

WAC Comments on H.R. 5088: *America’s Commitment to Clean Water Act*

Comment on Previous Legislation	Proponents Description of H.R. 5088: America’s Commitment to Clean Water Act	WAC Discussion of Changes Made by H.R. 5088
<p>The definition of “waters of the U.S.” (WOUS) is too broad in that it covers “all waters.”</p>	<p>Using the current regulatory definition as the base, the bill refers to “All other waters . . . the use, degradation, or destruction of which <u>does or would affect</u> interstate or foreign commerce, the obligation of the United States under a treaty, or the territory or other property belonging to the United States.”</p>	<p>The new definition still uses the problematic phrase “all other waters.” Unlike the current regulations which limit that phrase to effects on Commerce, ACCWA broadens the limits to waters that “would affect” “territory” and “property” belonging to the United States and obligations of the United States under a Treaty. This standard fails to provide a meaningful limit on jurisdiction of “all other waters,” so courts will likely interpret the phrase “all other waters” as including most, if not all, waters.</p>
<p>The bill changes the test for needing a permit from discharges into waters to “activities affecting waters.”</p>	<p>All references to “activities” have been deleted.</p> <p>The current regulatory definition is the basis for the bill’s definition and it does not refer to “activities.”</p>	<p>WAC agrees with this change.</p>
<p>Deleting the word “navigable” broadens the scope of the Act.</p>	<p>Deletes the term “navigable waters” and replaces it with “waters of the United States.”</p>	<p>Since passage of the CWA in 1972, the term “navigable,” which is used over eighty times in the CWA, has provided an important limit to the Federal Government’s authority to regulate waters. Deleting this term and replacing it with the definition of “waters of the United States” in ACCWA expands the scope of the CWA, removing any meaningful limit on Federal authority.</p>
<p>The status of the regulatory exclusion for Waste Treatment Systems is uncertain.</p>	<p>Codifies an exclusion for existing Waste Treatment Systems, including treatment ponds or lagoons, and sets parameters for new systems.</p>	<p>It codifies “<u>an</u>” exclusion NOT the current exclusion. Substantially changes and narrows the applicability of the exclusion for industries as diverse as electric utilities, state and local water management agencies, manufactures, etc.</p>

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The status of the regulatory exemption for Prior Converted Croplands is uncertain.	Codifies an exemption for Prior Converted Croplands, using the Department of Agriculture’s definition and preserving the role of the Secretary of Agriculture in making jurisdictional determinations.	It codifies “ <u>an</u> ” exclusion NOT the current exclusion. Limits PCC to agricultural use, unlike what occurs under the existing regulatory exclusion. Affects 160 billion dollars of private land value.
The definition is expanded to include ephemeral streams.	The proposed definition does not include any reference to ephemeral streams.	Ephemeral streams are not defined. Agencies have historically expanded the definition of tributary to include virtually all channels. Without language of limitation, ephemeral streams could be regulated if they are considered to be “tributaries” or “waters” adjacent to other waters.
The role of the States is diminished.	The bill does nothing to diminish the role of the States, and adds language to the Clean Water Act limiting Federal authority to the Commerce Clause, Treaty Power, and Property Clause of the Constitution, the Constitutional underpinnings for the Clean Water Act.	Section 101(b) and 101(g) are not acknowledged in the Findings or any where else in the Bill. Does not reaffirm Congressional intent to NOT regulate ground water in the statutory language. ACCWA merely reaffirms judicial interpretations, which are not the same as Congressional intent not to regulate ground water and which may be undermined by the new statutory language.
Perceived confusion over exemptions and savings clauses.	<p>The bill includes a blanket statement that the Act and the amendments made by the Act do not affect the authority of the Secretary of the Army or the Administrator of the Environmental Protection Agency under the provision of the Clean Water Act as of January 8, 2001 (the day before <i>SWANCC</i>.)</p> <p>The bill also adds statutory exclusions for Waste Treatment Systems and Prior Converted Croplands.</p>	The blanket statement referred to in the Findings that the ACCWA does not affect the interpretations of the Secretary of the Army or Administrator is CONTRARY to the fact that “navigable” is deleted and expansive constitutional provisions are added. Moreover, changes have been made to the existing regulatory definition and regulatory exclusions for waste treatment and prior converted cropland.

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No statement on ground water, and how ground water might be affected.	The bill specifically recognizes that ground water is treated separately from “waters of the United States” and that ground water has not been considered to be “waters of the United States” under the Clean Water Act. The bill and amendments made by the bill do not affect those interpretations.	ACCWA should clarify unambiguously that ground water is not regulated under the CWA. This statement in the Findings is confusing and only reaffirms administrative and judicial findings not the original intent of Congress in 1972 not to regulate ground water, but to leave it to the States.
The definition raises questions by referring to jurisdiction to the “fullest extent of the Constitution.”	The bill specifies the Constitutional authorities relied upon by referring to “All other waters . . . the use, degradation, or destruction of which <u>does or would affect</u> interstate or foreign commerce, the obligation of the United States under a treaty, or the territory or other property belonging to the United States.”	ACCWA has merely replaced the language to the “fullest extent of the Constitution” with the provisions of the Constitution on invoking Congressional authority. This is a change without distinction.
The overall bill would expand the scope of the Act, not restore it to pre-SWANCC and pre- <i>Rapanos</i> status.	Explicit language was added to the bill that the purpose of the bill to clarify the definition of “waters of the United States” consistent with interpretations prior to <i>SWANCC</i> and <i>Rapanos</i> .	The regulations prior to <i>Rapanos</i> and <i>SWANCC</i> did not regulate “international waters;” but rather the territorial seas which were limited by definition to 3 nautical miles. Moreover, the existing regulations only regulated “adjacent” wetlands; ACCWA regulates all “adjacent” waters. The current regulations were limited the Commerce Clause; this bill exercises authority over “all other waters” that affect “territory” of the United States and Treaties of the United States.