Expanding Federal Clean Water Act Jurisdiction

The Clean Water Restoration Act (S. 787)

Key Issue:
The Clean Water Act (CWA) has succeeded in large part due to the federal-state partnership it fosters. This partnership is based on the principal that federal jurisdiction need not be extended to all waters and that states should have broad authority to regulate waters within state boundaries. Key to establishing the line between state and federal jurisdiction has been the term “navigable waters.” However, pending legislation threatens to undermine this partnership by removing “navigable” from the definition of waters subject to federal jurisdiction under the CWA.

NASDA Position:
NASDA opposes the Clean Water Restoration Act (S. 787) because the legislation:

- **Expands federal jurisdiction:** S. 787 removes “navigable” from the definition of waters covered by the CWA and allows the federal government to exercise jurisdiction over all interstate and intrastate waters, including isolated ponds, prairie potholes, and intermittent streams.
- **Threatens rural economies:** S. 787 would vastly expand the number of activities that require CWA permits, unduly burdening farmers and ranchers without necessarily improving water quality. Not only would many activities not previously regulated require federal permits, those permits would be subject to challenge in federal court, exposing agriculture producers to citizen action suits and delaying or halting activities vital to our rural economies.
- **Creates uncertainty and increases litigation:** The CWA has been heavily litigated and significant case law developed. Removing “navigable” would fundamentally alter the underlying text of the CWA and likely open an entirely new round of litigation over “waters of the U.S.”
- **Erodes state authority:** S. 787 removes from state jurisdiction numerous water bodies. This would fundamentally alter the institutional relationships between federal and state partners and would likely lead to weakened state programs, resulting in negative environmental consequences. This undermines language in the CWA that recognizes that the primary responsibility for planning the development of use of water resources rests with the states.

Proposed Solutions:
NASDA supports the Clean Water Act’s goals of making the nation’s waters fishable and swimmable and is committed to efforts that ensure the maintenance of water quality at levels that protect human health, and environment. NASDA urges Congress to:

- **Retain “navigable”:** Maintain the distinction between state and federal jurisdiction by retaining “navigable” in the definition of “waters of the United States”
- **Recognize and protect state roles:** Protect the Clean Water Act’s recognition of states’ roles by protecting the principle that states have jurisdiction over water and land uses within state boundaries
- **Provide clarity:** Define unclear terms in the Clean Water Act such as “tributary,” “adjacent,” and “traditional navigable waters”

Additional Background:
Over the past 30 years, federal agencies have tried to expand jurisdiction of the CWA to include, for example, any wet area that could be used by a migratory bird. However, in recent years the U.S. Supreme Court has rebuffed this approach and ruled that the agencies’ expansive interpretation of waters covered by the CWA raised significant constitutional concerns (Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers in 2001 and Rapanos v. United States in 2006).