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TESTIMONY OF SARAH CHASIS

BEFORE THE U.S. COMMISSION

ON OCEAN POLICY

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Sarah Chasis

Ms. Chasis is a senior attorney with the Natural Resources Defense Council, Inc. (NRDC), a public interest organization with over 500,000 members nationwide that specializes in environmental protection. She serves as Director of NRDC's Water and Coastal Program. Her substantive work focuses on coastal and marine issues, including marine fish conservation, habitat protection, and coastal and ocean pollution.

For the past twelve years, she has overseen the preparation of reports on beach closings due to coastal pollution, the most recent of which—*Testing the Waters 2002: A Guide to Water Quality at Vacation Beaches*—examines beach closings and practices in 29 coastal and Great Lake states, plus 2 inland states and three territories.

In 1992, the National Oceanic and Atmospheric Administration (NOAA) named Ms. Chasis the first Coastal Steward of the Year. She served on the Marine Board of the National Research Council from 1994 to 1997 and is currently an adjunct assistant professor of law at the New York University School of Law where she teaches an Environmental Law Clinic. Ms. Chasis is a graduate of Smith College and the New York University School of Law.

Thank you for this opportunity to testify. I am Sarah Chasis, Director of NRDC's Water and Coastal Program. NRDC is a national environmental organization with over 500,000 members and offices in NYC, Washington, D.C., Los Angeles and San Francisco. NRDC has a longstanding commitment to working to protect our nation's coasts and oceans. My testimony today addresses the issue of nonpoint source pollution.

I. Serious Threats are Posed by Nonpoint Source Pollution to Coastal and Ocean Waters

This year marks the 30th anniversary of the Clean Water Act. Despite the Act's promise of fishable and swimmable waters for all communities, approximately forty-four percent of assessed water bodies remain impaired. Nonpoint source pollution constitutes the leading cause of this impairment.

For coastal areas as well, nonpoint source pollution, including nutrients, toxics and pathogens that run off farms, city streets and suburban areas, presents the most significant pollution threat. EPA's recent National Coastal Conditions report found the overall condition of our coastal waters to be only fair to poor. For example, many of the nation's coastal environments exhibit symptoms of over enrichment with nitrogen. Diffuse, nonpoint sources, including agricultural sources, are a principal contributor to this nitrogen loading. More than two-thirds of the surface area of estuaries and bays in the lower 48 states suffers one or more symptoms of nutrient over enrichment. Symptoms of this over enrichment include algal blooms, loss of sea grass beds and coral reefs, and serious oxygen depletion. The Dead Zone in the Gulf of Mexico, now larger in size than the state of Massachusetts, is the prime example of the effects of such pollution. The trends are not encouraging. It is estimated that if current practices are not altered, nitrogen inputs to the U.S. coastal waters in 2030 may be as much as 30 percent higher than at present.

Toxics also make their way into the ocean environment from diffuse, nonpoint sources. Recently, the NRC issued a report that determined that every eight months, the equivalent of the *Exxon Valdez* – 10.9 million gallons of oil – washes off coastal lands and into surrounding waters of the U.S. EEZ. A variety of toxic contaminants enter the food chain and can reach concentration levels in marine species at the top of the food chain, such as walrus, whales and

large predatory fish, which can be harmful to the animals themselves and to humans. In 2001, one hundred percent of the Great Lakes and their connecting waters and seventy-one percent of all coastal waters of the contiguous 48 states were under fish consumption advisory. The Food and Drug Administration (FDA) has issued an advisory concerning commercially sold ocean fish that warns pregnant women, children, and nursing mothers not to eat shark, swordfish, king mackerel, and tilefish because of mercury contamination.

Polluted runoff is a major contributor to the problem of pathogen pollution of coastal waters. Each year for the last 12 years, NRDC has done a report on beach closings and advisories at ocean, bay and Great Lakes beaches. This year's *Testing the Waters* report found that in 2001 there were over 13,000 closings and advisories due to pollution. The single largest known source of pollution causing or contributing to these closings and advisories was ***polluted runoff*** from city streets, suburban and agricultural areas, which caused or contributed to over 3, 700 closings and advisories.

II. Current Law Needs to be Implemented More Effectively; Additionally, Current Law Needs to be Strengthened to Better Control Nonpoint Pollution

As a nation, we must more effectively address nonpoint pollution if we are to protect our coastal, ocean and Great Lakes waters and the people that depend on them for their livelihood and enjoyment. To date, our current laws and policies have not effectively controlled nonpoint pollution. The primary authority, the Clean Water Act, is focused primarily on point sources and has not been effective at addressing nonpoint pollution. There are things that can and should be done under current law to better control nonpoint sources; in addition, current law should be strengthened in order to establish a more effective management.

A. Weaknesses in Current Law and Implementation

There are a number of sections of the Clean Water Act plus a section of the Coastal Zone Management Act that address nonpoint pollution.

Section 303 of the CWA. Section 303 establishes the Total Maximum Daily Load (TMDL) program. The TMDL program requires the determination of a total maximum daily load of pollutants, including from nonpoint sources, that can be accommodated by a water body and still meet water quality standards for its designated use. A waste-load allocation apportions the TMDL among the various sources, including nonpoint sources. States must then issue permits and take other actions to reduce or limit pollution to meet those standards. Unfortunately, EPA plans to issue newly revised rules shortly that would significantly weaken implementation of this section by removing existing deadlines for completion of TMDLs and by failing to provide meaningful EPA oversight of TMDL development and implementation.

Section 319 of the Clean Water Act. Section 319 of the CWA requires states to develop best management practices to reduce nonpoint sources of pollution as a condition of receipt of funding under that section; however, there is no requirement that states actually implement or enforce these practices on a comprehensive basis.

Section 402(p) of the Clean Water Act. This section calls for the permitting and regulation of stormwater discharges. EPA recently issued a proposed rule for controlling stormwater discharges from new development. Unfortunately, this proposal contained *no* performance standards at all for the post-construction phase of new development, even though pollution from new development is one of the fastest growing sources of water pollution in this country. For example, a one-acre parking lot produces 16 times the runoff as an undeveloped meadow. EPA had proposed minimum performance standards (e.g., capture of 80% of total suspended solids), but when the proposed rule went to OMB, the rule was gutted and the standards for new development were removed.

Section 404 of the CWA. This section dictates that the discharge of dredge and fill material requires an Army Corps of Engineers permit. While this program has slowed the rate of dredging and filling of wetlands, it is estimated that at least approximately 60,000 acres continue to be lost annually. It is vitally important to protect wetlands because, among other reasons, they serve as an important filter for polluted runoff. Currently, there is inadequate protection of wetlands from certain types of activities (e.g., draining, mining and dumping), some wetlands

lack any protection (e.g., isolated wetlands) and there is inadequate enforcement of permit conditions for regulated wetlands.

Section 6217 (the Coastal Nonpoint Source Pollution Control Program) of the Coastal Zone Management Act. This section requires that all states with federally approved CZM programs prepare a plan containing enforceable best management measures for existing and new sources of polluted runoff affecting coastal waters consistent with guidance issued by EPA and NOAA. If states fail to develop an adequate plan, they lose a portion of their CZM (section 306/306A) and CWA (section 319) funding. This program has been seriously under funded (with a maximum of \$10 million appropriated annually) and NOAA and EPA have been reluctant to penalize states that have come up with inadequate plans. Only 10 states and territories out of 35 have approved programs. (The states and territories with approved programs are: Rhode Island, Massachusetts, New Hampshire, Pennsylvania, Maryland, Delaware, Virginia, Puerto Rico, the Virgin Islands, California.)

B. Need for Improved Implementation of Current Law

Government can and should more effectively implement existing provisions of law. The following steps should be taken to better utilize current authorities:

1. EPA should enforce the *existing* TMDL regulations under the Clean Water Act so that governments and the public know where the pollution is coming from, how much there is, and what limits are needed to protect water quality standards. There should be a robust process, under EPA oversight, for the implementation and enforcement of TMDLs once they are developed.
2. EPA should require states to develop ambient water quality standards for nutrients in order to better control the sources of nutrient pollution, assess compliance and measure progress. Once such standards are developed for rivers, estuaries and coastal waters, a TMDL for nutrients would be required to be developed to ensure compliance with these standards.

3. NOAA and EPA should target funding to those states that develop and implement coastal nonpoint pollution control programs that to meet federal standards.
4. The Agriculture Department should target funding under the 2002 Farm bill (in particular, the Environmental Quality Incentives Program, EQIP) 1) to reward states that are performing well in controlling nutrient runoff as well as other pollutants, and 2) to encourage projects, such as implementation of BMPs on cropland and animal feedlots, that have the greatest water quality benefits, such as reducing fertilizer runoff.
5. EPA should issue technology-based performance standards for the control of runoff from new construction and development; in addition, EPA should require that stormwater control programs be designed to meet water quality standards.
6. EPA and the Corps should abandon any efforts to change the existing definition of “waters of the United States” so as not to limit protections for wetlands.

C. Need for Strengthening of Current Law

We recommend that the following elements be incorporated into a much enhanced national policy to control nonpoint sources of pollution:

- Utilization of best management practices (BMPs) to control/reduce polluted runoff should be required rather than voluntary (as is too often the case now).
- Important sources of federal funding for programs that affect water quality, including transportation and agriculture programs, should be tied to implementation of BMPs and to implementation of effective state nonpoint pollution control programs (as is done under the Clean Air Act for state implementation plans).
- EPA should set baseline standards for BMPs, as it has done with effluent guidelines for point sources. States can set more stringent standards if they so desire or if they need to in order to meet water quality standards.
- Polluted runoff must be reduced to levels that allow waters to meet their

designated use/water quality standards.

- Significant federal funding should go to implementation of clean-up programs for nonpoint pollution. Billions were spent on cleaning up point sources of pollution. We need a comparable effort on nonpoint sources.
- Wetlands, which are an important filter for polluted runoff, need to be protected and restored. The Army Corps should apply its engineering skills to major wetlands restoration projects in partnership with the natural resource agencies.
- The public needs to be educated about the consequences of nonpoint pollution and the benefits of controlling it.

Congress should take the following specific steps to implement this national policy:

- Increase funding under the State Revolving Fund, section 319 of the Clean Water Act and Section 6217 of the Coastal Zone Management Act for implementation of nonpoint pollution control programs. The State Revolving Loan Fund eligibility should be explicitly expanded to put urban runoff projects (“green infrastructure”) on a par with traditional sewage treatment plants.
- Make polluted runoff control programs enforceable. To this end, link implementation of best management practices and state nonpoint control programs with access to federal funds in a meaningful way. For example, amend Section 6217 to provide meaningful sanctions and disincentives (e.g., loss of federal highway funds or agricultural subsidies) for states that do not develop or implement approved coastal nonpoint programs.
- Amend Section 303 to strengthen the mandate for control of nonpoint pollution as part of state implementation of TMDLs.
- Amend Section 319 of the Clean Water Act to require states to implement enforceable management measures to address nonpoint pollution sources, including for upstream sources that contribute to downstream coastal water quality impairments.

- Close loopholes in the wetlands provisions of the CWA to clarify coverage of so-called “isolated” wetlands and reform the Army Corps’s oversight of that program to really achieve “no net loss” or transfer the whole program to EPA.
- Require that as a condition of receipt of crop subsidies and other federal farm aid farmers implement BMPs that will reduce runoff of nitrogen and other nutrients. Examples of such BMPs include:
 - * Applying nitrogen fertilizer as near as possible to the time of crop need, rather than fall application, which results in leaching during the winter and spring before crops are planted.
 - * Planting winter cover crop, which greatly reduces the leaching of nitrate.
 - * Returning marginal farmland to wetlands.
 - * Reducing nitrogen applications to farm fields to agronomic rates or below.
 - * Constructing and restoring wetlands and vegetative buffers to intercept tile drainage from farm fields.

Thank you for this opportunity to testify.