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The Clean Water Act
White Paper
July 23, 2009

Senator Russell Feingold has reintroduced legislation to expand the coverage of the Clean Water Act by defining "waters of the United States" under the act in much broader terms than is recognized under current law (S. 787). This legislation has often been referred to in the past as the "Oberstar bill." The new legislation is substantively unchanged from the bill introduced in the last Congress by Senator Fiengold and Congressman Oberstar.

The findings in the new bill are worded differently than those in the prior bill, but if anything, they are worse for water providers, because they go to even greater lengths to justify an expansive exercise of federal jurisdiction.[1] Like the prior bill, the new bill strikes the term "navigable waters" wherever it appears in the Clean Water Act, and substitutes the term "waters of the United States," defined as follows:

> " . . . all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, *to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution*." [Emphasis added.]

In this way, the coverage of the Clean Water Act would become essentially limitless. In our testimony on the prior legislation, CAP pointed out that this language would codify the agencies' worst excesses under the existing law, where the Corps of Engineers or EPA have asserted jurisdiction over geographic features, like dry desert washes and arroyos, that have no meaningful connection with or relationship to true waters or wetlands. However, because it is much more costly and time consuming to contest the federal exercise of jurisdiction, project proponents will often seek Clean Water Act permits even when they believe that no permit is legally required. Applying for a federal permit may also trigger a requirement to consult with the Fish and Wildlife Service under Section 7 of the Endangered Species Act, and entail additional time and expense, if any endangered species or its critical habitat is located in the area to be affected by the project.

The chief concern of water providers has always been that expanding the coverage of the Clean Water Act will unduly burden them with additional regulatory requirements under circumstances where there is no basis for doing so. EPA and the Corps of Engineers have more than adequate

[1] The one exception is the addition of a finding to the effect that the bill is not intended to regulate groundwater, an exception of relatively little importance. See Section 3, subsection (9) of S. 787.

authority to protect waters and wetlands under existing law. That they have often exceeded reasonable limits on that authority is amply demonstrated by the fact that the United States Supreme Court has now said on at least two occasions that the agencies' exercise of jurisdiction under the Act has been too broad.[2] One of the express purposes of the bill is to overturn these very cases.[3] Among other things, this would have the effect of reinstating the agencies' discredited "migratory bird rule," i.e., "if a duck lands on it, is a water of the United States," a rule that was invalidated by the U.S. Supreme Court in the SWANCC case.[4]

A more specific concern for CAWCD is the possibility that expanding federal jurisdiction in the fashion contemplated by S. 787 could lead to the regulation of the CAP aqueduct itself as a water of the United States, despite the fact that the aqueduct is not a natural waterway, but a concrete-lined canal that is fenced for its entire length. We have urged our congressional delegation, through letters and written testimony on prior versions of the bill, to oppose enactment of this legislation. If the bill receives serious consideration by Congress, it should be amended to provide a specific exemption from the definition of "waters of the United States" for artificially constructed water conveyance systems.

[2] Rapanos v. United States, 547 U.S. 715, 126 S.Ct. 2208 (2006); Solid Waste Agency of Northern Cook County v. Corps of Engineers, 531 U.S. 159, 121 S.Ct. 675 (2001).

[3] See Section 3, subsection (10), of S. 787.

[4] Solid Waste Agency of Northern Cook County v. Corps of Engineers, supra.