

## **Muddying the Clean Water Act**

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The Clean Water Act of 1972 (CWA) promotes having the natural waterways of the United States be “drinkable, swimmable, and fishable.” This was a noble objective, and in the past 35 years, it is clear that the Act has worked.

However, the law has been applied inconsistently across the country in recent years, primarily due to differences in agency interpretation of the CWA term “navigable waters”. In short, there has been considerable confusion – resulting in some serious litigation – regarding *which* waters and wetlands are subject to the Act.

Last year, this issue landed in the lap of the Supreme Court, which issued a split decision on the scope of regulatory jurisdiction of wetlands. In June 2007, the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) released their long-awaited interagency joint guidance memorandum which attempts to reflect the Supreme Court decision. That memo provided the regulated community with very little objective guidance with which to predict whether wetlands are jurisdictional.

Now Congress is stepping in to try to clarify things.

Earlier this year, Congressman James Oberstar (D-Minnesota) introduced the “Clean Water Authority Restoration Act of 2007,” (CWARA), which would open up CWA jurisdiction to ‘waters of the U.S.’, including wetlands, intermittent streams, prairie potholes, sloughs, meadows, playa lakes, mudflats, sandflats, natural ponds and more. The bill also applies to ‘activities affecting these waters’.

CWARA, though claiming otherwise, will actually create more uncertainty and confusion over the application and interpretation of the CWA. If signed into law, this legislation will only confuse the implementation of the Clean Water Act, thereby contributing to litigation and leaving more interpretations to the courts and regulatory agencies.

CWARA would appear to grant the EPA and the 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.

The Oberstar bill apparently has both tremendous support (160 House sponsors) and momentum, and also much opposition. Given that this type of issue affects just about type of water use and land use in the country, a tough legislative battle lies ahead. On the one side are municipalities, industry, property rights groups, and farming organizations, who oppose the bill. Most environmental organizations support it, claiming that significant parts of the nation's water resources are in jeopardy because of “polluter-led attacks” on the types of water bodies that the Clean Water Act can protect. In the view of

corporate environmental organizations, this translates to all types of water bodies, including man-made structures like ditches and irrigation canals.

This also means more regulations and associated expenses and delays for our nation's food producers.

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. For these interests, the CWARA could produce additional CWA Section 404 permitting and delays, further impeding the exercise of vested property rights and food production.

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. Here in the Klamath Basin, the Klamath Irrigation District has approximately 200 miles of canals and 200 miles of drains that it maintains, with no Corps oversight. If the district is required to get a permit for every maintenance location, they will need to secure 70-100 permits per year. According to the district's manager, coordinating the permitting process "would be a nightmare".

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. Unfortunately, the proposed CWARA is ambiguous and will lead to uncertainty and litigation. Western family farmers and ranchers should urge their members of Congress to clean up – not muddy up - the Clean Water Act.

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