



REASONS TO OPPOSE THE "CLEAN WATER RESTORATION ACT" S. 787

Issue: The Waters Advocacy Coalition opposes S. 787, the "Clean Water Restoration Act," because it would expand federal Clean Water Act (CWA) jurisdiction to virtually all wet areas in the United States.

Background: Since 1972, the CWA has regulated "navigable waters." The term "navigable waters" is further defined in the statute to mean "the waters of the United States." EPA and the Corps have provided varying regulatory definitions of "the waters of the United States" over the past 30 years. The United States Supreme Court has examined the scope of the CWA three times:

- **Riverside Bayview** (1985): Unanimously upheld the agencies' authority to regulate wetlands adjacent to navigable waters.
- **SWANCC** (2001): Rejected the agencies' authority to regulate isolated waters based upon the potential presence of migratory birds (the Migratory Bird Rule). The Court said that asserting jurisdiction over such waters raised "significant constitutional concerns."
- **Rapanos** (2006): Affirmed that CWA jurisdiction extends beyond strictly navigable waters, but does not extend to all areas with merely a "hydrological connection" to navigable waters. The unifying theme of all Justices was not that the CWA needed to be changed but rather that the Corps and EPA should issue new regulations. As Justice Breyer, who sided with the dissent, observed, the agencies should "write new regulations, and speedily so."

S. 787: S. 787 would delete the term "navigable" from the statute and replace it with a **new legislative definition** of "waters of the United States" that includes all "intrastate waters" and all "activities affecting these waters." Unlike the existing CWA that is based on Congress's Commerce Clause authority to regulate "navigable waters," S. 787 purports to exercise all of Congress's authority under the Constitution including the Necessary and Proper, Treaty, and Property Clauses.

Proponents of the legislation assert that S. 787 "restores" the original intent of the CWA and "clarifies" CWA jurisdiction. It does neither. Instead, S. 787 would:

- Grant EPA and the Corps *for the first time ever* jurisdiction over all "intrastate waters" -- essentially all wet areas within a state, including ground water, ditches, pipes, streets, municipal storm drains, gutters, and desert features subject only to undefined constitutional limits.
- Grant EPA and the Corps, *for the first time ever*, authority over all "activities affecting these waters" (private or public), regardless of whether the activity is occurring in water or whether the activity actually adds a pollutant to the water.
- Change the original intent of Congress in enacting the CWA from the Commerce Clause to the full "legislative power of Congress under the Constitution."
- Conflict with CWA sections 101(b) and 101(g) which state Congressional intent to "recognize, preserve, and protect the primary responsibilities and rights of the States" to control the development and use of local land and water resources and to "allocate quantities of water within [State] jurisdiction."
- Eliminate the existing regulatory exemptions which were authorized by both Democratic and Republican administrations for prior converted cropland and waste treatment systems.
- Place critical regulatory decisions in the hands of constitutional lawyers and result in costly litigation regarding the scope of "intrastate waters," the extent of "activities affecting these waters," and the limit of Congress's authority under the Constitution.

"Savings Clause" Problems: The savings clause of S. 787 does not address the WAC members' concerns with the legislation and, in fact, creates more confusion. The savings clause:

- Does not exempt any waters or areas from the broad definition of "waters of the United States" under S. 787. It exempts only certain *activities* from being considered "discharges." For example, *maintenance of an irrigation ditch* would not be considered a "discharge," but the ditch itself would still be a jurisdictional water such that *all other activities affecting the ditch* would be regulated.
- Fails to adopt important *regulatory* exemptions for prior converted cropland and waste treatment systems.
- Limits the agencies' ability to adopt future regulatory exemptions. By setting forth specific statutory exemptions, many will argue that these are the exclusive exemptions recognized by Congress -- there are no others.
- Paraphrases the existing statutory exemptions, unnecessarily raising questions regarding Congressional intent with respect to the full scope of the existing statutory exemptions.

Practical Impacts:

- EPA and the Corps will exercise **unlimited regulatory authority over all intrastate waters**, including, for example, waters now considered entirely under state jurisdiction. Enormous resources will be needed to expand and defend the federal regulatory program, exacerbating an existing CWA funding gap and leading to longer permitting delays.
- Increased delays in securing permits will **raise costs of and impede many economic activities** -- commercial and residential real estate development, agriculture, electric transmission, transportation, and mining all will be affected. Based upon Coalition members' experiences, it takes on average between 2-3 years to obtain an individual permit. The current backlog for individual permits is estimated between 15,000 and 30,000.
- An expanded federal water program would impose an **unfunded mandate on States** by increasing the number of waters subject to water quality standards, effluent limitation guidelines, the setting of Total Maximum Daily Loads (TMDLs), and expanding the permitting workload under various aspects of state-administered programs.
- Expanded federal jurisdiction would **pre-empt traditional state and local government authority** over land and water use decisions and alter the balance of federal and state authority.

Recommendation:

- **Oppose S. 787.** Congress should not expand the jurisdictional reach of the Clean Water Act.

About the Waters Advocacy Coalition: *Statement of Policy:* The members of WAC are committed to the protection and restoration of America's wetlands resources. WAC does not believe, however, that it is in the nation's interest to have federal agencies regulate ditches, culverts and pipes, desert washes, sheet flow, erosional features, and farmland and treatment ponds as "waters of the United States," subjecting such waters to all of the federal regulatory requirements of the CWA. *Members include:* American Council of Engineering Companies; American Farm Bureau Federation®; American Forest & Paper Association; American Iron and Steel Institute; American Road and Transportation Builders Association; Associated General Contractors of America; CropLife America; Edison Electric Institute; The Fertilizer Institute; Foundation for Environmental and Economic Progress; Industrial Minerals Association-North America; International Council of Shopping Centers; National Association of Flood and Stormwater Management Agencies; National Association of Home Builders; National Association of Industrial and Office Properties; National Association of Manufacturers; National Association of REALTORS®; National Association of State Departments of Agriculture; National Cattlemen's Beef Association; National Corn Growers Association; National Council of Farmer Cooperatives; National Mining Association; National Multi Housing Council; National Pork Producers Council; National Stone, Sand and Gravel Association; Public Lands Council; Responsible Industry for a Sound Environment; Southern Crop Production; United Egg Producers; and Western Business Roundtable.