



## The Waste Treatment Systems Exclusion and S. 787

### INTRODUCTION

On June 18th, the Senate Environment and Public Works Committee adopted a “compromise” version of the *Clean Water Restoration Act* (“S. 787”) which would prevent the ability of certain new industrial, municipal, and agricultural facilities to use waste treatment systems to achieve compliance with Clean Water Act (“CWA”) requirements. Moreover, S.787 could lead to a wave of litigation challenging existing facilities’ systems which were lawfully created to comply with CWA requirements.

### CONCERNS WITH THE EXCLUSION

Under S. 787, all “waters of the United States,” defined broadly as “**all** interstate and intrastate waters,” and impoundments of those waters, would be federally jurisdictional waters and subject to the full range of federal CWA protection. This broad definition could encompass waste treatment systems used by many industrial, municipal, and agricultural facilities for decades to treat water prior to discharge in order to comply with CWA discharge limitations. The compromise bill purports to exclude these systems from jurisdiction but the language used is narrower than the current Environmental Protection Agency (“EPA”)/U.S. Army Corps of Engineers (“Corps”) regulatory exemptions that have been in effect since 1980 – more than 20 years before the *Solid Waste Agency of Northern Cook County V. United States Army Corps of Engineers* (“SWANCC”) decision that S. 787 intends to overrule.

- The Exclusion Is Limited To Manmade Bodies Of Water That Are Not Created In Or By Impounding Waters Of The United States. EPA’s waste treatment system exclusion contained the same limitation as that in S. 787 – but only for three months. As EPA recognized in 1980 when it retracted the limitation, it could encompass many legitimately created waste treatment systems, including those constructed before enactment of the CWA. Such a limitation could preclude the creation of new waste treatment systems where those systems impinge in any way on jurisdictional waters, even if there are no other alternatives, due, for example, to space limitations at the facility.

Moreover, S. 787 would undermine existing effluent limitations for numerous sources using treatment ponds as an accepted technology. If a treatment pond is considered a “water of the United States,” discharges into the pond, rather than discharges from the pond, will be required to meet effluent limitations, thereby negating the pond as an accepted method of treatment. By making such a fundamental change in the status of treatment ponds, S. 787 could require the reconsideration of existing effluent limitations in many stormwater and wastewater permits subsequently requiring states, EPA and many facilities to expend significant resources to revise those permits. Thus, what appears to be a “small clarification” to jurisdiction sets in motion a fundamental revision of the entire CWA.

- The Exclusion Would Transform Many Waste Heat Treatment Systems Into Jurisdictional Waters. S. 787’s waste treatment system exclusion also prevents cooling ponds for waste treatment except in very limited circumstances. No other type of treatment system is singled out in this fashion, and the restriction is an attempt to return the current regulatory regime to a 1970’s rule that was eliminated by EPA in 1982. This repudiation of an accepted treatment methodology for heat does not consider the

existence or practicability of alternatives and the impact of such alternatives on the environment, the demand for extra electricity, and the welfare of electricity consumers.

- The Exclusion May Not Cover Many Facilities that Took the Lead in Treating Their Effluent Before Congress Passed the CWA. Many industrial and municipal facilities began using treatment ponds in the 1960's or before. Some have therefore argued that those impoundments were not “designed to meet” CWA requirements that were not implemented until the CWA passed in the 1970's. By perpetuating this phrase, S. 787 will also perpetuate the prospect of future litigation against these early adopters of what later became standard treatment technology.

S. 787, in its current amended form, would turn back the regulatory clock to impose restrictions on waste treatment systems that EPA correctly discarded in the 1980's. In other words, the restrictions did not exist in either the EPA's or Corps' section 402 and 404 permit program regulations pre-SWANCC. S. 787's exclusion could upset the jurisdictional status of many new and existing waste treatment systems that rely on ponds, lagoons, or impoundments. If these systems are reclassified as “waters of the U.S.”, they could no longer be used for their intended purpose. Instead, the regulated facility would need to find another means of complying with its water permit, which may be impossible in some cases, or would be extremely time consuming and enormously costly. Indeed, there is no guarantee that a new treatment facility incorporating pipes, tanks, concrete basins or other hardware in lieu of ponds, lagoons, or impoundments could be sited without impinging on wetlands or other “waters of the United States.” Equally important, S. 787 would constrain any future industrial, municipal, or agricultural development for which use of treatment ponds, lagoons, or impoundments created in or by impounding waters of the United States is the only reasonable alternative. In short, despite the exclusion, S. 787 could impose huge costs and seriously debilitate a huge sector of the economy—both existing facilities and potential new development--without providing any real environmental benefit while commensurately burdening the regulatory agencies to revise current, well established practices.

### **S. 787 TEXT:**

Exclusions—

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(ii) Waste Treatment Systems – Waste treatment Systems including, treatment ponds or lagoons designed to meet the requirements of this Act (other than cooling ponds which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal areas in wetlands) nor resulted from the impoundment of waters of the United States. (Emphasis added).

**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.

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