

How America's Commitment to Clean Water Act Addresses Comments to Prior Legislation

Comment	America's Commitment to Clean Water Act	Discussion
<p>The definition is too broad in that it purports to cover “all waters.”</p>	<p>Using the current 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 critics of the bill failed or refused to recognize that the reference to “all” waters was modified by the Constitutional limit on Federal authority. The current bill, using the structure of the existing regulations, more clearly limits Federal jurisdiction to specific Constitutional authorities underlying the Clean Water Act.</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. The current regulatory definition is the basis for the bill’s definition and it does not refer to “activities.”</p>	<p>The bill never changed the operative test of section 301 of the Clean Water Act, which establishes the standard that “the discharge of any pollutant by any person shall be unlawful.” The bill never intended to, nor should have been interpreted to regulate “activities” rather than “discharges”.</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>In 1972, Congress specifically deleted the term “navigable” from the definition of “navigable waters”. Instead, Congress defined “navigable waters” as “The waters of the United States, including the territorial seas.” Congress deleted the term “navigable” from the definition <u>38 years</u> ago. The Supreme Court reinserted the term “navigable” into the definition in 2001, narrowing the scope of the Act in the process. However, although all 9 justices in the <i>SWANCC</i> and <i>Rapanos</i> decisions agreed that the Clean Water Act extends beyond the navigable-in-fact waters, no more than 4 justices could agree on what “navigable” means. Retaining the term perpetuates confusion as to its meaning.</p>

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<p>The status of the regulatory exemption for Waste Treatment Systems is uncertain.</p>	<p>Codifies an exemption for existing Waste Treatment Systems, including treatment ponds or lagoons, and sets parameters for new systems.</p>	<p>Codifying the exemption eliminates concern that the regulatory exemption has been adversely affected, and conforms the exemption to EPA's original proposal.</p>
<p>The status of the regulatory exemption for Prior Converted Croplands is uncertain.</p>	<p>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.</p>	<p>Codifying the exemption eliminates concern that the regulatory exemption has been adversely affected.</p>
<p>The definition is expanded to include ephemeral streams</p>	<p>The proposed definition does not include any reference to ephemeral streams.</p>	<p>The current regulatory definition does not refer to ephemeral streams.</p>
<p>The role of the States is diminished.</p>	<p>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.</p>	<p>The Federal authority for the Clean Water Act was not stated in law in 1972. Now it will be. The State roles under the Clean Water Act, such as permitting, establishing designated uses for waters and water quality standards, and administering financial assistance are unaffected by the definition.</p>

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<p>Perceived confusion over exemptions and savings clauses.</p>	<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 SWANCC.) The bill also adds statutory exemptions for Waste Treatment Systems and Prior Converted Croplands.</p>	<p>Creating a list of provisions not affected would be endless and of no legal value. The basic rules of statutory construction protect existing and unamended provisions of the Clean Water Act. The blanket statement will be more effective.</p>
<p>No statement on ground water, and how ground water might be affected.</p>	<p>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.</p>	<p>The Clean Water Act has never been used to regulate discharges into ground water so as to protect the quality of the ground water. The bill preserves this relationship.</p>
<p>The definition raises questions by referring to jurisdiction to the "fullest extent of the Constitution."</p>	<p>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."</p>	<p>The critics of the bill failed or refused to recognize that the reference to "all" waters was modified by the Constitutional limit on Federal authority. The current bill, using the structure of the existing regulations, more clearly limits Federal jurisdiction to specific Constitutional authorities underlying the Clean Water Act.</p>

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The overall bill would expand the scope of the Act, not restore it to pre-SWANCC and pre-Rapanos 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 SWANCC and Rapanos.	The "expansion" comments were never supported by the language of the bill, but were general arguments in opposition. The bill now contains affirmative language that the bill is not an expansion.