April 9, 2008

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 have a significant impact on property rights and economic growth in the U.S.

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 Senator 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 the judiciary.

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 General 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.

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 subject to federal authority under the Clean Water Act.

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.

Thank you for your immediate attention to this important issue.

Sincerely,

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