



The “Compromise” Clean Water Restoration Act Expands the Federal Regulatory Reach and Promotes Bureaucracy

INTRODUCTION

On June 18, the Senate Environment and Public Works (EPW) Committee adopted, with a straight party line vote, a “compromise” version of the Clean Water Restoration Act (S. 787). Both S. 787, as introduced and the compromise, result in the same outcome – fundamentally expanding the scope of federal Clean Water Act (CWA) jurisdiction. Because the bill would require federal regulation of virtually all wet areas, including ditches, culverts, and many treatment ponds, the Waters Advocacy Coalition opposes the bill.

S. 787 would delete the term “navigable” from the Act, a term that appears in the current law more than 80 times and is the sole limit on the federal government’s authority. It also would expand federal jurisdiction by 1) including certain water features that the Supreme Court decided were in the purview of the states and 2) taking the unprecedented action in the 37-year history of the CWA to expand federal government jurisdiction beyond the Commerce Clause of the Constitution.

CONCERNS WITH S. 787

Expansion, not Restoration, of CWA Jurisdiction: S. 787 grants sweeping new authority to regulators based upon the fullest extent of Congress’s legislative power.

- The “compromise” S. 787 is in stark contrast to the current law. The current law gives the federal government authority under the Commerce Clause of the Constitution to regulate navigable waters, limited non-navigable waters, and wetlands associated with “navigable waters.”
- The definition in S. 787 includes all “intrastate waters” including “intermittent streams” and “tributaries.” However, nothing in the law or regulations in place prior to the Supreme Court decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)* covered all intrastate waters. The new definition could allow regulators and third-parties to assert jurisdiction over roadside ditches, municipal storm drains used for flood control and other purposes, groundwater, small desert washes that carry water only a few hours a year, and other features on the landscape that may carry water.
- By overturning *SWANCC* and reinstating the so-called Migratory Bird Rule, S. 787 would establish federal CWA jurisdiction over any waterbody that “could be used” by a migratory bird (virtually any water), reaching well beyond the isolated waters S. 787 supporters say they are targeting.
- The “compromise” upsets the balance between federal and state authority that is expressly stated in the CWA. The CWA recognizes that states should retain the authority to make decisions about their land and resources, water allocation, and police powers, and this is completely upended by the “compromise.”

Confusion and More Litigation, Not Clarity: The “Findings” and “Rules of Construction,” are incorrectly claimed to demonstrate that S. 787 simply reinstates jurisdiction as defined in regulations that existed before the *SWANCC* and *Rapanos* decisions.

- Findings: S. 787 addresses fundamental topics in Clean Water Act protection through legislative findings that would be better addressed instead through clear statutory language. Further, findings cannot overrule plain statutory language. Thus, a finding that groundwater is not included within “waters of the United States” will not negate legislative language that “all” waters are “Waters of the United States,” nor will a finding retaining the states’ authority to allocate their own water preserve the states’ authorities over land and water use.
- Rules of Construction: In Section 6 of the bill, the subsection titled “Rules of Construction” puts forth rules that are internally inconsistent and will lead to confusion and litigation. One rule relies on pre-*SWANCC* interpretations, which would be premised on Congress’s Commerce Clause authority (the basis of the 1972 CWA). The other relies on “the legislative authority of Congress under the Constitution,” which would reach

beyond the Commerce Clause. Which controls? Moreover, the statutory language says “**all**” waters are jurisdictional, which also is in conflict with the subsection.

- **Pre-SWANCC Jurisdiction Was Not Fixed or Certain:** S. 787 assumes that "pre-SWANCC jurisdiction" is well-defined and easily-understood. But over the years there have been countless changing interpretations of different kinds of waterbodies and jurisdictional concepts, such as "adjacent," "ordinary high water mark," "tributary," "ditches", etc. Thus, using pre-SWANCC as a basis for jurisdiction will breed uncertainty and litigation.
- **Citizen Suits:** Defining "waters of the United States" to mean **all** waters greatly expands the number of waters that for the first time could be subject to citizen suits in federal district courts. The “compromise” S. 787 would grant broad, unfettered opportunities for activists to file lawsuits against property owners or even county governments.

The S. 787 Exclusions are More Limited than Current Regulations: Recognizing that “all” means “all,” S. 787 purports to exclude from federal jurisdiction waters that both Democratic and Republican Administrations long ago recognized should not be subject to federal jurisdiction. However, S. 787 is more limited than those regulatory exclusions.

- **Prior Converted Cropland (PCC):** The amendment does not reflect the entire 1993 regulation adopted by the Clinton administration and does not make clear that PCC can be used for either agricultural or nonagricultural uses. The amendment could tie the hands of farmers and ranchers and directly impact the use and value of over 55 million acres of agricultural land. Changing this important regulatory exemption will devastate and devalue the assets of hundreds of thousands of landowners currently making plans to use their property, sell development rights or give conservation easements. It also runs against the stated intentions of the bill’s sponsors by re-regulating lands that were unaffected by SWANCC or *Rapanos* and overturning a regulation that has been in effect since 1993.
- **Waste Treatment Systems:** The waste treatment exclusion is utilized by numerous agricultural, construction, industrial, and municipal facilities to comply with effluent limitation for stormwater and waste water. S. 787 and the amendment exclude only certain “manmade bodies of water.” This is much narrower than current regulations, which have been in place since 1980 and which allow properly authorized treatment ponds to be created or to impound waters of the U.S. Under S. 787, water discharged *into* certain waste treatment systems must meet effluent limitations and water quality standards, thereby negating the use of a treatment pond as an acceptable form of treatment and instead requiring a new treatment alternative. Moreover, S. 787 prohibits the use of cooling ponds as an accepted method for treating heat, contrary to current practice. Due to this narrow exemption, which cuts back on existing regulation, some facilities which have been operating consistent with CWA permits for decades would have to find other extremely expensive ways to treat their discharges, assuming alternative treatments are technologically practicable.

CONCLUSION

WAC members fully support the protection of navigable waters of the United States and fully understand that, to achieve that goal, we need to protect rivers and streams that flow to navigable waters. These protections are provided under current law. If additional waters need to be protected, it would be far better to identify those waters, and the federal interest in protecting them, and then make targeted amendments to the Clean Water Act, or other appropriate federal laws, to protect that federal interest. WAC, therefore, opposes S. 787 and the amendment passed by the EPW committee on June 18th and stands ready to work with Congress on a more targeted approach to achieving needed water quality protection.

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 systems as “waters of the United States,” subjecting such waters to all of the federal regulatory requirements of the CWA. *Members include:* 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; Irrigation Association; National Association of Home Builders; NAIOP, the Commercial Real Estate Development Association; 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.