



## **H.R. 5088** *America's Commitment to Clean Water Act*

H.R. 5088 is presented as an attempt to address concerns about previous legislative proposals. But the new text has many problems and results in an expansion of federal authority to virtually all waters in the United States, unnecessarily encroaching on private property and state and local authority. It will create legal and regulatory uncertainties that will undermine economic activity and jeopardize environmental progress.

**First, the Clean Water Act has always been grounded in the Commerce Clause, but H.R. 5088 expands the Constitutional basis to both the Treaty and Property Clauses. The extent of federal control under this new “authority” would be almost limitless and from a practical standpoint anything but clear.**

- The current Clean Water Act (CWA) is based on Congressional authority to regulate navigable waters under the Commerce Clause. The Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) have tried to push the limits of that authority. Because H.R. 5088 references “all other waters” and invokes the Treaty and Property Clauses (in addition to the Commerce Clause) as a basis for asserting federal authority, it could be read to allow regulation of any roadside ditch, irrigation ditch, erosional feature, irrigated area, dry wash or overland sheet flow, artificial lake or pond, or water filled depression.
- New authority to regulate all waters under the **Treaty Clause** will allow the EPA and the Corps to regulate any water based on the theory that it would be used by migratory birds, which are protected by treaty.
  - It is unclear what other treaties would provide a basis for federal regulation.
  - The Committee on Foreign Affairs should hold hearings to fully understand the breadth of this new authority under the Treaty Clause.
- New authority to regulate all waters under the **Property Clause** opens up whole new possibilities for federal regulation. The Property Clause, as traditionally interpreted, broadly authorizes Congress to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>1</sup> Under H.R. 5088, if the “use, degradation, or destruction” of water “does or would affect” U. S. territory or federal property there would be federal jurisdiction

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<sup>1</sup> U.S. Const., Art. IV, § 3, cl. 2.

over that water. This raises new questions about the potential reach of federal authority that will be determined by federal agencies and ultimately the courts.

- The Supreme Court has held that the extent of control over federal land under the Property Clause is “without limitation.”<sup>2</sup>
- The Committee on Natural Resources should hold hearings to examine the scope of the Clean Water Act under this new authority.

**Second, H.R. 5088 does not just codify the existing regulatory definition of “waters of the United States.” It expands the current definition to include “international waters” (not just the “territorial seas”) and “adjacent waters” (not just adjacent wetlands) and removes language of limitation in the current regulatory definition.**

- The current Clean Water Act regulations define waters of the United States to include the territorial seas (defined by regulation as three nautical miles from land), not **international waters** (which generally are waters beyond the exclusive economic zone). It is unclear what is intended by the expansion of Clean Water Act jurisdiction to international waters because U.S. law does not apply extraterritorially.
  - The Clean Water Act permits are already required for activities on the outer continental shelf, by virtue of the Submerged Lands Act.<sup>3</sup> Shared international waters, such as the Great Lakes, are regulated by international agreement, such as the Boundary Waters Treaty.
  - Thus, it is unclear what is intended by the expansion of Clean Water Act jurisdiction into international waters or even how “international waters” is to be defined for the purposes of the Clean Water Act. The Committee on Foreign Affairs should hold hearings to examine this question.
- Under the current Clean Water Act regulations, wetlands that are **adjacent** to other waters (other than waters that are themselves wetlands) are subject to regulation. H.R. 5088 expands jurisdiction to all adjacent **waters** and not just adjacent wetlands.
  - Corps Districts and the EPA regions have no consistent interpretation of the current regulations, which define “adjacent” as “bordering, contiguous, or neighboring.” “Adjacent” wetlands have been interpreted to mean anything from a wetland that lies within 200 feet of another waterbody to a wetland that is within the same floodplain as another waterbody. Some regulators have even used sheet flow of rain water to establish adjacency.<sup>4</sup> In the *Carabell* case, the

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<sup>2</sup> U.S. v. San Francisco, 310 U.S. 16, 29 (1940). *See also* Kleppe v. New Mexico, 426 U.S. 529 (1976) (upholding federal law against shooting wild burros on federal land under the Property Clause but leaving open the extent of its application to private land).

<sup>3</sup> 43 U.S.C. §§1301-1315.

<sup>4</sup> GAO, Water and Wetlands, Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction (Feb. 2004) (GAO-04-297).

Corps claimed a wetland was adjacent to a water of the U.S. (there a ditch) even though it was separated by a berm that prevented any water flows from the land into the ditch.

- Because the bill expands jurisdiction to adjacent “waters,” and not just adjacent wetlands, it is difficult to understand what the boundaries of jurisdiction would be.

**Third, by removing the word “navigable” from the statute, H.R. 5088 confuses the meaning of key terms, like “tributary.”**

- Current regulations do not define “tributary.” As a result, there has been no limit on what constitutes a tributary, a problem that is magnified when jurisdiction is no longer based on a relationship to navigable waters.
- Some regulators believe federal jurisdiction extends to channels that rarely, if ever, hold water.<sup>5</sup> Regulators also use the concept of tributary to claim jurisdiction over ditches built in uplands, and even storm drains.<sup>6</sup>

**Fourth, H.R. 5088 significantly narrows the existing regulatory exclusion for waste treatment systems.**

- H.R. 5088 limits the applicability of the WTS exclusion by defining waste treatment systems (WTS) as only those that are “confined, discrete structures,” and requiring them to have been “specifically” designed “and engineered” to meet CWA requirements. Furthermore, they must have been “documented” by Section 402 and 404 permitting authorities. All of these are new requirements that could strip away the current WTS exclusion from existing WTS and, because the EPA is the arbiter of which facilities have documentation, the Administrator would be able to second guess the original permitting authorities.
- Additionally, H.R. 5088 would in effect ban new WTS constructed in or resulting from an impoundment of waters of the United States, as broadened by the bill. As a result, any new waste treatment area that would require a section 404 permit could be considered a water of the U.S. and any water going **into** the system would require treatment to meet water quality standards, eliminating the purpose of such systems. This could affect stormwater treatment areas protecting the Florida Everglades, some stormwater retention basins, some cooling ponds, some settling ponds to protect downstream waters from mining sediments, and some treatment wetlands used as agricultural best management practices or to polish municipal wastewater discharges. In effect, the construction of many new WTS will be prohibited even though they may be the only practicable method of treatment or environmentally preferable.
- The H.R. 5088 WTS grandfather clause further narrows the applicability of the exclusion by requiring the subset of existing facilities that would otherwise qualify for the WTS exclusion to meet an additional and exceedingly vague hurdle (i.e. “meets applicable standards and limitations at the point of discharge in a manner similar to other dischargers under the Act”).

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<sup>5</sup> Id.

<sup>6</sup> Id.

**Fifth, H.R. 5088 significantly narrows the existing regulatory exclusion for prior converted cropland.**

- The prior converted cropland (PCC) exclusion included in H.R. 5088 guts the existing regulatory exclusion. The bill limits PCC to agricultural use. Under existing regulations, farmers routinely use or allow PCC to be used for many non-agricultural uses and are not required to obtain a section 404 permit for such non-agricultural uses.
- Prior converted croplands, defined as wetlands that have legally been converted to non-wetlands prior to 1985, are excluded from federal Clean Water Act jurisdiction in accordance with a regulation published in 1993 by the EPA and the Army Corps of Engineers. The regulation says: “Waters of the United States” do not include prior converted cropland<sup>7</sup>, and the Preamble states explicitly: “This determination of CWA jurisdiction is made regardless of the types or impacts of the activities that may occur in those areas.”<sup>8</sup>
- The Corps of Engineers had consistently maintained that the exclusion from Clean Water Act Jurisdiction was maintained even after farmers stopped using the prior converted croplands for crop purposes.
- H.R. 5088 will subject, for the first time, 53 million acres of privately-owned, prior converted cropland to federal Clean Water Act jurisdiction.
- H.R. 5088 would remove that exclusion, which will immediately devalue prior converted cropland, whether it is presently being cropped or used for some other purpose.
- The United States Department of Agriculture’s Economic Research Service estimates the ability to use PCC for non-agricultural purposes is worth \$160 billion to agricultural landowners. That value will evaporate if H.R. 5088 is adopted.
- Farmers have long counted on their prior converted croplands for many legitimate reasons associated with running a farm.
- The Committee on Agriculture should hold a hearing to examine the impacts on farmers and farm communities and the role of the Secretary of Agriculture in implementing the bill.

**Sixth, when H.R. 5088 expands the definition of “waters of the U.S.,” it expands the range of ordinary activities that would require both 402 and 404 permits. The current CWA 404(f) dredge and fill permitting exclusions are not available to many ordinary activities and do not solve the problem of an overreaching definition of “waters of the U.S.”**

- The exclusions only exempt certain activities from the 404 permitting requirement; they do not exempt waterbodies from being “waters of the U.S.” or from the 402 permitting requirements.
- EPA and the Corps interpret permitting exemptions narrowly.

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<sup>7</sup> 58 Fed. Reg. 45,008, 45,038 (Aug. 25, 1993) (codified at 33 C.F.R. § 328.3(a)(8) (Corps); 40 C.F.R. § 122.2 (EPA))

<sup>8</sup> *Id.* at 45,034.

- Narrow interpretations have created problems for farmers engaging in normal farming activities, for foresters harvesting timber, for flood control officials maintaining floodways, and for persons engaging in oil and gas exploration activities, among others.

**Seventh, expanded federal jurisdiction gives further ammunition to third parties seeking to halt economic activity through law suits.**

**Eighth, the changes made by H.R. 5088 would require the Corps and the EPA to amend and expand the scope of their existing regulations to conform to and interpret the new provisions of law.**

- H.R. 5088 is such a significant departure from current law that the EPA and the Corps will no longer be able to rely on their existing regulations.
- To match the expanded authority in the bill, new regulations would have to be much broader than existing regulations and, as applied, would invite further expansion of federal control.

**Ninth, the Committees on Transportation and Infrastructure, Natural Resources, Foreign Affairs, Agriculture, Small Business, Oversight and Government Reform, and Energy and Commerce all should hold hearings to determine the breadth of this proposed new authority and its impacts.**

**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; Florida Sugar Cane League; 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 Milk Producers Council; 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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