

Dear {Western Member of Congress}

I am writing on behalf of the multi-sector membership of the Western Business Roundtable to express our concern and opposition to a legislative effort, being spearheaded by Congressman James Oberstar (D-MN), to greatly expand the scope of the Clean Water Act (CWA).

The legislation, which Oberstar is now gathering cosponsors on, is expected to mirror his legislation from the 109th Congress (H.R. 1356 – The Clean Water Authority Restoration Act of 2005.) Oberstar claims his intention is to simply “clarify” the original intent of Congress, in light of recent Supreme Court cases that expressed concern regarding ambiguities in the statute. However, the legislation goes much further. It would greatly expand the jurisdictional sweep of CWA, by changing the waters to be regulated from “navigable waters” to “waters of the United States.”

The results would be devastating to the West. Not just water delivery entities would be impacted. The proposed CWA amendments would also make it more costly to grow crops, provide water to cities, operate and maintain water storage and delivery facilities and carry out other activities on the land.

SPECIFIC ROUNDTABLE CONCERNS

1. The legislation would expand the regulatory reach of the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) to include essentially all arguably wet areas within a state.

The proposed definition of “waters of the United States” would include “all interstate and intrastate waters and their tributaries...” This essentially means that all wet areas (or areas that have been wet at some time) within a state would fall under federal regulatory authority, including: groundwater, ditches, pipes, streets, gutters and desert features.

The proposed definition also includes all “impoundments of the foregoing,” regardless of whether the impoundment is natural or man-made. The new definition would likely regulate all treatment ponds associated with any

industrial activity, requiring the development of expensive new treatment systems. Read broadly, it could be applied to include any accumulation and storage of waters that otherwise would not be regulated.

2. The legislation would expand the legal basis for the legislation, thus making federal reach under the CWA virtually unlimited.

Currently, CWA jurisdiction is limited to the confines of Congressional authority to regulate commerce under the Commerce Clause of the U. S. Constitution. The proposed amendments would change that to "all waters.....subject to the legislative power of Congress under the Constitution." Therefore, anything which could be included under the Treaty Powers, the Property Clause, the Necessary and Proper Clause or other parts of the Constitution could provide a basis for jurisdiction. The reach of this expansion of power would be virtually unlimited.

3. The legislation would essentially grant EPA and the Corps with a veto over local land use policies.

The legislation would grant EPA and the Corps authority to regulate virtually *all* activities (private or public) that may affect "waters of the United States," regardless of whether the activity is occurring in, or may impact, water at all.

It is important to note that referencing "activities" in the definition of "waters" diverges from the format of the CWA, which prohibits the "discharge of any pollutant" (*Section 301*) and authorizes permits for discharges of pollutants from point sources (*Section 402*) and discharges of dredged and fill material (*Section 404*).

This language could be read broadly to allow the regulation of all activities that "affect" waters. In other words, regardless of whether an activity is discharging a pollutant from a point source or discharging dredged and fill material into a water of the United States, the fact that the activity may impact "water" would allow the activity to be regulated under the CWA. The introduction of undefined terminology such as "activities" and "affecting" provides federal agencies and courts with considerable room for expansive interpretation.

This could expose a whole range of activities to permit requirements under a regulatory system that is already overwhelmed. Today, it already takes on average between 2-3 years to obtain an individual permit under CWA. The current backlog for individual permits is estimated between 15,000 and 30,000. The costs and delays associated with securing such permits will impede a host of economic activities including: commercial and residential real estate

development, agriculture, electric transmission, transportation, mining and energy development, among others.

- 4. The legislation would eliminate existing regulatory limitations that allow common sense uses such as prior converted cropland and waste treatment systems.**

The proposed definition does not include any regulatory limitations. That omission is particularly important because the existing rules acknowledge two important limitations covering prior converted cropland and waste treatment systems designed to meet CWA requirements.

- 5. The legislation's expanded definition would burden state and local governments – administratively and financially.**

This broad expansion of the CWA's jurisdiction would thrust unfunded mandates on state and local governments by imposing significant new administrative responsibilities on them. For example, states would be required to adopt water quality standards to monitor and report on the quality of those waters and ensure attainment of applicable standards, including preparation of total maximum daily loads and allocations where necessary.

Because most states now possess National Pollutant Discharge Elimination System (NPDES) permitting authority, they would also need to issue many new NPDES permits for any point source discharges to the expanded inventory of "waters" and potentially devise regulatory programs for "activities affecting these waters." The consequences on state non-point source control programs are difficult to determine, but they could be equally dramatic. Nothing in the bills suggests that the proponents have considered the wisdom of imposing such requirements or how to pay for them.

Changes at the state level would impact comprehensive land use plans, floodplain regulations, building and/or special codes, watershed and storm water plans, etc. Local governments, both large and small, are also responsible for a number of public infrastructure projects that will be impacted by proposed changes, including water supply, solid waste disposal, road and drainage channel maintenance, storm water detention, mosquito control and construction projects. Local government efforts to carry out maintenance of government-owned buildings (hospitals, schools, municipal offices, etc.) could also be adversely impacted.

6. The legislation would cause water providers, landowners' and water use entities' liability risk to grow.

CWA citizen suit liability and exposure for attorney fees awards will increase for all land-owners with water features on or near their properties. Similar concerns and risks will be imposed upon all water delivery or water use entities.

CONCLUSION

Should this legislation become law, it would drastically expand the scope of the CWA and federalize waters previously under the jurisdiction of states. Please do not sign on to co-sponsor this legislation. Rather, we would ask you to stand up for the West by actively opposing this and other efforts to expand the CWA.

Sincerely,



Jack Ekstrom
Chairman

cc:

Western Governors
Western Governors' Association
American Legislative Exchange Council
Council of State Governments-West

The Roundtable is a non-profit business trade association comprised of CEOs and senior executives of organizations doing business in the Western United States. Our member companies are involved in a broad range of industries, including agricultural products, accounting, chemicals, coal, construction and construction materials, conventional and renewable energy production, energy services, engineering, financial services, internet technologies, manufacturing, mining, oil and gas, pharmaceuticals, pipelines, telecommunications, and public and investor-owned utilities. We work for a common sense, balanced approach to economic development and environmental conservation, and we support public policies that encourage economic growth, opportunity and freedom of enterprise.