

Commentary: The Clean Water Act-- Misinterpretation and misimplementation

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This indentation in the soil at the edge of the vineyard on Goehring's farm could be subject to broad interpretation of the current Clean Water Act, but would be severely impacted if H.R. 2421 passed.

By Brad Goehring

Acting on an overly broad interpretation of the Clean Water Act, the Army Corps of Engineers (ACE) issued a cease and desist order on our family farm in the spring of 2004. We were planning to transition a parcel of grazing pasture into winegrapes and were accused of deep-ripping the ground and filling and destroying waters of the United States. In reality, we had simply disked the ground once annually as part of our normal and routine farming practices to reduce the fire hazard and regenerate the grasses for winter cattle feed.

The ACE claimed that there were wet areas on our property subject to the Clean Water Act (CWA) and our proposed transition from pasture to grapes violated the "prior converted cropland" provision of the CWA.

The cease and desist order remained in place for two years, during which time we were not able to graze cattle or begin planting the vineyard as planned. We lost two years' worth of production income, in addition to hours of time and energy spent proving the parcel did not contain "navigable intrastate waters of the U.S." that were subject to the CWA.

Unfortunately, this is not the only experience we've had where the jurisdiction of the Clean Water Act has been misinterpreted and misimplemented to the detriment of our family farm. Now, that jurisdiction could be broadened even further.

Chairman James Oberstar, D-Minn., of the House Transportation and Infrastructure Committee has introduced the Clean Water Authority Restoration Act (H.R. 2421), which would drastically expand the regulatory reach of the Clean Water Act, as enforced by the ACE and the Environmental Protection Agency (EPA). By deleting the word "navigable" from the original law, this proposal would move beyond protecting wetlands and waterways, and create legislation that would regulate nearly every wet area in the

nation--even if water were only present for a few days, and despite California's existing environmental protections.

The enactment of H.R. 2421 would open the door to the broadest possible interpretation of the CWA. Its enactment also would end claims that Congress originally intended any limits on the CWA's regulatory reach. Further, it would impede agricultural activities, impose additional unfunded mandates on state and local governments and pre-empt those governments and the use of private property.

If passed, H.R. 2421 would require farmers and ranchers to obtain federal permits in an area traditionally reserved for the states in order to carry out their daily land management activities. This will greatly increase the cost and time associated with managing stock ponds, ditches, gutters and possibly even groundwater. For example, landowners would likely need to acquire a federal permit to place a culvert in a ditch or implement conservation practices such as installing buffer strips or restoring wet areas that have no hydrological connection to a traditionally navigable waterway.

In its current form, the Clean Water Act is well intentioned and already regulates truly navigable waters and streams with both permanent and seasonal flows. It is a federal law enacted in 1972 to ensure the quality of the waters of the United States. Over the years, parts of the CWA have been amended and the jurisdiction of the law has also been challenged in court.

These court decisions are another reason why H.R. 2421 is not necessary to protect vital wetlands and waterways. These areas are already protected under existing law as defined by a series of U.S. Supreme Court cases such as *United States v. Riverside Bayview Homes* in 1985, *Solid Waste Agency of Northern Cook County* in 2001 and most recently *Rapanos* in 2006. Furthermore, in the recent *Rapanos* case the unifying theme of all the justices was not to amend the CWA, but rather that the ACE and EPA clarify their existing regulations and speedily so.

The legislation has broad support in Congress, largely because the underlying impacts are not obvious and not understood. Twenty-seven members of the California delegation in the House of Representatives have signed on as co-sponsors of this bill. I've taken many opportunities to work with my congressman, Jerry McNerney--the only San Joaquin Valley representative co-sponsoring this bill--to help him understand how devastating this would be to agriculture.

There are many other representatives in important agricultural districts who don't understand the implications this legislation would have on the ability of farmers and ranchers to grow crops and raise livestock. We need to educate our representatives about this issue and ask them to oppose H.R. 2421. Register for Farm Team at www.cfbf.com to receive updated information on the bill and to write your member of Congress.

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