June 28, 2010

The Honorable Peter DeFazio
2134 Rayburn H.O.B.
Washington, DC 20515

RE: America's Commitment to Clean Water Act, H.R. 5088

Dear Representative DeFazio:

Our organizations represent Oregon's farmers, nursery growers, wheat growers, and irrigation water suppliers. In short, we represent a sizable sector of Oregon's rural citizens and the immense contribution that they make to our state's economy and social fabric.

We write to advise you of our serious concerns about H.R. 5088—the America's Commitment to Clean Water Act (ACCWA). We have serious concerns that the bill as introduced would greatly expand the historic scope of the federal government's jurisdiction under the Clean Water Act. This could have serious impacts upon Oregon's agricultural operations. We therefore ask that you not support this bill.

Our Concerns Explained

We are trade associations with members who depend on the state's natural resources for their livelihood. Our members recognize the value of protecting those resources, and strive to be good stewards of Oregon's land and water in their daily practices.

It is our view that H.R. 5088 will impair the individual states' ability to manage water quality issues at a local watershed level by expanding federal jurisdiction to activities and waters and lands that have never before been subject to federal jurisdiction under the Clean Water Act (CWA). This will hurt agriculture in Oregon and elsewhere in the United States. Before moving this bill forward, we are encouraging the entire Oregon delegation to carefully consider the economic and practical impacts that H.R. 5088 in its current form could have on the agricultural community.

H.R. 5088 proposes to restore the scope of federal jurisdiction under the CWA in response to the U.S. Supreme Court's decisions in *SWANCC* [1] and *Rapanos*.[2] However, rather than restore CWA jurisdiction, the bill expands CWA jurisdiction well beyond current or historical levels. Our organizations are concerned H.R. 5088 would expand federal water quality jurisdiction over "all waters of the United States," including intermittent, ephemeral and seasonal streams, and even irrigation ditches.

---

[1] *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001).
[2] *Rapanos v. United States*, 547 U.S. 715 (2006).

Because of these changes, the bill opens the door to new regulations governing a broader scope of actions in a broader scope of settings than has ever been the case under the CWA. And, of course, if history is any guide, the proposed amendments to the CWA will set off years of litigation over the meaning and impact of the changes.

Our organizations believe that H.R. 5088 would expand the scope of federal jurisdiction beyond historical levels in the following ways:

1. By removing all references to "navigable waters of the United States" each place it appears and inserting "waters of the United States." (*H.R. 5088, Sec. 4*). The removal of the so-called navigability test would extend federal water quality jurisdiction over all waters of the United States, not just the nation's principal waterbodies and their tributaries that meet the navigability test. This is certainly a roll-back to the pre-*SWANCC* regulatory environment; but when paired with the other changes in the bill and the lack of a savings clause, it goes well beyond.

2. By classifying intrastate waters as "waters of the United States." (*H.R. 5088, Sec. 4*). By specifically adding intrastate waters to the definition of waters of the United States, H.R. 5088 would open the door for the EPA and the Corps to promulgate regulations that expand their jurisdiction to cover all permanently or periodically wet areas within a state. This would invite the federal government to regulate matters that have previously been the exclusive domain of state and local governments.

3. Ditches are not excluded from "waters of the United States." Under current Corps regulations, many ditches are considered to be tributaries to other water bodies. Under H.R. 5088, tributaries are included in the definition of waters of the United States, meaning that H.R. 5088 would extend CWA jurisdiction to all activities affecting ditches, including brush clearing, culvert replacement, general maintenance, and similar activities.

4. H.R. 5088 lacks a savings clause expressly recognizing the continuing validity of several agricultural permitting exemptions in the CWA. In a noticeable omission, unlike S. 787 (the Clean Water Restoration Act), H.R. 5088 does not contain a savings clause that expressly preserves the agricultural exemptions contained in CWA sections 402 and 404. Section 402(L)(1) and (2) contain NPDES permitting exemptions for agricultural runoff related to normal farming and ranching activities and for discharges related to maintenance of serviceable farm structures. Section 404(f)(1) contains exemptions from Corps-issued discharge permits for discharges to wetlands related to maintenance of certain agricultural ponds and ditches and construction of farm roads. The absence of a savings clause recognizing the continuing validity of these exemptions will, at a minimum, create legal uncertainty about their continuing validity if this bill is passed. Needless to say, it would be a crippling economic burden on Oregon's farmers, ranchers, and irrigation water suppliers if they were required to obtain NPDES and/or Section 404 discharge permits every time they needed to clear a ditch, repair a headgate, or construct a farm road to access their property.

5. Diminishment of the prior converted cropland exemption. H.R. 5088 adds a new statutory definition of "prior converted cropland," which is currently defined in USDA regulations at 7 C.F.R. § 12.2. Prior converted croplands are exempt from Corps 404 permitting because they are lands that were already under cultivation in 1985, when the so-called "Swampbuster" provisions were passed as part of the 1985 Farm Bill.

The proposed statutory definition is generally consistent with 7 C.F.R. § 12.2, except for one obvious difference. The proposed definition adds a requirement that the exempt wetland/farmland be "devoted to an agricultural use." Based on information posted on the House Infrastructure and Transportation Committee's website, it is clear that the intent of the new language is to eliminate arguments that the exemption is permanent. That information points to various historical practices and regulatory guidance that indicate that the Corps, EPA, and USDA consider the exemption to be subject to forfeiture in the event that the farmer stops using the land for agricultural use for five consecutive years. However, H.R. 5088 makes no mention of a five-year forfeiture period, instead simply providing that the land must be devoted to agricultural use. This implies an immediate risk of forfeiture if a farmer stops using land for agricultural use—even for a short period of time. Non-use could occur for a variety of legitimate reasons including crop rotation patterns, enrollment in federal conservation programs, drought, illness, and financial hardship. The existing language is far too vague to assure us that this is not a diminishment of this important exemption.

6. General impacts from expanded jurisdiction. Even if the current agricultural permitting exemptions in the CWA are preserved, there are other contexts where the expansion of the statutory the definition of federally regulated waters will significantly impact agricultural landowners and operators. By way of example, the Sixth Circuit Court of Appeals has determined that NPDES permits are required for pesticide applications "in, over, or near" waters of the United States.[3] If the jurisdictional scope of the CWA is expanded as proposed under H.R. 5088, many western Oregon agricultural landowners would be required to obtain NPDES permits before applying pesticides *anywhere* on their properties, given the prevalence of waters that would meet the jurisdictional test under H.R. 5088. Under the current navigability test, EPA estimates that the *National Cotton* ruling will apply to some 5.6 million annual pesticide applications for 365,000 applicators. If CWA jurisdiction is expanded, that already large number could potentially increase in stunning fashion.

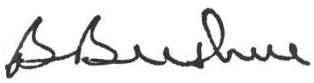
Conclusion

Our members are committed to good stewardship of Oregon's land and water resources. We believe that Oregon's current watershed-based approach to agricultural water quality management is an excellent example of an effective state-based program. The success of this program has hinged on the state's ability to operate its water quality program without federal interference. As the bureaucratic and economic impacts of the *National Cotton* case are felt in coming years, we are certain that the merits of a state-based water quality

[3] *The National Cotton Council of America v. U.S. Environmental Protection Agency*, 553 F.3d 927 (6th Cir. 2009).

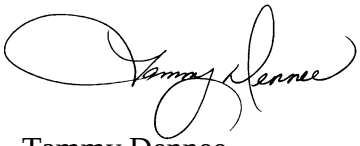
program will become clear to all involved. We urge you to keep the success of Oregon's state managed watershed-based approach in mind as you consider whether to support the ACCWA.

The Clean Water Act is a very complicated law, and the proposed changes to that law have the potential to create significant unintended consequences. We ask that your office engage our groups in discussion and consultation in the coming months about how to avoid such impacts on Oregon's vital agricultural industry.



Barry Bushue
President
Oregon Farm Bureau

Jeff Stone
Director of Government Relations
Oregon Association of Nurseries



Tammy Dennee
Executive Director
Oregon Wheat Growers League

Anita Winkler
Executive Director
Oregon Water Resources Congress