Oregon Water Resources Congress
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May 4, 2009

The Honorable Ron Wyden
United States Senate
Washington, D.C. 20510

Delivered via facsimile

Subject: Oregon Water Resources Congress comments on S. 787

Dear Senator Wyden:

On behalf of the members of the Oregon Water Resources Congress (OWRC), thank you for your commitment to work to resolve our concerns about the impact on irrigation water delivery systems of Senator Feingold's proposed amendments to the Clean Water Act contained in S. 787.

As we expressed to you during the last Congress, we believe that the bill Senator Feingold introduced during that Congress (S. 1870) would have extended Federal jurisdiction under the Clean Water Act far beyond what was intended when the Act was first enacted. While we acknowledge Senator Feingold's statements that the savings clauses in S. 787 are intended to address these concerns, we join in the comments of the Oregon Association of Nurseries (OAN) that S. 787 will also extend Federal jurisdiction far beyond the intent of the original Act. Rather than repeat the concerns raised by the OAN in its memorandum to Senator Merkley's staff, we are including a copy of that memorandum with this correspondence and fully concur with the points raised therein.

We have several concerns in addition to those raised by OAN.

First, while the savings clauses in Section 6 of S. 787 do restate certain existing provisions of the Act, we seek language to clarify that those exemptions extend beyond on-farm irrigation systems to the organized systems that deliver water to and provide drainage for farmers.

Specifically we request that the reference to irrigation ditches in 33 USC 1344(f)(1)(C) be further clarified to explicitly include dredge or fill material associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant to and functionally related to irrigation ditches. This clarifying language appears in the U.S. Army Corps of Engineers' Regulatory Guidance Letter No. 07-02, "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of Clean Water Act," dated July 4, 2007.

Second, we believe that S. 787 as introduced will lead to extensive rulemaking and litigation to clarify terms used in the bill. In particular:

- The substitution of "water of the United States" for "navigable water of the United States" renders moot over thirty years of litigation to clarify Federal jurisdiction under the Clean Water Act based on the term "navigable waters of the United States."

- Use of the term "affecting the waters of the United States" eliminates the narrow trigger that the Clean Water Act now has by focusing on the discharge of a pollutant from a point source to jurisdictional waters.
- The use of these two new terms will result in litigation to determine the meaning and extent of the savings clauses.

While the Act's current wording is far from precise, it has evolved over time with years of refinement as a result of various rulemaking efforts and litigation outcomes. OWRC would rather work within the framework we know, with precious resources focused on the implementation of on-the-ground efforts, than spend another thirty years in polarized rulemaking efforts and new rounds of litigation.

Third, as emphasized in the OAN memorandum, the operative language in S. 787 goes far beyond the bill's stated intent of merely returning Federal jurisdiction under the Clean Water Act to where it was before the U.S. Supreme Court decisions in *SWANCC*[1] and *Rapanos.*[2] Rather than undertake the amendments contained in S. 787, we suggest that if the goal is truly one of winding back the clock and returning Federal jurisdiction to where it was in 2000, such a goal could be accomplished by simply reversing the specific changes made by the *SWANCC* and *Rapanos* decisions and further stating that the Federal Government retains jurisdiction over the waters that were affected by those two decisions. In our view, such an approach would be more honest and direct than what is proposed in S. 787.

Unfortunately, we feel that both S. 787's approach generally, and particular language specifically—such as language that purports to have the Federal courts interpret the Act to "the maximum extent of the legislative authority of Congress under the Constitution"—is counter to the stated intention of returning Federal jurisdiction to pre-SWANCC and Rapanos levels.

Thank you for this opportunity to provide comments.

Sincerely,

Anita Winkler
Executive Director
Oregon Water Resources Congress

Enclosure: Memorandum from Oregon Association of Nurseries, "Oregon Association of Nurseries Comments on S. 787, dated Mary 1, 2009.

Copy to Senator Jeff Merkley via facsimile

[1] *Solid Water Agency of Northern Cook County v. United States Army Corps of Eng'rs,* 531 U.S. 159 (2001).

[2] *Rapanos v. United States,* 547 U.S. 715 (2006).