important issue. I look forward to your questions.