Coalition Letter on the Clean Water Restoration Act

October 9, 2007

The Honorable Nancy Pelosi
Speaker of the U.S. House of Representative
H-232, U.S. Capitol
Washington, DC 20515

Dear Speaker Pelosi:

A bill is now making its way through the House that would, according to one legal expert, push "the limits of federal power to an extreme not matched by any other law, probably in the history of this country."

The bill, the Clean Water Restoration Act (H.R. 2421) is sponsored by Rep. James Oberstar. A similar bill, S. 1870, has been introduced by Sen. Russell Feingold in the Senate. The Clean Water Restoration Act seeks ostensibly to restore protections under the Clean Water Act lost due to Supreme Court decisions in 2001 and 2006 and to clarify which waters would be subject to regulation under the act.

We're concerned, however, that the Clean Water Restoration Act would achieve the opposite: It would expand the scope of the Clean Water Act far beyond its original intent while increasing confusion over what is and isn't to be protected. In addition, we believe the bill runs counter to the principle of accountable government as it seeks to transfer legislative power from elected officials to those appointed for life.

These shortcomings have significant implications for retirees, families, farmers, ranchers and owners of small businesses – many of whom have a significant portion of their net worth tied up in homes, lots or other real estate. With the real estate market already down and foreclosures due to sub-prime mortgage problems likely to drive it down further, the last thing that we need is government regulation that would diminish property values further.

In the 30+ years that the Clean Water Act has been on the books, there's been considerable uncertainty over what is subject to federal regulation. As a Government Accountability Office report notes, "[Army Corps of Engineers]… districts differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the jurisdiction of the federal government."

The absence of clear and consistent standards under the Act has led to abuse.

Floridian Ocie Mills and his son Carey, for example, were convicted of filling a "wetland" after placing clean fill dirt on mostly dry land. They ended up serving 21 months in prison.

U.S. District Court Judge Roger Vinson later characterized the conviction this way: "This case presents the disturbing implications of the expansive jurisdiction which has been assumed by the United States Army Corps of Engineers under the Clean Water Act. In a reversal of terms that is worthy of Alice in Wonderland, the regulatory hydra which emerged from the Clean Water Act mandates… that a landowner who places clean fill dirt on a plot of subdivided dry land may be imprisoned for the statutory felony offense of 'discharging pollutants into navigable waters of the United States.'"

Despite Judge Vinson's statement, Rep. Oberstar has defended this spectacular abuse and labeled the Millses "polluters," arguing that "Mill [sic] was a well-known activist in the property rights movement; testimony in his case revealed that he wanted to challenge the authority of the Clean Water Act."

It seems that Representative Oberstar believes that participating in the political process and challenging overzealous regulators constitutes criminal conduct. This is a rather expansive view of federal authority, to say the least.

Two U.S. Supreme Court cases, one in 2001 (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers)* and another in 2006 *(Rapanos v. U.S.)*, have significantly reduced the potential for abuse under the Clean Water Act.

The Clean Water Act was intended to prevent pollution of "navigable waters" of the U.S. The Court's decisions limit the federal government's previously wide latitude to define "navigable" and exert federal authority. Isolated, non-navigable waters, for example, are no longer subject to regulation. Isolated drainage ditches with insignificant, intermittent flows also are no longer be subject to federal authority under the Clean Water Act.

The Clean Water Restoration Act would restore the virtually limitless regulatory power federal agencies had assumed in contravention of congressional intent.

The bill would give federal agencies authority over "all interstate and intrastate waters," including non-navigable waters. As such, it not only seeks authority far beyond the original scope of the Clean Water Act, but beyond Congress's constitutional powers, as "non-navigable" waters are unlikely to fall under the Commerce Clause, the principle enumerated power upon which Congress has relied for passage of environmental laws. Greater confusion over what waters are and are not subject to the Act would result, requiring the courts to attempt to sort things out.

The bill would also permit Congress to abdicate its legislative responsibilities. It defines "waters of the United States," in part, as "all waters… to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution," effectively deferring to courts to determine what waters are subject to regulation.

Further, the bill's reference to "activities affecting these waters" could give federal agencies the ability to assume expansive authority over not only water, but land and the air, too.

The expansive authority assumed by the federal government under the Clean Water Act has been poisonous to the rights of American citizens.

As you begin your important work on this issue, we hope you will remember that one does not reduce the harmful effects of poison by increasing the dosage.

Sincerely,

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**John Berthoud died on September 27, before this letter could be delivered.*