

Senate Acts on WOTUS; Leading to Further Litigation

This week, the Senate finally took up a series of votes on the EPA and Army Corps of Engineers' "waters of the United States" rule. A major priority for cattle producers and all land-use stakeholders, this rule would place millions of additional acres of private and state property under federal jurisdiction. Cattle producers have pointed to the rule as ambiguous, further muddying the waters of the Clean Water Act and vastly overreaching the intent of Congress and extending beyond Supreme Court precedent. The Army Corps of Engineers have also expressed their concerns that Corps' data was incorrectly used and applied out of context in crafting the final rule, going so far as to ask that their name and logo be removed from the final rule.

Beyond the concerns expressed by producers and the Corps, the Courts have also pointed to several flaws in the rule, leading first to an injunction on implementation of the rule from the Federal Court in North Dakota for 13 states, and finally a nationwide stay on implementation from the Sixth Circuit Court of Appeals. In granting the stay, the Court of Appeals cited a substantial likelihood of success on the merits of the challenge to the rule and the facially suspect nature of the EPA's rulemaking process. Echoing the concerns of the Corps, the Court found the determinations made by the EPA in the final rule had little relation to the information in the proposed rule that was released for public comment.

Additionally concerning is the EPA's grassroots lobbying campaign to solicit public comments in favor of the rule, pointed out by the New York Times and the House Oversight Committee hearing into the process EPA followed in crafting this rule. All this supports cattle producers' contention that this flawed rule came from a flawed process, fruit of a poisonous tree.

While the Senate did not have the votes to overcome a filibuster and move to debate the Federal Water Quality Protection Act, sponsored by Senator John Barrasso (R-Wyo.), the vote and the bill's sponsors showed the bi-partisan support in the Senate against the rule. Without 60 votes to debate the bill, the Senate turned to consideration of a joint resolution of disapproval sponsored by Senator Joni Ernst (R-Iowa). Again the vote in support of the joint resolution showed bi-partisan support and the resolution passed 53-44. The joint resolution must still be considered by the House before it will inevitably be vetoed by the President in support of his administration's regulatory rampage.

Unfortunately, this action by Congress and the administration only sets cattle producers up for years of litigation and millions of dollars in expenses to defeat this regulation. Moreover, with dozens of states also engaged in litigation, this inaction will also cost taxpayers litigation expense because Congress could not muster the votes to act against a regulation that so many find to be so seriously flawed.