TESTIMONY OF
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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 three 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 three 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 FY 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 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 2,747comments 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 three 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 five 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 five 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 five 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 FY 2001 Budget increases State grant funding for TMDLs by $45 million in FY 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% of funding under section 319 to develop TMDLs and for related work. The President's request for 319 funding in FY 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 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 three 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 FY 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 FY 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 FY 2001.

The bill would authorize $500 million for the section 319 grant program, which is double the President's FY 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% 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% 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 two 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.

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