This paper sets forth the Nevada Division of Environmental Protection’s (NDEP’s) opposition to Senate Bill 787 (S. 787), also known as the Clean Water Restoration Act. S. 787 is an unwarranted expansion of federal authority and should not be adopted.

The main intent of S. 787 is to clarify federal jurisdiction over the nation’s waters by amending the Federal Water Pollution Control Act (Act) to replace the term “navigable waters” with “waters of the United States (U.S.)”. The bill dramatically expands the definition of waters of the U.S. and proposes to federally protect virtually every waterbody in the country. Additionally, S. 787 nullifies the United States Supreme Court 2006 “Rapanos” decision (1).

Simply stated, the original intent of the 1972 Act was to protect “navigable” inter and intrastate waters used for commerce, including tributaries that could effect such commerce. However, since its inception, the scope of federal jurisdiction under the Act has been significantly expanded by the lower courts, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) to include isolated wetlands and non-navigable channels, ditches and ephemeral drainages that have no apparent connection to a “navigable water”.

The Rapanos case challenged that overarching federal jurisdiction. In its decision, the Supreme Court generally addressed where the federal government can apply the Act, and provided specific conditions for determining whether a wetland or tributary is a “water of the U.S.” and therefore subject to federal authority.

The Rapanos decision was unique with four justices affirming the lower court ruling in a dissenting opinion giving great deference to the EPA and Corps’ broad interpretation of the Act and the scope of each agency’s jurisdiction. In a concurring opinion known as the plurality opinion, four justices vacated the lower court ruling limiting the scope of a “water of the U.S.” to “relatively permanent, standing continuously flowing bodies of water” connected to traditional navigable waters, and to “wetlands with a continuous surface connection to” such relatively permanent waters(2). Supreme Court Justice Anthony M. Kennedy issued a separate opinion that did not side with the dissenting opinion and only agreed in part with the plurality opinion. Although he agreed that “waters of the U.S.” extend beyond “traditional navigable waters” Justice Kennedy did not concur with plurality opinion that only waters which are relatively permanent, flowing etc. are jurisdictional. He concluded there must be a “significant nexus” to a “traditional navigable water” in order for it to be subject to the Act’s jurisdiction.
As no majority was reached, legal determination is derived from the opinion of five or more justices. Therefore either the plurality’s relatively permanent flow standard or Justice Kennedy’s “significant nexus” standard shall be used to determine if a water body is a “water of the U.S.” and subject to the jurisdiction of the Act.

NDEP believes Justice Kennedy’s opinion creating a “significant nexus” test is appropriate and should be utilized to determine federal jurisdiction. We do not dispute that a “federal floor” as it has been termed is needed to protect the nation’s waters; but that floor must be set at a reasonable level. The Supreme Court 2006 Rapanos decision established that reasonable, practical floor and provides a viable test to determine federal jurisdiction.

NDEP has received a copy of the May 20, 2009 letter to Representative James Oberstar, Chair of the Committee on Transportation and Infrastructure from the Council on Environmental Quality, EPA, Corps, Department of Agriculture and Department of the Interior. The letter expresses tacit support for S. 787 in that it calls for expanding the pre-Rapanos interpretation of the scope of waters protected by the Act. Referring to Rapanos (and the Supreme Court 2001 SWANCC decision (4)), the letter indicates these rulings have resulted in substantial confusion, uncertainty, time delays and cost overruns. As suggested by the federal agencies, additional legislation from Congress is needed to fix these problems. Although NDEP acknowledges that issues and challenges certainly exist, we maintain that the solution is not more legislation and an expansion of the scope of the Act. Instead, Congress should direct federal agencies to develop consistent inter-agency guidance for implementing Rapanos; and then require the federal agencies to follow that guidance.

It must be emphasized that the issue is not whether non-navigable waters should be protected but rather the line between federal and State jurisdiction. Nevada’s statutes clearly provide for protection of all waters in the State, both on the surface and in the ground (3), and therefore NDEP has the ability to adequately safeguard non-federal waters. The goal of S. 787 to protect every potential waterbody at the federal level is unnecessary, impracticable and counterproductive to achieving meaningful water quality protection or improvement.

The cost to implement the expanded federal jurisdiction of the Act must also be considered. To date, Congress has not provided adequate funding to achieve the basic requirements of the Act, let alone the additional broad interpretation of federal jurisdiction implemented by EPA and the Corps, and proposed by S. 787. If Congress moves forward with determining a new federal floor, the costs associated with protecting those waters must be factored in. It is disingenuous to claim that the federal government intends to protect the nation’s waters to the maximum extent possible without providing adequate funding to States or EPA to accomplish that directive.
In summary, NDEP is opposed to S. 787 for the following reasons:

- The bill is an inappropriate and untenable expansion of federal authority. A broadening of the definition of "waters of the U.S." is not necessary, as adequate protection for the nation's waters already exists under the Act.
- The Supreme Court 2006 Rapanos decision established a clear legal test and practical means for determining a "water of the U.S." The ruling is as close to a bright jurisdictional line as can be realistically and reasonably established. Instead of attempting to redefine the scope of the Act, Congress should mandate that federal agencies implement Rapanos. Any other action by Congress will only complicate jurisdictional issues and result in even more litigation.
- The intent to bring nearly every waterbody in the nation under federal jurisdiction is unreasonable and counterproductive to achieving real environmental results. Post Rapanos, there were dire forecasts of rivers and lakes being decimated by pollution from unregulated sources. These predictions have not materialized in Nevada, precisely because adequate protection already exists under the Act and in State statutes and regulations.
- Current federal funding is not adequate to address the existing requirements of the Act. S. 787 is an unfunded mandate that should not be adopted by Congress unless significant appropriation is concurrently provided.

Numerous critical water quality and other environmental issues face the nation today, including mercury contamination, endocrine disruptors, pharmaceuticals and the effects of climate change on our water quality and quantity. The expansion of the Act under S. 787 to replace the term "navigable" with "waters of the U.S." and nullify Rapanos will negatively impact state and federal abilities to focus on these serious environmental challenges.

2. EPA/Corp Clean Water Act Guidance document 12/2/08 pg. 2