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H.R. 5088: Clean Water Myths versus Reality

(Prepared by Committee on Transportation & Infrastructure Republican Staff)

MYTH: The America's Commitment to Clean Water Act (H.R. 5088) would merely "restore" jurisdiction under the Clean Water Act, and would not expand Federal authority.

REALITY: H.R. 5088 will not restore, but vastly *expand* jurisdiction under the Clean Water Act. The bill will eliminate the traditional basis for Clean Water Act jurisdiction under the Interstate and Foreign Commerce Clause by replacing the term "navigable waters" with the newly defined term "waters of the United States," and expanding the scope of Federal jurisdiction to "*all interstate and international waters*" and "*all other waters*," including all waters the "*use*" of which "*does or would affect*" not only interstate or foreign commerce, but also "*the obligations of the United States under a treaty, or the territory or other property belonging to the United States*" under the Constitution. This is far broader than ever before.

MYTH: H.R. 5088 would "reaffirm Congressional intent" that the Clean Water Act cover all waters.

REALITY: When the Clean Water Act was first enacted, Congress recognized an appropriate balance between Federal and state jurisdictional responsibilities, and did not intend the Federal government to regulate all waters without limitation. Federal jurisdiction was grounded in Congress' authorities under the Commerce Clause of the Constitution, and recognized that there are limits to Federal jurisdiction.

MYTH: H.R. 5088 will "clarify" jurisdiction under the Clean Water Act and reduce litigation.

REALITY: H.R. 5088 will have the opposite effect. H.R. 5088 will effectively erase decades of jurisprudence and invite the courts to decide the Constitutional limits of Federal authority and the scope of jurisdiction under the Clean Water Act. This uncertainty will be a matter for much speculation and future litigation as the government and stakeholders struggle to clarify the uncertain scope of jurisdiction under the bill.

MYTH: H.R. 5088 would simply codify the existing Federal regulations defining Clean Water Act jurisdiction.

REALITY: H.R. 5088 does not simply adopt the current definition of "waters of the United States" from the Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA) regulations. H.R. 5088 uses some existing regulatory language, but ignores other provisions and adds new, more expansive language. H.R. 5088 would delete the term "navigable" from the Clean Water Act, and would specifically *expand* the scope of Federal jurisdiction to "*all interstate and international waters*" and "*all other waters*," including all waters the "*use*" of which "*does or would affect*" not only interstate or foreign commerce, but also "*the obligations of the United States under a treaty, or the territory or other property belonging to the United States*" under the Constitution. Neither current law nor the EPA/Corps' regulations say that.

MYTH: Removing the term "navigable" from the statute will clarify the intent of Congress in passing the Clean Water Act in 1972.

REALITY: It is clear Congress intended to use the term "navigable waters" when it passed the Clean Water Act in 1972. The conference report specifically stated that "Congress intends the term 'navigable waters' be given its broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." Removing the term "navigable" from the statute combined with the proposed alteration of the statute's definition of "waters of the United States" does *not* clarify the original intent of Congress; *it changes and expands it*. This expansion of jurisdiction would result in confusion—not clarity—regarding the intent of Congress.

MYTH: As a result of Supreme Court decisions and the Corps and EPA interpretative guidance, the Clean Water Act's protections now apply only to certain waters that are "navigable-in-fact" or permanently flowing. Most non-navigable bodies of water, including headwater streams, will no longer be covered by the law.

REALITY: Federal regulators are finding that most non-navigable waters, including headwater streams, have been and will continue to be jurisdictional. There is no evidence that massive areas of wetlands and other important aquatic ecosystems are going unprotected or being destroyed as a result of the Supreme Court decisions and the agencies' guidance.

MYTH: If H.R. 5088 does not pass, many intrastate waters will go unprotected.

REALITY: This misleading notion asserts that the states will recklessly allow pollution of state waters in the absence of broader Federal regulation. States can and do regulate the discharge of pollutants into intrastate waters (including wetlands) without the need for Federal authorization or approval. There is no evidence that massive areas of wetlands and other important aquatic ecosystems are going unprotected or being destroyed as a result of the Supreme Court decisions.

MYTH: The Corps and EPA had clearly and consistently asserted Clean Water Act jurisdiction over ALL waters in the United States for the 30 years prior to the Supreme Court's *SWANCC* and *Rapanos* decisions.

REALITY: On the contrary, these agencies have never had a consistent understanding of their jurisdiction. Regulatory creep has broadened jurisdiction under the Clean Water Act over the 30 years prior to the Supreme Court's decisions. The initial regulations these agencies promulgated in 1972, shortly after enactment, narrowly interpreted jurisdiction to little more than "traditional" navigable waters. The agencies promulgated further sets of regulations, between 1974 and 1986, which gradually *broadened* the scope of its asserted jurisdiction over "navigable waters." In the 1986 publication of regulations, the agencies for the first time explicitly asserted jurisdiction over non-navigable, isolated, instrastate waters that are or may be used as habitat for migratory birds (the "Migratory Bird Rule"). But even then, the agencies did not interpret tributaries to mean anywhere water flows or could flow, as H.R. 5088 would do, and the agencies expressly disclaimed authority over drainage ditches, which would be regulated under H.R. 5088.

MYTH: The *SWANCC* and *Rapanos* decisions have left millions of acres of geographically isolated wetlands at risk and a majority of our stream miles unprotected.

REALITY: To date, there is no evidence to support these kinds of baseless, sensationalistic statements, or that waters are not being protected in any widespread way. Some limited, highly isolated wet areas may fall outside of Federal jurisdiction; however, these will have no hydrological, chemical, physical, or biological connection to jurisdictional waters. And while there may not be a Federal interest in protecting some of these limited areas, it is appropriate for the states, tribes, and local governments to consider protecting them.

MYTH: The *Rapanos* case has created uncertainty in implementation of the Clean Water Act and delays in state and local construction projects.

REALITY: While the *Rapanos* case did not result in a unified decision, the Court uniformly recognized that there are limits to Federal jurisdiction. As the Corps and EPA have continued to gain experience and consistency in implementing the guidance since the *Rapanos* decision, it is becoming clearer to them as to how to make jurisdictional determinations under the Act, and the backlog of permit applications is being worked down. The guidelines that are in place are protecting the Federal interest in clean water and respecting the rights of states, tribes, and local governments to manage their own resources and land use. Expanded jurisdiction under H.R. 5088 would mean a huge increase in permit applications, and this would lead to longer permitting delays.