



The Savings Clause Does Not “Save” Any Private Land from Federal Regulation

Proponents of S. 787 are telling farmers and others that the bill will not encroach on their farmland and that they have ensured that statutory and regulatory exemptions in the bill would protect farmers from undue regulation. That is simply not true.

Farmers have wetlands, ditches, and other features on their land, many of which – even though they are dry for extended periods of time – could still be considered “intrastate waters” and thus be brought under the regulatory scope of the bill. Even if the government proposed not to regulate such features, the citizen lawsuit provisions of the CWA would give activists an opening to litigate in Federal court to bring such dry land under CWA jurisdiction.

The so-called “Savings Clause” does not address federal jurisdiction. It relates to who needs permits once jurisdiction is determined. The Savings Clause merely repeats current statutory exemptions enacted thirty years ago that allow farmers to conduct certain very limited and narrowly construed activities in these federal areas. In practice, these exemptions provide very little relief to farmers because of ‘regulatory creep’ that has narrowed the protections over the years. Ultimately, the bill, with or without the Savings Clause, will classify more and more land as technically ‘water’ subject to Federal regulation. The bill would also impose more regulatory restrictions on the use of the land, create additional regulatory uncertainty and expense for farmers, invite citizen lawsuits over private land use, and set off a new round of regulatory proposals - the outcome of which is far from certain.

Limits on the Savings Clause are illustrated by a two step analysis.

1. Jurisdictional Determinations Limit Agricultural Use

- S. 787 classifies “all intrastate waters” as federal waters subject to regulation under the Clean Water Act (CWA).
- A farmer’s land often has wetlands, depressions, ditches, and other features that could, without clarification, meet this definition – even though such features might be dry most of the time.
- Once a feature on a farmer’s land is classified as “jurisdictional,” that feature, even if it is dry, is subject to federal regulation or control as a “water of the U.S.”
- The federal government can then dictate how the farmer can and cannot use such features on the land.

2. The “Savings Clause Does Not “Save” Any Farmland or Farm Features from Being Classified as Federal Waters
 - The *activities* listed in S. 787’s Savings Clause are wholly unrelated to whether a ditch, drain, or other feature on a farmer’s property is determined to be a “water of the U.S.” and within the scope of federal jurisdiction.
 - The Savings Clause simply lists certain specified and limited activities that the farmer is allowed to undertake in the —federally regulated “intrastate water”—once jurisdiction is established. These narrowly construed activities would not require a permit. However, if an activity is not listed or, more commonly, is interpreted by the agencies as not being covered by the narrow exemption, then the farmer is required to obtain a permit or face civil and criminal penalties if he does not.

Accordingly, farmers are faced with having to limit their activities if federal “intrastate waters” or other federal waters are deemed to exist on their property. Therefore, the Savings Clause does not “save” any farmland or other non-listed farming activities from federal jurisdiction under S.787.

The following provides specific examples of this analysis at work.

Normal Farming Exemption – Congress exempted the “discharge of dredge or fill material from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices.” In 1996, the Corps issued guidance that narrowed this exemption to “established (i.e., ongoing) farming, silviculture, or ranching operations.” The “established” requirement restricts the ability of a landowner to engage in new farming activities, alternate land use between farming, forestry and ranching, or switch between different methods of farming. The guidance states that a discharge associated with any “change in use” is not exempt.

Farm and Forest Roads – Congress exempted the construction and maintenance of farm and forest roads. In 1988, the Corps issued guidance stating that roads constructed primarily for farm and forest activities are exempt from 404 permit requirements even though the roads may be incidentally used for other purposes. The guidance acknowledges that any road will be subject, on occasion, to various other uses. However, there is no standard for determining whether a road occasionally subject to other uses meets the requirement that it is “primarily” used for farm or forest activities. In light of the lack of a clear, objective standard and the narrow construction of the exemption by the agencies and the courts, the application of this exemption can be arbitrary and significantly narrowed to a point that it is of little practical value.

Minor Drainage – Congress specifically exempted “minor drainage” from dredge and fill permitting if conducted in conjunction with normal farming, silviculture and ranching activities, and the maintenance of drainage ditches. If in the Corps’ judgment a drainage ditch has not been serving a drainage function for a period of time, drainage ditch reestablishment would be regulated, not exempt. In addition, ditches that are not

regularly maintained are ineligible for the ditch maintenance exemption. It is also Corps policy to disallow ditch maintenance if the maintenance provides for a change in use.

Ponds – Congress exempted discharges of dredge or fill material into waters of the U.S. for the purpose of construction or maintenance of farm or stock ponds. Corps policy is that the ponds must be used in the farming and ranching operations to be exempt, and the Corps has often looked to the size of a pond in making this determination. There are currently no standards on the size of a pond in relation to the size of the agricultural operations. The lack of standards has resulted in the arbitrary application of this exemption and a significantly narrowed exemption.