

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.

The Honorable Nancy Pelosi

October 9, 2007

page 2

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.

The Honorable Nancy Pelosi
October 9, 2007
page 3

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,

David Ridenour
Vice President
National Center for Public Policy Research

Paul M. Weyrich
National Chairman
Coalitions for America

Linda C. Runbeck
President
American Property Coalition

J. William Lauderback
Executive Vice President
The American Conservative Union

G. Ray Arnett
Former President
National Wildlife Federation

Hon. Malcolm Wallop
Chairman
Frontiers of Freedom

John Berthoud*
President
National Taxpayers Union

Lori Roman
Executive Director
American Legislative Exchange Council

Fred Smith
President
Competitive Enterprise Institute

Steven C. Borell, P.E.
Executive Director
Alaska Miners Association

Laura Skaer
Executive Director
Northwest Mining Association

Jim Handley
Executive Vice President
Florida Cattlemen's Association

Adrian T. Moore
Vice President of Research
Reason Foundation

Larry Pratt
Executive Director
Gun Owners of America

Jim Martin
President
60 Plus Association

H. Sterling Burnett
Senior Fellow
National Center for Policy Analysis

Chris Derry
President
Bluegrass Institute

Mychal Massie
Advisory Council Chairman
Project 21

Helen Moore
Executive Director
Water for Life, Inc.

Dennis Hollingsworth
State Senator
California

Caren Cowen
Executive Director
New Mexico Cattle Growers' Association

Lenore Hardy Barrett
State Representative
Idaho

Timothy La Farge, Ph.D
Forest Geneticist, Retired
USDA Forest Service

Randy T. Simmons
Mayor, Providence City, UT
Professor, Utah State University

Tracy Walton
President, Gem County Farm Bureau
Emmett, ID

R.J. Smith
Director
Center for Private Conservation

Niger Innis
National Spokesman
Congress of Racial Equality

Paul A. Cleveland, Ph.D.
Professor of Economics
Birmingham-Southern College

Chris Perkins
Executive Director
Coalition for a Conservative Majority

Leroy Watson
Legislative Director
National Grange

The Honorable Nancy Pelosi

October 9, 2007

page 4

Partnership for the West	Bill Moshofsky Vice President Oregonians In Action	Roy Cordato, Ph.D. VP for Research and Resident Scholar John Locke Foundation
Kelsey Zahourek Executive Director Property Rights Alliance	Thomas K. Remington Managing Editor U.S. Hunting Today	Margaret Nachtigall Executive Director South Dakota Stock Growers Association
Lew Uhler President National Tax Limitation Committee	Robert Sanchez Policy Director James Madison Institute	Elizabeth Arnold Environmental Community Outreach Services, Juneau, AK
Maxine and Ron Korman Korman Ranch Hinsdale, Montana	Roger Jones Engineer Red River Coal Company, Inc.	Amy Ridenour Director Americans for the Preservation of Liberty
Mark Pollot Justice Dept. Official, Reagan Admin., Instrumental Force behind Reagan Executive Order on Regulatory Takings	Mike Dail Chairman American Land Foundation	Bruce A. Griffith President Griffith Lumber Co., Inc.
Carol W. LaGrasse President Property Rights Foundation of America	Chuck Cushman President American Land Rights Association	E. Calvin Beisner Assoc. Prof. of Historical Theology and Social Ethics, Knox Theological Seminary
Paul Driessen Senior Policy Advisor Center for the Defense of Free Enterprise	Candace Oathout Chair, Citizens Against Recreational Eviction—USA	Jerry Hamilton Environmental Coordinator Formation Capital Corporation, US
Tom DeWeese President American Policy Center	Christian J. Schoenewald Vice Chairman, VA 5 th Congressional District Republican Committee	Forest Thigpen President Mississippi Center for Public Policy
Rachel Thomas Property Rights Advocate Huachuca City, AZ	John Taylor President Tertium Quids	C. Preston Noell III President Tradition, Family, Property, Inc.
Paula Easley President Alaska Land Rights Coalition	Michael S. Coffman President Environmental Perspectives, Inc.	Steve Hammond President Citizens Alliance for Property Rights
Richard O. Rowland President Grassroot Institute of Hawaii	Chris Horgan Executive Director Stewards of the Sequoia	C.J. Hadley Publisher/Editor Range Magazine
Judy Boyle Property Rights Activist Idaho	Beth Machens Board of Aldermen City of West Alton, MO	Bill Wilson President Americans for Limited Government
John and Connie Morris Members, Tongue River Watershed Alliance, and MT and WY Farm Bureaus	Dana Joel Gattuso Senior Fellow National Center for Public Policy Research	Holt and Jane Hogan Chairman and Secretary-Treasurer Ontario Hardwood Company, Inc.
Ron and Glenda Frei Idaho County Farm Bureau	Richard Falknor Executive Vice President Maryland Taxpayers Association, Inc.	Howard Hutchinson Executive Director Coalition of Arizona/New Mexico Counties

The Honorable Nancy Pelosi

October 9, 2007

page 5

Dane vonBreichenruchardt
President
U.S. Bill of Rights Foundation

Stephanie Whalen
President
Hawaii Agriculture Research Center

Fred Grau
Executive Director
Take Back Pennsylvania

Dan Goulet
Editor and Publisher
Freedom Journal

Teresa Platt
Executive Director
Fur Commission USA

Walt Harvey
Director and Treasurer
Grassroot Institute of Hawaii

Brian Bishop
Director
Rhode Island Wise Use

Leo M. Schwartz
Chairman
Virginia Land Rights Coalition

Harold L. Stephens
Member
Citizens to Protect the Confluence

Bruce Colbert
Executive Director of the Property Owners
Association of Riverside County, CA

Jonathan DuHamel
President
People for the West-Tucson

Jerry Fennell
Chairman
Jicarilla Mining District

Dan Byfield
President
Liberty Matters

Jack and Patricia Shockey
President and Director
Citizens for Property Rights

Timothy L. Ravndal
President
Montana Multiple Use Association

Leri M. Thomas, Ph.D.
Charter Member
Virginians for Property Rights

Margaret Byfield
Executive Director
Stewards of the Range

Bonner R. Cohen, Ph.D.
Senior Fellow
National Center for Public Policy Research

Katherine Lehman
President
People for the USA Grange #835

Jo Ann Roach
President
Sisters of the River

Joyce Morrison
Citizens Action for Agricultural
Property Rights

Don Corace
Author, "Offshore: A Novel"
Naples, FL

Milari Madison
Property Owner
Loudoun County, VA

Alexandra H. Mulkern
Mechanicsville, MD

Donald Castellucci, Jr.
Councilman, Town of Owego
Tioga County, NY

Carol L. Brown
Vancouver, WA

Pamela Secord
Santa, ID

Nancy Landt
Member
Santa Creek Land Owners Association

Cliff McDonald
Needles, CA

Stephen L. Ralston
Columbia, PA

Pete Ellsworth
Culdesac, ID

For more information, contact:
David Ridenour
The National Center for Public Policy Research
501 Capitol Court, NE, Suite 200
Washington, DC 20002
(202) 543-4110
dridenour@nationalcenter.org

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