



● **Board of Directors**
Communications and Legislation Committee

6/8/2010 Board Meeting

8-7

Subject

Express opposition, unless amended, to H.R. 5088 (Oberstar, D-MN) regarding the America's Commitment to Clean Water Act

Description

Summary

H.R. 5088 (Oberstar D-MN), seeks to amend the Federal Water Pollution Control Act, commonly known as the Clean Water Act ("CWA"), by expanding the current jurisdiction of the Act, by legislatively reversing two Supreme Court decisions that the bill asserts have limited federal jurisdiction under the Act, and by removing the term "navigable waters" from the Act and substituting in its place, the phrase "waters of the United States."

Background and Analysis

The self-stated goals of H.R. 5088 are to:

- reaffirm the original objective of Congress in enacting the CWA Amendments of 1972;
- reaffirm the definition of the waters of the United States that are subject to the CWA consistent with the interpretation prior to the decisions of the U.S. Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC"), and the consolidated cases of *Rapanos v. U.S.* and *Carabell v. U.S. Army Corps of Engineers*, 547 U.S. 715 (2006) ("*Rapanos*"), by legislatively overturning the effect of those decisions; and
- define the term "waters of the United States" and to protect such waters as authorized by the powers granted under Article I, Section 8; Article II, section 2; and Article IV, section 3; of the U.S. Constitution, consistent with the CWA and subsequent amendments.

The bill would affirm and return federal jurisdiction to that in effect in 2001, prior to limitations on federal jurisdiction that resulted from U.S. Supreme Court decisions in the *SWANCC* and *Rapanos* cases. In *SWANCC*, the Court invalidated a 1986 U.S. Army Corps of Engineers regulation, the "Migratory Bird Rule," that had required CWA Section 404 permits for certain isolated wetland areas providing habitat for migrating birds. The Court found that federal jurisdiction under the CWA did not extend to areas with no hydrologic connection to bodies of water over which the Corps' traditional jurisdiction, under a navigable standard, would apply. And in the *Rapanos* decisions, a divided court, found that to justify federal jurisdiction under the CWA, a "significant nexus" between a traditionally defined navigable waterway and the regulated wetland was required.

Similar legislation was introduced in 2009 as S. 787 (Feingold, D-WI). While voted out of the Senate Committee on Environment and Public Works in June 2009, the measure has not been brought to the full Senate for a vote. Unlike S. 787, that explicitly recognized the protective water rights language of Section 101(g) of the CWA, the present bill is silent on the provisions of the act that recognize state water rights and seeks to expand the CWA jurisdiction beyond the traditional Commerce Clause basis.

Metropolitan has been closely working with the Western Urban Water Coalition as well as other national water groups. Primarily those groups are adopting oppose positions unless amended; many looking for an exemption for drinking water systems similar to an existing exemption for wastewater systems.

Effect on Metropolitan

If enacted into law, the bill would expand current federal jurisdiction to include some areas that are not presently covered by the CWA. Metropolitan would likely be required to obtain additional CWA Section 404 permits for maintenance and construction projects within its service area. This would result in additional time and expense for some projects and the potential delay of critical maintenance work.

Recommended amendments

The proposed amendments ([Attachment 1](#)) propose an exclusion for certain water conveyance facilities, similar to those provided in the bill for waste treatment systems and prior converted cropland, and seek to clarify that Congress did not intend to require the "significant nexus" test set forth in the *Rapanos* decisions as a limitation for wetlands jurisdiction under the CWA.

Policy

Although the Board has, in the past, adopted principles supportive of the goals set forth in the CWA, no adopted policy principle specifically addresses the amendments proposed by H.R. 5088.

California Environmental Quality Act (CEQA)

CEQA determination for Options #1 and #2:

The proposed action is not defined as a project under CEQA because it involves continuing administrative activities, such as general policy and procedure making (Section 15378(b)(2) of the State CEQA Guidelines). In addition, where it can be seen with certainty that there is no possibility that the proposed action in question may have a significant effect on the environment, the proposed action is not subject to CEQA (Section 15061(b)(3) of the State CEQA Guidelines).

The CEQA determination is: Determine that the proposed action is not subject to CEQA pursuant to Sections 15378(b)(2) and 15061(b)(3) of the State CEQA Guidelines.

CEQA determination for Option #3:

None required

Board Options

Option #1

Adopt the CEQA determination and authorize the General Manager to express Metropolitan's opposition to H.R. 5088, unless amended.

Fiscal Impact: Unknown

Business Analysis: If adopted as currently drafted, H.R. 5088 may result in additional permitting costs and delays for Metropolitan construction and maintenance projects.

Option #2

Adopt the CEQA determination and authorize the General Manager to express Metropolitan's opposition to H.R. 5088.

Fiscal Impact: Unknown

Business Analysis: If adopted as currently drafted, H.R. 5088 may result in additional permitting costs and delays for Metropolitan construction and maintenance projects.

Option #3


Take no position on H.R. 5088.

Fiscal Impact: Unknown

Business Analysis: If adopted as currently drafted, H.R. 5088 may result in additional permitting costs and delays for Metropolitan construction and maintenance projects.

Staff Recommendation

Option #1


Linda Waade
Deputy General Manager, External Affairs

5/21/2010
Date


Jeffrey Kichtlinger
General Manager

5/25/2010
Date

Attachment 1 – Proposed Amendments to H.R. 5088

Ref# ea12606114

111TH CONGRESS
2D SESSION

H. R. 5088

To amend the Federal Water Pollution Control Act to reaffirm the jurisdiction of the United States over waters of the United States.

IN THE HOUSE OF REPRESENTATIVES

APRIL 21, 2010

Mr. OBERSTAR (for himself, Mr. DINGELL, and Mr. EHLERS) introduced the following bill; which was referred to the Committee on Transportation and Infrastructure

A BILL

To amend the Federal Water Pollution Control Act to reaffirm the jurisdiction of the United States over waters of the United States.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “America’s Commit-
5 ment to Clean Water Act”.

6 **SEC. 2. PURPOSES.**

7 The purposes of this Act are as follows:

- 8 (1) To reaffirm the original objective of Con-
9 gress in enacting the Federal Water Pollution Con-

1 trol Act Amendments of 1972 (86 Stat. 816) to re-
2 store and maintain the chemical, physical, and bio-
3 logical integrity of the Nation's waters.

4 (2) To reaffirm the definition of the waters of
5 the United States that are subject to the Federal
6 Water Pollution Control Act (33 U.S.C. 1251 et
7 seq.) consistent with the interpretation of such Act
8 prior to the decisions of the United States Supreme
9 Court in ~~Solid Waste Agency of Northern Cook~~
10 ~~County v. United States Army Corps of Engineers,~~
11 ~~531 U.S. 159 (2001), and~~ the consolidated cases of
12 Rapanos v. United States and Carabell v. United
13 States Army Corps of Engineers, 547 U.S. 715
14 (2006), by legislatively overturning the effect of
15 ~~those that~~ decisions.

16 (3) To define the term "waters of the United
17 States" and to protect such waters as authorized by
18 the powers granted under section 8 of article I, ~~see~~
19 ~~tion 2 of article II, and section 3 of article IV~~ of the
20 Constitution of the United States and in a manner
21 consistent with the Federal Water Pollution Control
22 Act and subsequent amendments thereto.

23 **SEC. 3. FINDINGS.**

24 Congress finds the following:

1 (1) The decisions of the United States Supreme
2 Court in ~~Solid Waste Agency of Northern Cook~~
3 ~~County v. United States Army Corps of Engineers~~
4 ~~and~~ the consolidated cases of Rapanos v. United
5 States and Carabell v. United States Army Corps of
6 Engineers unduly restricted the scope of the Federal
7 Water Pollution Control Act and impaired~~ed~~ the statu-
8 tory protections for waters of the United States con-
9 trary to the intent of Congress.

10 (2) Water is a unique and precious resource
11 that is necessary to sustain human life and the life
12 of animals and plants.

13 (3) Water is important for agriculture, trans-
14 portation, energy production, recreation, fishing and
15 shellfishing, and municipal and commercial uses.

16 (4) Water moves through interconnected hydro-
17 logic cycles, and the pollution, degradation, or de-
18 struction of a part of an aquatic system, including
19 ~~geographically isolated or~~ certain intrastate waters, can
20 affect the chemical, physical, and biological integrity
21 of other parts of the aquatic system.

22 (5) Small and intermittent streams, including
23 seasonal streams, and their headwaters comprise the
24 majority of all stream and river miles in the
25 conterminous United States. These waters affect the

1 introduction of pollutants to larger rivers and
2 streams, the life cycles of aquatic organisms and
3 other wildlife, and the flow of higher order streams
4 during floods.

5 (6) The pollution, degradation, and destruction
6 of waters of the United States, individually and in
7 the aggregate, have a substantial relation to and ef-
8 fect on interstate commerce. Discharges of pollut-
9 ants into waters of the United States are the result
10 of, relate to, and are a necessary part of commercial
11 or economic activity.

12 (7) Millions of people in the United States de-
13 pend on the waters of the United States, including
14 wetlands, to improve water quality, recharge surface
15 and subsurface drinking water supplies, protect
16 human health, and create commercial or economic
17 opportunity. Source water protection areas con-
18 taining one or more small or intermittent streams
19 provide water to public drinking water supplies that
20 serve more than 117,000,000 people in the United
21 States.

22 (8) Millions of people in the United States
23 enjoy recreational activities that depend on the wa-
24 ters of the United States, including wetlands, and
25 those activities and associated travel generate bil-

1 lions of dollars of income each year for the travel,
2 tourism, recreation, and sporting sectors of the econ-
3 omy of the United States.

4 ~~(9) Protecting the waters of the United States~~
5 ~~from discharges of pollutants, degradation, and de-~~
6 ~~struction is a necessary and proper means of imple-~~
7 ~~menting treaties to which the United States is a~~
8 ~~party, including treaties protecting fish, birds, and~~
9 ~~wildlife.~~

10 ~~(10) Protecting the waters of the United States~~
11 ~~from discharges of pollutants, degradation, and de-~~
12 ~~struction is a necessary and proper means of pro-~~
13 ~~tecting the territory or other property belonging to~~
14 ~~the United States, including parkland, refuge land,~~
15 ~~and other land under Federal ownership and the wa-~~
16 ~~ters encompassed by that land.~~

17 (11) Administrative and judicial interpretations 18 of the
Federal Water Pollution Control Act have

19 treated ground water separately from “waters of the
20 United States” as that term is used in such Act, and
21 ground water has not been considered to be “waters
22 of the United States” under such Act. This Act and
23 the amendments made by this Act do not affect
24 those administrative and judicial interpretations.

1 ~~(12) This Act and the amendments made by~~
2 ~~— this Act do not affect the authority of the Secretary~~
3 ~~— of the Army or the Administrator of the Environ-~~
4 ~~— mental Protection Agency under the provisions of the~~
5 ~~— Federal Water Pollution Control Act as inter-~~
6 ~~— preted or applied by the Secretary or Administrator~~
7 ~~— as of January 8, 2001.~~

(*) Congress supports the policy in effect under section
101(g) of the Federal Water Pollution Control Act (33 U.S.C.
1251(g)), which states that “the authority of each State to allocate
quantities of water within its jurisdiction shall not be superseded,
abrogated or otherwise impaired by this Act. It is the further policy of
Congress that nothing in this Act shall be construed to supersede or
abrogate rights to quantities of water which have been established by
any State. Federal agencies shall cooperate with State and local
agencies to develop comprehensive solutions to prevent, reduce and
eliminate pollution in concert with programs for managing water
resources.”

8 **SEC. 4. DEFINITIONS.**

9 Section 502 of the Federal Water Pollution Control
10 Act (33 U.S.C. 1362) is amended—

11 (1) by repealing paragraph (7); and

12 (2) by adding at the end the following:

13 “(26) WATERS OF THE UNITED STATES.—

14 “(A) IN GENERAL.—The term ‘waters of

15 the United States' includes—

16 “(i) all waters that are currently used,
17 were used in the past, or may be suscep-
18 tible to use in interstate or foreign com-
19 merce, including all waters that are subject
20 to the ebb and flow of the tide;

21 “(ii) all interstate and international
22 waters, including interstate and inter-
23 national wetlands;

24 “(iii) all other waters, including intra-
25 state lakes, rivers, streams (including

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1 intermittent streams), mudflats, sandflats,
2 wetlands, sloughs, prairie potholes, wet
3 meadows, playa lakes, or natural ponds,
4 the use, degradation, or destruction of
5 which does or would affect interstate or
6 foreign commerce, the obligations of the
7 United States under a treaty, or the terri-
8 tory or other property belonging to the
9 United States;

10 “(iv) all impoundments of waters oth-
11 erwise defined as waters of the United
12 States under this paragraph;

13 “(v) tributaries of waters identified in
14 clauses (i) through (iv);

15 “(vi) the territorial seas; and

16 “(vii) waters, including wetlands, ad-
17 jacent to waters identified in clauses (i)
18 through (vi).

19 “(B) EXCLUSIONS.—The term ‘waters of
20 the United States’ does not include—

21 “(i) waters that are all or part of a
22 waste treatment system, including treat-
23 ment ponds or lagoons designed to meet
24 the requirements of this Act; or

1 “(ii) prior converted cropland, except
2 that, notwithstanding the determination of
3 an area’s status as prior converted crop-
4 land by the Secretary of Agriculture, for
5 the purposes of this Act, the final author-
6 ity regarding jurisdiction under this Act
7 remains with the Administrator.

“(iii) man-made conveyance systems, including
pipelines, aqueducts, canals, and associated facilities.”

8 “(27) WASTE TREATMENT SYSTEM.—

9 “(A) IN GENERAL.—The term ‘waste
10 treatment system’ means a confined and dis-
11 crete system or structure that is specifically de-
12 signed and engineered to meet the requirements
13 of this Act and that is determined by the Ad-
14 ministrator to be documented by the applicable
15 permitting authority under section 402 or 404.

16 “(B) SPECIAL RULE.—A system or struc-
17 ture may not be documented as a waste treat-
18 ment system and the Administrator may not
19 make a determination under subparagraph (A)
20 if, after the date of enactment of this para-
21 graph, such system or structure is created in
22 waters of the United States or results from the
23 impoundment of waters of the United States.

24 “(C) GRANDFATHER.—Notwithstanding

25 subparagraph (B), a waste treatment system in

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1 existence and documented before the date of en-
2 actment of this paragraph may include a waste
3 treatment system that was either originally cre-
4 ated in or resultant from the impoundment of
5 waters of the United States if the discharge
6 from such system meets applicable standards
7 and limitations at the point of discharge in a
8 manner similar to other discharges under this
9 Act.

10 “(D) APPLICABILITY.—The definition con-
11 tained in this paragraph shall apply only for the
12 purposes of paragraph (26).

13 “(28) PRIOR CONVERTED CROPLAND.—The
14 term ‘prior converted cropland’ means a wetland as
15 determined by the Secretary of Agriculture—

16 “(A) that has been converted by draining,
17 dredging, filling, leveling, or other manipulation
18 (including the removal of woody vegetation or
19 any activity that results in impairing or reduc-
20 ing the flow and circulation of water) for the
21 purpose of or to have the effect of making pos-
22 sible the production of an agricultural com-
23 modity without further application of the ma-
24 nipulations described herein if—

1 “(i) such production would not have
2 been possible but for the conversion; and

3 “(ii) before the conversion such land
4 was wetland, farmed wetland, or farmed-
5 wetland pasture;

6 “(B) on which such conversion occurred
7 prior to December 23, 1985;

8 “(C) on which an agricultural commodity
9 had been produced at least once before Decem-
10 ber 23, 1985;

11 “(D) that, as of December 23, 1985, did
12 not support woody vegetation and met the fol-
13 lowing hydrologic criteria:

14 “(i) inundation was fewer than 15
15 consecutive days during the growing season
16 or 10 percent of the growing season,
17 whichever is less, in most years (50 per-
18 cent chance or more); and

19 “(ii) if a pothole, playa, or pocosin,
20 ponding was fewer than 7 consecutive days
21 during the growing season in most years
22 (50 percent chance or more) and satura-
23 tion was fewer than 14 consecutive days
24 during the growing season most years (50
25 percent chance or more); and

1 “(E) that is devoted to an agricultural
2 use.”.

3 **SEC. 5. CONFORMING AMENDMENTS.**

4 The Federal Water Pollution Control Act (33 U.S.C.
5 1251 et seq.) is amended—

6 (1) by striking “navigable waters of the United
7 States” each place it appears and inserting “waters
8 of the United States”;

9 (2) in section 304(l)(1) by striking “NAVIGABLE
10 WATERS” in the paragraph heading and inserting
11 “WATERS OF THE UNITED STATES”; and

12 (3) by striking “navigable waters” each place it
13 appears and inserting “waters of the United
14 States”.