Statement of
Honorable James L. Oberstar
Committee on Transportation and Infrastructure
Hearing on
"Status of the Nation's Waters, including Wetlands, Under The Jurisdiction of the Federal Water Pollution Control Act"
July 17, 2007

Today, the Committee meets to discuss one of the most important environmental issues of our time – the jurisdictional scope of the Federal Water Pollution Control Act Amendments of 1972.

This hearing is the first of two hearings scheduled on the history of the Clean Water Act, the intent of Congress over three decades ago in enacting this statute, and how two recent Supreme Court decisions have undermined what has been called one of the most successful environmental statutes ever enacted.

This October marks the 35th anniversary of the modern Clean Water Act. This landmark environmental statute established a national commitment to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. It is the main reason the nation's waterways have shown dramatic improvement in water quality, even as the nation's population has increased by close to 30 percent.

Yet, even today, roughly one-third of all waters do not meet the fishable and swimmable standards established over 30 years ago – so there is still work to be accomplished. Unfortunately, this task has been made more difficult by two activist rulings of the United States' Supreme Court that have limited the jurisdictional scope of the Act. These two decisions undermine decades of Federal, State, and local efforts to improve the nation's water quality, and have placed at risk the nation's ability for continued improvement of our water-related environment.

This Committee bears the responsibility for determining the future successes or failure of the Clean Water Act. Our efforts to correct the Court's unfortunate interpretation literally mean the difference between achieving the fishable and swimmable goals established almost 35 years ago and admitting that waters today are as clean as they will ever be.

As the administrative assistant to the "father of the Clean Water Act," John Blatnik, and an active participant in this legislation, let me state to my Committee colleagues that Congress clearly intended the broadest possible constitutional interpretation of the Act to "restore and maintain the chemical, physical, and biological integrity of the Act."

I have read both the SWANCC and Rapanos decisions, and I strongly disagree with the Court's invention of a fictional nexus between authority to protect the nation's waters and so-called "traditionally-navigable waters."

Our predecessors on the then-Public Works Committee understood the traditions of Congressional authority for “traditionally-navigable” waters, yet they purposefully deviated from these notions in order to establish a new national commitment to clean water.

The 1972 Act represented a fundamental shift towards the restoration and maintenance of the nation’s waters, and established a national goal that all waters be fishable and swimmable by 1983. Congress understood that limiting Federal authority to only the interstate waters and inland waterways could not achieve the desired goal of achieving fishable and swimmable for all the nation’s waters.

As noted by Chairman Blatnik, during floor consideration of this bill:

In this measure, we are totally restructuring the water pollution control program and making a far-reaching national commitment to clean water, as much as our space program was restructured a decade ago when the late President Kennedy committed American to land on the moon...The legislation we are considering is of immeasurable significance to the Nation. In many ways, it is a far more difficult undertaking than the 42,500-mile highway program which the Public Works Committee initiated in 1956…That program has been hailed as the greatest public works undertaking in all of history. The water pollution control program we are initiating in this body will, in my judgment, be an even more monumental task.

Opponents of strong Federal protections over the nation's water-related environment continue to argue that Congress never intended an expansive view of Federal authority to protect the nation’s waters. For example, the late-Justice Rehnquist and Justice Scalia point to the use of the term “navigable,” which appears throughout the Clean Water Act, as an indication of Congress’ intent to tie jurisdiction with traditional concepts of navigability.

It is without question that the Clean Water Act uses the terms "navigable waters." The Act uses the term "navigable" 86 times. However, the legislative history clearly shows that Congress rejected the concept of a limited Federal authority over U.S. waters. As the Committee learned from the failed model of the first Federal Water Pollution Control Act, enacted in 1948, limiting Federal authority to interstate waters and inland waterways would not achieve the dramatic improvements in water quality demanded by the nation.

For example, the House passed version of the 1972 Act specifically defined the term “navigable waters” to mean “the navigable waters of the United States, including the territorial seas.” Yet, the Public Works Committee Report clearly expressed that “the Committee was reluctant to define the term ‘navigable waters’ … on the fear that any interpretation would be read narrowly…[which was] not the Committee’s intent.”

Yet, even our Committee's intent for broad Federal authority was further expanded during negotiations with the Senate. During conference negotiations, the definition of the “waters of the United States” was further amended to its current form by dropping the term “navigable” from the definition, and in the words of Congressman Dingell, “clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern [the scope of the Act].”

Finally, as noted in the Conference report, "The conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation…"

In the decades after enactment of the Clean Water Act, both the Corps and EPA broadly interpreted the Clean Water Act's authority over waters consistent with the broadest possible constitutional interpretation of the Act. The regulatory definitions for "waters of the United States" were promulgated to allow the agencies to assert jurisdiction upon a waterbody's relation to interstate commerce – based upon Congress' Commerce Clause authorities.

By allowing the Corps and EPA the flexibility to address potential impairments of water quality at the source, rather than further downstream, the Federal agencies have been able to achieve significant improvements to water quality over the past three decades.

For close to 30 years, the scope of the Clean Water Act was settled case law. Stakeholders on both sides of this issue understood the concepts behind the program, and were more-or-less comfortable with the implementation of the Act. Yet, in 2001, and again in 2006, the Supreme Court decided to reinterpret what most scholars, practitioners, and governmental agencies thought was settled law. In the words of Justice Stevens, who wrote the dissenting opinion in SWANCC, “the Court takes an unfortunate step that needlessly weakens our principal safeguard against toxic water.”

Today, we begin the debate on restoring the certainty that a few activist members of the Supreme Court have taken away. We sit in the same room as our predecessors on this Committee – visionaries who had the dedication to protect the nation's waters for our generation, and generations to come.

They faced many of the same issues we face today – voting in support of clean water over the concerns of the regulated community. Yet, they also had the foresight to see what good could come from protecting the nation's waters for their children and grandchildren, as well as the courage to stand up for what they knew was right – acting as loyal stewards for the world they inherited from their forefathers. Today, we begin a similar journey on Clean Water, and we must also dedicate ourselves to these efforts. We owe future generations no less.

###