



# Express Opposition, Unless Amended, to HR 5088 (Oberstar, D-MN) -- "America's Commitment to Clean Water Act"

Communications and Legislation Committee

Item 8-7

June 8, 2010

# Background

## Stated Goals of HR 5088 are to:

- “Reaffirm” Congressional intent when enacting Clean Water Act amendments of 1972
- Overturn the effect of two U.S. Supreme Court decisions that limited CWA jurisdiction
- Define the term “waters of the United States” broadly and protect such waters to extent authorized by U.S. Constitution

# *Solid Waste Agencies of Northern Cook County v. U.S. Army Corps of Engineers (2001) 531 U.S. 159*

- 5-4 decision
  - Statutory term “waters of the US” not intended to include “non-navigable, isolated, intrastate waters” merely because they are frequented by migratory birds
  - Strongly suggests CWA jurisdiction comes from Congress’ traditional power over navigation arising from Commerce Clause
- Dissent, J. Stevens, citing *United States v. Riverside Bayview Homes, Inc.*, (1985) 474 U.S. 121
  - “[T]he Act's definition of ‘navigable waters’ as ‘the waters of the United States’ makes it clear that the term ‘navigable’ as used in the Act is of limited import.”

# *Rapanos v. United States and Carabell v. United States* (2006) 547 U.S. 715

- 4-4-1 decision
- The “Narrowest Grounds Test” renders Justice Kennedy’s opinion the controlling rule of law
- Jurisdiction requires significant nexus to a navigable waterway and must include significant chemical, physical, or biological affects

# Proposed Amendments

- Exclude water conveyance systems (pipelines, aqueducts, canals) along with already excluded waste treatment systems and prior converted croplands
- Add language affirming CWA section 101(g) policy “that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State”
- Delete language overturning effect of *SWANCC* decision

# Board Options

- Option #1
  - Adopt the CEQA determination
  - Oppose HR 5088, unless amended
- Option #2
  - Adopt the CEQA determination
  - Oppose HR 5088
- Option #3
  - Adopt the CEQA determination
  - Take no position on HR 5088

# Staff Recommendation

- Option #1

