June 22, 2009

To: Senator Pat Roberts


Dear Senator Roberts,

On behalf of Governor Mark Parkinson, the Kansas Natural Resources Subcabinet, comprising the Departments of Health and Environment, Agriculture, Wildlife and Parks, the Kansas Water Office, State Conservation Commission, Kansas Corporation Commission and Animal Health, would like to express concerns over S. 787, the Clean Water Restoration Act. The bill, moving through the Senate Committee on Environment and Public Works, intends to clarify the jurisdiction of the Clean Water Act (CWA), by defining “waters of the United States”, in place of the current CWA term “navigable waters”. The intent is to restore the original jurisdiction of the CWA before the SWANCC and Rapanos decisions by the Supreme Court limited the applicability of the CWA.

The original jurisdiction of the CWA was defined in administrative regulation (33 CFR § 328.3 and 40 CFR § 128.2) interpreting Section 502 of the CWA. The SWANCC decision denied applicability of the CWA to isolated wetlands. The Rapanos decision introduced a requirement that jurisdictional waters have a “significant nexus” to historically navigable waters. The subsequent interpretation of those decisions on jurisdiction determinations has created a quandary in many Corps of Engineers and Environmental Protection Agency regional offices, predominantly leading to protracted delays in decisions on issuing Section 404 permits involving dredge and fill activities on certain water bodies, notably wetlands.

A previous bill introduced by Representative Oberstar in the last session of Congress, H.R. 2421, sought to clarify the jurisdictional issue similar to S. 787. That legislation encountered resistance from certain States and non-governmental organizations, who feared expansion of CWA applicability to situations such as ephemeral streams and farm ponds. Subsequently, the legislation was not reported out, but indications are the House Subcommittee on Water Resources and Environment will be drafting revised language to address the CWA jurisdiction issue this summer. In Kansas, similar concern over expansion has been raised by State agencies, non-governmental organizations and Basin Advisory Committees.

While jurisdictional water determinations have not been a major issue in Kansas, the Subcabinet agrees that clarification of CWA jurisdiction in matters involving Section 404 permits is necessary, given the uncertainty raised by the Supreme Court decisions. However, we are concerned that the current language of the proposed legislation may lead to an expansion of the number of waters subject to the CWA, including adherence to Federal water quality standards; and stormwater and wastewater NPDES permitting in lieu of state-directed efforts. One of the benefits touted with the proposed legislation is protection of small headwater streams. In Kansas, such drainages are either “ephemeral” (flows only during rain) or already protected as “waters of the state” under State law; therefore, expanded CWA authority is unnecessary. Return to the pre-SWANCC definition of jurisdictional waters should ensure ephemeral streams are not arbitrarily considered “Waters of the
US" while still allowing for protection of wetlands and playa lakes that play a vital role in migratory bird habitat and groundwater recharge.

Expansion of the CWA to additional waters, including dry streams and the estimated 100,000 – 250,000 farm ponds across the state, places an undue and unnecessary burden on Kansas agency resources dedicated to protecting the waters of the state by diverting their attention to gulches or ephemeral waters of marginal benefit. Over the past five years, conducting use attainability analyses (UAAs) on the classified surface waters in Kansas has cost the state $300,000 annually per 500 UAAs. Using such estimates as a baseline, S. 787 could increase the cost of state analysis by millions of dollars, while also increasing the costs of compliance for Kansans not traditionally impacted by CWA.

Furthermore, application of expanded CWA jurisdiction to certain ephemeral or private waters runs counter to existing State law identifying waters subject to surface water quality standards. The impact of expanded CWA jurisdiction to the citizens of Kansas is twofold: first, a sweeping jurisdiction is more likely to include more citizens and potentially subject their activities to growing federal permitting requirements. As demonstrated by recent rulings regarding pesticide applications, the number of activities requiring federal permits is on the rise. Second, by diverting attention to marginal waters, CWA jurisdiction expansion diminishes the capability of the state agencies to provide adequate response to issues in waters truly used by the public.

The Kansas Natural Resources Subcabinet agencies are committed to protecting and restoring water quality within Kansas. That commitment reflects a long-standing recognition of which waters are subject to CWA scrutiny. The current language of S.787 will upset the balance between State and Federal jurisdiction in these matters.

We agree that CWA jurisdiction should be clarified. Placing the defining language of 33 CFR 328.3(a), in its entirety, into Section 502 of the Clean Water Act would solve the problem. Therefore, we urge you to monitor S. 787 and any floor amendments, as well as any similar legislation introduced in the House and oppose expansion of CWA jurisdiction beyond that applied before the SWANCC decision. Additionally, explicit exclusions of CWA applicability to ephemeral waters, ground water and farm ponds are necessary to maintain the State-Federal balance in CWA administration and enforcement in Kansas. If expansion of CWA jurisdiction does occur, States should be given the discretion to apply any expanded scope to situations where beneficial impacts to the environment are readily apparent.

Should you have any need for more information, please contact Kim Christiansen of the Kansas Water Office at 785-296-3185. Please note the Natural Resources Subcabinet has scheduled a conference call and GLANCE on-line briefing on the issue Friday, June 26 at 9:30 EDT. Please refer to Ms. Christiansen’s June 16 email for information on participating in that briefing.

Sincerely,

[Signature]

Mike Hayden, Chair
Kansas Natural Resources Subcabinet