

# denverpost.com

THE DENVER POST

opinion

## Reject unchecked federal jurisdiction over water

Posted: 09/04/2009 01:00:00 AM MDT

*The Colorado Competitive Council; Colorado Concern; Colorado Dairy Producers; Colorado Farm Bureau; Colorado Stone, Sand and Gravel Association; and the Denver Metro Chamber of Commerce contributed to this commentary.*

Over the last several decades, the Clean Water Act (CWA) has been responsible for extraordinary advances in improving the health of the nation's surface waters and watersheds. Through the collaborative efforts of the U.S. Environmental Protection Agency, states, tribes and industry, the act's regulatory and non-regulatory programs — augmented by other federal conservation programs — continue to serve as the engine of progress.

Since 1972, the CWA has regulated "navigable waters." That term is further defined in the statute to mean "the waters of the United States." The EPA and the U.S. Army Corps of Engineers have provided varying regulatory definitions of "the waters of the United States"

over the past 30 years. The U.S. Supreme Court also has issued multiple decisions, declaring that certain water features are in the purview of the states.

The so-called Clean Water Restoration Act that is now being considered by Congress is legislation that would delete the term "navigable" from the Clean Water Act. Legal experts and members of the regulated community agree that deleting this term from the 1972 act will fundamentally expand, not simply restore, the CWA's jurisdiction. By deleting the word "navigable," federal jurisdiction over U. S. waters will no longer be based upon the Commerce Clause of the Constitution. Removing this anchor to federal authority would lead to the greatest expansion of federal jurisdiction over our state's water since the act was written.

The new definition of "waters of the U.S." contained in the legislation includes all "intrastate waters" including "intermittent streams" and "tributaries." This new definition could allow regulators and third parties to assert jurisdiction over roadside ditches, municipal storm drains used for flood control and other purposes, small desert washes that carry water only a few hours a year, and other features on the landscape that may carry water.

Today, the Clean Water Act recognizes that states should retain the authority to make decisions about their land and water resources. The Clean Water Restoration Act as introduced, as well as the "compromise" version, upsets this critical balance between federal and state

Advertisement



Average U.S.  
Credit Score



Your Credit  
Score



Visit  
[FreeCreditReportValue.com](http://FreeCreditReportValue.com)

Print Powered By  FormatDynamics™

# denverpost.com

THE DENVER POST

authority that has led to water quality improvements over the past 37 years.

Further, this legislation grants sweeping new authority to regulators based upon the fullest extent of Congress' legislative powers. Whether some intended to grant such far-reaching authority in 1972 may be open to debate; whether Congress did so is not. What is also certain is that these changes will place critical regulatory decisions in the hands of constitutional lawyers and result in more costly litigation regarding the scope of Clean Water Act jurisdiction, the extent of activities affecting these waters and the limit of Congress' authority under the Constitution. This legislation will have significant negative impacts on many industries in Colorado.

Time-consuming litigation will not effectively protect our state's or our nation's waters. Each of us has a duty to protect our natural resources. Simply giving the federal Government unchecked authority to regulate water in a roadside ditch will benefit no one. A more pragmatic approach would be to handle these issues at the local level. Hopefully Colorado's two senators can resist granting our federal government such broad and sweeping authority.

Advertisement



Send flowers for any occasion

**Bouquets \$19<sup>99</sup>**  
from **19<sup>99</sup>** +s/h

ProFlowers®

Order ONLY at  
[proflowers.com/happy](http://proflowers.com/happy)  
or call 1-877-888-0688

Print Powered By  FormatDynamics™