May 20, 2009

Senator Barbara Boxer
Chair
Committee on Environment and Public Works
United States Senate
Room 410
Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chair Boxer:

In response to your request for the Administration's views, this letter briefly outlines issues related to problems and needed clarification on waters protected by the Clean Water Act and identifies certain principles that may help guide legislative and other actions to address these issues.

Problem Statement

The Clean Water Act is one of the Nation's most effective environmental laws. Since its enactment in 1972, the condition of rivers, lakes, streams, wetlands, and coastal waters across the country has dramatically improved. Today, millions of Americans are able to enjoy swimming, fishing, boating, and other recreational activities because of the cooperative efforts by Federal, State, Tribal, and local governments to implement the Clean Water Act. In addition, by protecting the health of the Nation's aquatic ecosystems, the Clean Water Act has helped assure that water is safe to drink and that fish and shellfish are safe to eat. Along with these vital environmental and public health benefits, clean and safe water is critical to the economic well-being of the Nation, providing significant economic benefits associated with activities ranging from recreation to urban revitalization.

Supreme Court decisions in 2001 and 2006 narrowed the prior interpretation of the scope of waters protected by the Clean Water Act. (Rapanos v. United States, 547 U.S. 715 (2006); Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001)) Federal agencies have faced significant challenges implementing these recent decisions. In addition, U.S. Circuit Courts of Appeal have taken different positions in interpreting the Supreme Court decisions, further complicating implementation. Current agency guidance implementing the decisions contemplates complex findings that sometimes result in jurisdictional determinations that lack consistency across the country and can be time-consuming and expensive. Delayed and unpredictable decisions are frustrating and costly to persons seeking approval of projects related to these waters.

It is important to note that although the Supreme Court decisions arose in the context of the Clean Water Act dredged or fill program, they affect all Clean Water Act protections because the Act has a single definition for "waters of the United States". As a result, these decisions affect the National Pollutant Discharge Elimination System (NPDES) program, water quality standards program, oil spill prevention and clean-up program, as well as the permit program for discharges of dredged or fill material. Taken together, these programs are the heart of the Clean Water Act

We are committed to resolving key issues with respect to the scope of the Clean Water Act in order to provide a solid foundation for addressing continuing challenges to the health of aquatic ecosystems. We are focused on the importance of coordination among Federal, State, and local programs related to wetlands, floodplain management, water quality protection, and habitat restoration. We also recognize that the impacts of a changing climate, including changes in precipitation patterns and rising sea levels, will pose difficult challenges for protection of aquatic ecosystems. Finally, as we work to meet goals for wetlands protection nationwide, we need to identify opportunities to expand protection of wetlands and other aquatic resources that are especially vulnerable or critical to sustaining the health of these systems.

Principles

As we work to address the issues associated with the scope of the Clean Water Act, we urge you to consider the general principles described below.

1) **Broadly Protect the Nation's Waters:** It is essential that the Clean Water Act provide broad protection of the Nation's waters, consistent with full Congressional authority under the Constitution. All of the environmental and economic benefits that these aquatic ecosystems provide are at risk if some elements are protected and others are not.

2) **Make Definition of Covered Waters Predictable and Manageable:** The definition of waters protected by the Clean Water Act should be clear, understandable, well-supported, and transparent to the public. Legislation

and supporting guidance concerning waters covered by the Act should promote prompt actions and avoid time-consuming and costly technical analyses.

3) **Promote Consistency Between Clean Water Act and Agricultural Wetlands Programs:** Farmers often face complex issues with respect to whether wetlands located on their farm are within the scope of the Clean Water Act, the wetland conservation provisions of the Food Security Act, or both. Identification of waters covered by the Clean Water Act and the Food Security Act, and operational elements of implementing programs, should reflect consistent, predictable, and straight-forward decision guidelines.

4) **Recognize Long-standing Practices:** In over thirty years of implementing wetlands protection programs, Federal agencies worked with States and stakeholders to make common-sense interpretations of the Clean Water Act in various agency regulations. Congress should consider including in the Clean Water Act certain exemptions that are now in effect only through regulations or guidance. For example, a carefully crafted statutory exemption for "prior converted cropland" would be useful to both farmers and Federal agencies.

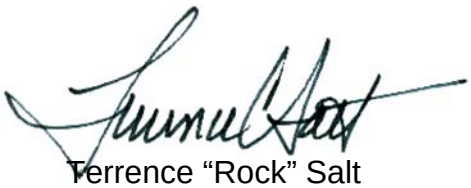
Enactment of legislation amending the Clean Water Act – based on these principles – would go a long way toward addressing the substantial confusion and uncertainty arising from the recent Supreme Court decisions. Since existing guidance documents and supporting regulations can be revised to implement these principles to only a limited degree, a clear statement of Congressional intent is needed to provide a foundation for steady and predictable implementation of the Clean Water Act in the years to come.

Thank you for your interest in this important problem. We look forward to working with you to address these issues in the future.

Sincerely,

Nancy Sutley
Chair
Council on Environmental Quality

Lisa Jackson
Administrator
Environmental Protection Agency



Terrence “Rock” Salt
Acting Assistant Secretary
of the Army (Civil Works)



Tom Vilsack
Secretary
Department of Agriculture



Ken Salazar
Secretary
Department of the Interior

cc: Senator James Inhofe, Ranking Member