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LEGAL MEMORANDUM

TO: Jeremiah Baumann & Jessica Adamson

FROM: Steven Shropshire

DATE: May 1, 2009

RE: Oregon Association of Nurseries Comments on S. 787
File No. 47677-37099

Thank you for the opportunity to provide you with the Oregon Association of Nurseries' (OAN) comments regarding the April 2, 2009 version of S. 787. The first part of this memorandum is a description of the OAN's position with respect to the bill. The second part of the memorandum contains suggested amendments to the bill that would help address the OAN's concerns.

OAN Position

The OAN is a trade association consisting in large part of members who grow irrigated nursery stock in Oregon. These people depend on the state's natural resources for their livelihood. They recognize the value of protecting those resources, and strive to be good stewards of Oregon's land and water in their daily practices.

It is the OAN's view that S. 787 will impair the states' ability to manage water quality issues at a local watershed level by expanding federal jurisdiction to activities and waters that have never before been subject to federal jurisdiction. This will hurt agriculture in Oregon and elsewhere in the United States. Before moving this bill forward, we encourage the Oregon delegation to carefully consider the economic and practical impacts that S. 787 in its current form could have on the agricultural community.

S. 787 proposes to restore the scope of federal jurisdiction under the Clean Water Act (CWA) in response to the U.S. Supreme Court's decisions in *SWANCC*[1] and *Rapanos*[2]. However, rather than restore CWA jurisdiction, the bill expands CWA jurisdiction well beyond current or historical levels. The OAN is concerned S. 787 would expand federal water quality jurisdiction over "all waters of the United States," including intermittent, ephemeral and seasonal streams,

[1] *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001).
[2] *Rapanos v. United States*, 547 U.S. 715 (2006).

and even irrigation ditches. Likewise, the OAN is concerned that S. 787 opens the door to regulation of any activity "affecting" waters of the United States, regardless of whether the activity is occurring in water or whether the activity actually discharges a pollutant. Because of these changes, the bill opens the door to new regulations governing a broader scope of actions in a broader scope of settings than has ever been the case under the CWA.

The OAN believes that S. 787 would expand the scope of federal jurisdiction beyond historical levels in the following ways:

1. By removing all references to "navigable waters of the United States" each place it appears and inserting "waters of the United States." (SB 787, Sec. 5). The removal of the so-called navigability test would extend federal water quality jurisdiction over all waters of the United States, not just the nation's principal waterbodies and their tributaries that meet the navigability test. This is certainly a roll-back to the pre-*SWANCC* regulatory environment; and when paired with the other changes in the bill, it goes well beyond.

2. By classifying intrastate waters as "waters of the United States." (SB, 787 Sec. 4). By specifically adding intrastate waters to the definition of waters of the United States, S. 787 would open the door for the EPA and the Corps to promulgate regulations that expand their jurisdiction to cover all permanently or periodically wet areas within a state. This would invite the federal government to regulate matters that have previously been the exclusive domain of state and local governments.

3. By expanding the scope of regulated activities from the discharge of pollutants to "activities affecting" waters of the United States. (SB 787, Sec. 4). This could prove to be the most profound change in S. 787. The inclusion of the words "or activities affecting these waters" in the definition of "waters of the United States" is a tremendous expansion of the categories of regulated activities. Currently, the only activity regulated by the CWA is the discharge of a pollutant to a jurisdictional waterbody. The terms "discharge" and "pollutant" have both been interpreted broadly by the agencies and the courts. However, S. 787 opens the door to regulation of any activity "affecting" waters of the United States, private or public, regardless of whether the activity is occurring in water or whether the activity actually adds a pollutant to the water. As a result of this change, the CWA could be extended to cover upland forestry, farming, and recreational practices that have nothing to do with waterways or wetlands, but which could have the potential to affect those waters under certain conditions. This impact is magnified by other provisions in S. 787 that would now make isolated ditches, holding ponds, and other currently unregulated water conveyances "waters of the United States."

4. By extending jurisdiction over waters of the United States (and activities affecting these waters) "to the fullest extent that these waters or activities affecting these waters, are subject to the legislative power of Congress under the Constitution." (SB 787, Sec. 4). This "fullest Constitutional extent" language expands CWA jurisdiction beyond Congressional

authority to regulate commerce under the Commerce Clause of the U.S. Constitution as has historically been the case. This language appears to be a legislative effort to force courts to interpret the amended CWA as broadly as possible. Typically, courts have discretion to exercise a range of interpretive doctrines depending on the context in which a case is presented. This provision would limit that discretion.

5. Ditches are not excluded from "waters of the United States." Under current Corps of Engineers regulations, many ditches are considered to be tributaries to other water bodies. Under S. 787, tributaries are included in the definition of waters of the United States, meaning that S. 787 would extend CWA jurisdiction to all activities affecting ditches, including brush clearing, culvert replacement, general maintenance, and the like, only some of which are likely to be exempt from regulation under the Savings Clause in Section 6 of the bill.

Suggested Amendments

The OAN has specific proposals for amendments to the April 2, 2009 version of S. 787 that it would like to see your office carry forward in discussions with Senator Feingold's office and other supporters of the bill.

1. The most important change is to remove the language "or activities affecting these waters" from the proposed language in Section 4 of the bill. This language could arguably impair the usefulness of the CWA's agricultural exemptions that are specifically reaffirmed in Section 6 of S. 787. The problem is that those exemptions apply to discharges of pollutants. If *activities affecting* waters of the United States are now subject to jurisdiction, these exemptions may be inadequate to cover many upland agricultural activities.

2. In Section 4 remove the following language: "the fullest extent that these waters… are subject to the legislative power of Congress under the Constitution." There is other language elsewhere in the bill that better addresses Congressional intent with respect to the interpretation of the CWA.

3. We would like to see the inclusion of additional language that clarifies that neither irrigated lands nor man-made irrigation conveyance or storage structures such as ditches and ponds are "waters of the United States" subject to CWA jurisdiction.

Thank you for your interest in the OAN's position on this bill. Please do not hesitate to contact anyone on our team if you have any questions.