

Clarification – Not Expansion – Should be Applied to the Clean Water Act

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Last Thursday in Washington, D.C. a Senate committee heard testimony on issues related to a controversial bill introduced by Rep. James Oberstar (D-MN) in the House and Senator Russ Feingold (D-WI) in the Senate. The “Clean Water Authority Restoration Act of 2007,” (CWARA) - although its intent may be otherwise - may actually create more uncertainty and confusion over the application and interpretation of the Clean Water Act (CWA), thereby contributing to litigation and leaving more interpretations to the courts and regulatory agencies.

CWARA would appear to grant the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) unprecedented regulatory control over all “intrastate waters” – which some will interpret as essentially all wet areas within a state. Importantly, it fails to clarify any limits on this expanded and uncertain authority.

Western irrigators should be gravely concerned about the broader implications associated with the redefining of “navigable waters” contemplated by this bill. There is already confusion over the waters to which Section 404 of the CWA applies; CWARA raises concerns regarding jurisdictional determination that apply to the entirety of the CWA. Rather than clarify jurisdictional questions, CWARA would create still more uncertainty as to even routine activities such as pumping irrigation water from one area to another. Such implications could have huge ramifications for simple operations that do not adversely impact the water quality of U.S. rivers and streams.

CWARA fails to recognize the primary right and responsibility of States to control local water use decisions, which appears to be inconsistent with Section 101(b) of the existing CWA. It also does not explain how an expanded federal presence in the water quality arena will impact the existing state processes that are already addressing the same issues CWARA purports to address. It is not as if there is a vacuum of clean water regulations; state regulatory processes are in place and they are working.

Further, as the number of waters subject to federal water quality standards increases, untold time and resources will be spent at the local level dealing with the Corps and EPA, further encumbering a system that is already known to be overburdened and less than responsive. This adds yet another degree of uncertainty to farmers and ranchers who require a reliable water supply in order to secure operating loans and other types of financing. To avoid this unintended but certain outcome, new CWA legislation should instead more narrowly and clearly define existing authority.

Already, unnecessary restrictions have been placed on private landowners trying to use their property and on the ability of local agencies to operate and maintain man-made

canals and ditches. Also, as more Westerners look at agricultural waters to supply future municipal needs, more water treatment plants are being built off rivers and canal systems to treat surface water to drinking supply standards. For these interests, the CWARA could produce additional Section 404 permitting and delays, further impeding the exercise of vested property rights and food production, and disrupting the ability to efficiently move water to treatment plants.

As but one example, consider the routine maintenance of the thousands of miles of existing ditches and canals in the West that transport water for agricultural, municipal, and industrial uses. These facilities - some over a century old - require continual maintenance in order to serve the functions for which they were constructed. Such maintenance activities include routine activities like replacing concrete panels and riprap, stabilizing channels and channel banks stabilization, connecting pipes, and controlling aquatic weeds.

The purpose of this work is to better manage and conserve limited water supplies, and in many cases, to maintain flood carrying capacity. Generally, maintenance activities are performed during limited windows of time when there is little or no flow in the canal, and direct water quality impacts are therefore minimal or non-existent. In fact, many maintenance activities, such as bank stabilization, protect and enhance water quality, the goal of the CWA. Most of these activities currently do not require Section 404 permits.

However, as drafted CWARA could, and likely would, be interpreted to require Section 404 permits for many routine maintenance activities. Nationwide, we are told there is a current backlog of at least 15,000 CWA permit requests. Even the most straight-forward Section 404 permit can take months or years to process now – time that system operators don't always have. Further delays in meeting the expanded permitting requirements of CWARA will result in the disruption of vital water supply operations and deferral of maintenance activities necessary to assure supply reliability, flood protection and water quality.

Congress has a unique opportunity to instill a common-sense approach to protecting our water quality and related resources; one that steers clear of creating certain havoc in surface water operations throughout the country by clarifying that man-made ditches are not jurisdictional. Unfortunately, the proposed CWARA is ambiguous and will lead to uncertainty and litigation. Appropriate protections are already afforded to U.S. waters under the CWA, particularly via existing state programs. Congress should reject the unprecedented federal expansion proposed in this bill, and instead find ways to streamline current CWA administration.

Western family farmers and ranchers need clarity, not expansion of the Clean Water Act.