

SIDE-BY-SIDE COMPARISON

DEFINITION OF “WATERS OF THE UNITED STATES”
H.R. 5088 (111th Congress) vs. CWA REGULATIONS vs. S. 787 (111th Congress)

<u>H. R. 5088 (as introduced) (111th Congress)</u>	<u>The Corps/EPA CWA Regulations</u>	<u>S. 787 (as proposed to be reported from EP&W Committee) (111th Congress)</u>
<p><u>DEFINITION OF WATERS OF THE UNITED STATES.</u></p> <p>(A) IN GENERAL- The term ‘waters of the United States’ includes:</p> <p>(i) all waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;</p> <p>(ii) all interstate <u>and international</u> waters, including interstate <u>and international</u> wetlands;</p> <p>(iii) all other waters, <u>including</u> intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, <u>the use, degradation, or destruction of which <u>does or would</u> affect interstate or foreign commerce. <u>the obligations of the United States under a treaty, or the territory or other property belonging to the United States</u></u>;</p> <p>(iv) all impoundments of waters otherwise defined as waters of the United States under this paragraph;</p> <p>(v) tributaries of waters identified in clauses (i) through (iv);</p> <p>(vi) the territorial seas; and</p> <p>(vii) <u>waters, including</u> wetlands, adjacent to waters identified in clauses (i) through (vi).</p> <p>(B) EXCLUSIONS- The term ‘waters of the United States’ does not include--</p> <p>(i) <u>waters that are all or part of a</u> WASTE TREATMENT SYSTEM, including treatment ponds or lagoons designed to meet the requirements of this Act; or</p>	<p><u>DEFINITIONS.</u></p> <p>The term “waters of the United States” means:</p> <p>(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;</p> <p>(2) All interstate waters including interstate wetlands;</p> <p>(3) All other waters <u>such as</u> intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, <u>the use, degradation, or destruction of which <u>could</u> affect interstate or foreign commerce</u> including any such waters:</p> <p>(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or</p> <p>(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or</p> <p>(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;</p> <p>(4) All impoundments of waters otherwise defined as waters of the United States under the definition;</p> <p>(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;</p> <p>(6) The territorial seas;</p> <p>(7) Wetlands adjacent to waters <u>other than waters that are themselves wetlands</u> identified in paragraphs (a)(1)-(6) of this section.”</p> <p>(8) Waters of the United States do not include</p> <p><i>[Note: The sequence of text below is reversed from that in the regulation, for ease of comparison.]</i></p> <p>WASTE TREATMENT SYSTEMS, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.</p>	<p><u>DEFINITION OF WATERS OF THE UNITED STATES.</u></p> <p>(A) <u>IN GENERAL.</u>—The term ‘waters of the United States’ means</p> <p>all waters subject to the ebb and flow of the tide, the territorial seas, and <u>all interstate and intrastate waters</u>, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, and natural ponds, all tributaries of any of the above waters, and all impoundments of the foregoing.</p> <p>(B) <u>EXCLUSIONS.</u>—</p> <p><i>[Note: The sequence of text below is reversed from that in the bill, for ease of comparison.]</i></p> <p>(ii) <u>WASTE TREATMENT SYSTEMS.</u>— 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.</p>

(ii) PRIOR CONVERTED CROPLAND, except that, notwithstanding the determination of an area's status as prior converted cropland by the Secretary of Agriculture, for the purposes of this Act, the final authority regarding jurisdiction under this Act remains with the Administrator.

(27) WASTE TREATMENT SYSTEM-

(A) IN GENERAL- The term 'waste treatment system' means a confined and discrete system or structure that is specifically designed and engineered to meet the requirements of this Act and that is determined by the Administrator to be documented by the applicable permitting authority under section 402 or 404.

(B) SPECIAL RULE- A system or structure may not be documented as a waste treatment system and the Administrator may not make a determination under subparagraph (A) if, after the date of enactment of this paragraph, such system or structure is created in waters of the United States or results from the impoundment of waters of the United States.

(C) GRANDFATHER- Notwithstanding subparagraph (B), a waste treatment system in existence and documented before the date of enactment of this paragraph may include a waste treatment system that was either originally created in or resultant from the impoundment of waters of the United States if the discharge from such system meets applicable standards and limitations at the point of discharge in a manner similar to other discharges under this Act.

(D) APPLICABILITY- The definition contained in this paragraph shall apply only for the purposes of paragraph (26).

(28) PRIOR CONVERTED CROPLAND- The term 'prior converted cropland' means a wetland as determined by the Secretary of Agriculture--

(A) that has been converted by draining, dredging, filling, leveling, or other manipulation (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) for the purpose of or to have the effect of making possible the production of an agricultural commodity without further application of the manipulations described herein if--

(i) such production would not have been possible but for the conversion; and

(ii) before the conversion such land was wetland, farmed wetland, or farmed-wetland pasture;

(B) on which such conversion occurred prior to December 23, 1985;

(C) on which an agricultural commodity had been produced at least once before December 23, 1985;

PRIOR CONVERTED CROPLAND. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(Emphasis added.)

(i) PRIOR CONVERTED CROPLAND.—

Waters of the United States do not include prior converted cropland.

Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of this Act, *the final authority regarding jurisdiction under this Act remains with the Environmental Protection Agency.*

(D) that, as of December 23, 1985, did not support woody vegetation and met the following hydrologic criteria:

(i) inundation was fewer than 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more); and

(ii) if a pothole, playa, or pocosin, ponding was fewer than 7 consecutive days during the growing season in most years (50 percent chance or more) and saturation was fewer than 14 consecutive days during the growing season most years (50 percent chance or more); and

(E) that is devoted to an agricultural use.

SEC. 5. CONFORMING AMENDMENTS.

The Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) is amended—

(1) by striking ‘navigable waters of the United States’ each place it appears and inserting ‘waters of the United States’;

(2) in section 304(l)(1) by striking ‘NAVIGABLE WATERS’ in the paragraph heading and inserting ‘WATERS OF THE UNITED STATES’; and

(3) by striking ‘navigable waters’ each place it appears and inserting ‘waters of the United States’.

* * *

CONFORMING AMENDMENTS.

- (1) by striking “navigable waters of the United States” each place it appears and inserting “waters of the United States”;
- (2) in section 304(l)(1) by striking “NAVIGABLE WATERS” in the heading and inserting “WATERS OF THE UNITED STATES”; and
- (3) by striking “navigable waters” each place it appears and inserting “waters of the United States”.

REGULATIONS.

- (a) PROMULGATION.—Not later than 18 months after the date of enactment of this Act, the Administrator of the Environmental Protection Agency and the Secretary of the Army shall promulgate such regulations as are necessary to implement this Act and the amendments made by this Act.
- (b) RULES OF CONSTRUCTION.—Subject to the exclusions in paragraph (25)(B) of section 502 of the Federal Water Pollution Control Act (33 U.S.C. 1362) (as amended by section 4), the term “waters of the United States” shall be construed consistently with—
 - (1) the scope of Federal jurisdiction under that Act, as interpreted and applied by the Environmental Protection Agency and the Corps of Engineers prior to January 9, 2001 (including pursuant to the final rules and preambles published at 53 Fed. Reg. 20764 (June 6, 1988) and 51 Fed. Reg. 41206 (Nov. 13, 1986)); and
 - (2) the legislative authority of Congress under the Constitution.

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<p><u>SEC. 3. FINDINGS.</u></p> <p>* * *</p> <p><u>(1) Administrative and judicial interpretations of the Federal Water Pollution Control Act have treated GROUND WATER separately from 'waters of the United States' as that term is used in such Act, and ground water has not been considered to be 'waters of the United States' under such Act. This Act and the amendments made by this Act do not affect those administrative and judicial interpretations.</u></p> <p>* * *</p> <p><u>(Emphasis added.)</u></p>		<p><u>SEC. 3. FINDINGS.</u></p> <p>* * *</p> <p>(2) "ground waters" are treated separately from "waters of the United States" for purposes of the Federal Water Pollution Control Act and are not considered "waters of the United States" under this Act;</p> <p>* * *</p> <p>(24) nothing in this Act or any amendment made by this Act establishes any new right of access to private property for recreational purposes.</p> <p>* * *</p> <p><u>(Emphasis added.)</u></p>
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