July 20, 2010

"America's Commitment to Clean Water Act"
Restores the Scope of the Clean Water Act without Expanding It

Dear Colleague:

On April 21, 2010, I introduced H.R. 5088, America's Commitment to Clean Water Act (ACCWA), for the purpose of overturning two Supreme Court cases that have created great confusion about the scope of the Clean Water Act. The bill does so without expanding or contracting the scope of the Act.

To confirm my intent, I wrote to EPA Administrator Lisa Jackson and Assistant Secretary of the Army Jo-Ellen Darcy and asked whether the agencies agree that the bill would restore, but not expand, the geographic scope of the Clean Water Act. The answer from both Administrator Jackson and Assistant Secretary Darcy is "yes."

EPA Administrator Jackson wrote, "After reviewing the legislation, it is EPA's view that ACCWA would restore the historic scope of CWA jurisdiction as it existed prior to the Supreme Court decisions without expanding it."

Assistant Secretary Darcy wrote, "The Army holds the view that H.R. 5088, as drafted, would generally restore the historic scope of the Clean Water Act jurisdiction as it existed prior to SWANCC and Rapanos/Carabell."

The agencies charged with implementing the Clean Water Act agree that America's Commitment to Clean Water Act does not expand the scope of Federal jurisdiction. Copies of both letters are posted on the Committee on Transportation and Infrastructure website.

The bill is necessary because the two Supreme Court decisions in *SWANCC* and *Rapanos* as to what waters are within the jurisdiction of the Clean Water Act diminish protection for water quality and create confusion in the regulated community and at the implementing agencies. The results are delays in considering jurisdiction and unnecessary costs for everyone. The court cases allow for increased pollution and destruction of waters. For example, drinking water source areas – headwaters and small streams – that provide water to 117 million people are vulnerable to pollution as a direct result of the Supreme Court decisions.

The key to addressing the Supreme Court cases is to delete the word "navigable" from the Clean Water Act. Although "navigable" appears in several sections of the Act, Congress made it clear in 1972 that "navigable" was not being used to define the coverage of the Act. At that time, Congress struck the term "navigable" from the definition of "waters of the United States." Unfortunately, the current Court struggles to give meaning to the term. "Navigable" created so much confusion that the Supreme Court justices presented five separate opinions in *Rapanos*, with no opinion having a majority of the Court.

To those who say that Congress only intended to address waters that are actually navigable, the Supreme Court does not agree. The Court has considered the scope of the Clean Water Act three times, and each time all nine justices agreed that waters do not have to be "navigable" to be covered by the Act. Yet the Court cannot agree on a meaning for the term.

Deleting the word "navigable" as proposed in H.R. 5088 does not broaden the scope of the Act as it existed prior to the Supreme Court decisions. Yet, critics of the bill argue that the EPA and the Corps of Engineers would interpret the bill to greatly expand Clean Water Act jurisdiction to every drop of water, including puddles and birdbaths. The agency interpretations reject the critics.

Simply put, if a discharge into waters of the United States was not subject to being regulated prior to the Supreme Court cases, it will not become regulated because of the passage of this bill. That is the intent of the bill, and Administrator Jackson and Assistant Secretary Darcy agree.

For more information on the bill, or to cosponsor America's Commitment to Clean Water Act, contact the Subcommittee on Water Resources and Environment at 225-0060.

Sincerely,

James L. Oberstar