

**DETAILED RESPONSES TO WAC'S
"REASONS TO OPPOSE THE CLEAN WATER RESTORATION ACT"**

1. Claim that CWRA would "for the first time ever" extend jurisdiction to "essentially all wet areas" including "ground water, ditches, pipes, streets, municipal storm drains, gutters, and desert features."

CWRA does not expand jurisdiction, but simply puts into statute a definition of "waters of the United States" based on the agencies' well-established rules. Since 1972, the Clean Water Act has applied to all of the "waters of the United States." The agencies' longstanding regulations have similarly protected all water bodies, defining "waters of the United States" to include all traditionally navigable waters, all interstate waters, and all "intrastate waters" as follows: "All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce," including waters that could be used "by interstate or foreign travelers for recreational or other purposes," "[f]rom which fish or shellfish are or could be taken and sold in interstate or foreign commerce," or could be put to an "industrial purpose by industries in interstate commerce. . . ." The agencies regulations also include in the definition of "waters of the United States" all impoundments of such waters, tributaries to such waters, and wetlands adjacent to such waters. *See* 33 C.F.R. 328.3 (a); 40 C.F.R. 230.3(s).

The agencies have not historically used this definition to regulate all wet areas as "waters". Instead, the agencies have recognized that some accumulations of water -- like ornamental ponds and swimming pools, "[a]rtificially irrigated areas which would revert to upland if the irrigation ceased," and certain upland ditches -- are not generally considered waters of the United States. *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (November 13, 1986).

The Clean Water Restoration Act language -- which lists what is included in "waters of the United States," is not broader than the Clean Water Act -- which requires the regulation of the "waters of the United States," without further defining that term. As a result, it will permit the exclusion of insignificant water features to the same extent that current law does. Man-made conveyances, such as those that carry rain water, may be subject to CWA jurisdiction after CWRA, but such features have also been subject to jurisdiction under the CWA -- for instance, where they are conveying pollutants to significant water bodies or where they function as tributaries to other covered waters. Moreover, depending on the nature of the pipe or drain, some pipes and drains are only regulated as "point sources," meaning that they are regulated only at their discharge point into another jurisdictional water. The Corps and EPA have never regulated swimming pools under the Clean Water Act, and they will not do so under CWRA either.

WAC's claim that the bill will change how groundwater is regulated is another boogeyman. Several Clean Water Act provisions distinguish between "navigable waters" and "ground waters," and if CWRA becomes law, and the term "waters of the United States" replaces

“navigable waters” throughout the law, then the statute will still distinguish between “waters of the United States” and “ground waters.”

2. Claim that CWRA would “for the first time ever” extend jurisdiction to “all ‘activities affecting these waters’” regardless of whether the activity is occurring in water or actually adds a pollutant to the water.”

The Clean Water Restoration Act covers waters, not activities, and does not in any way expand the activities regulated under the Clean Water Act. The term “activities” appears in the bill only to help identify the water bodies that Congress intends to protect and has the authority to protect under the Constitution (just as the existing EPA and Corps rules protect waters when their use or degradation could affect interstate commerce). Furthermore, the Clean Water Act’s core permitting programs apply only to activities that result in the discharge of pollutants from specified “point sources” into protected waters, and nothing in the bill changes that long-standing limitation of the Act.

3. Claim that CWRA changes congressional intent regarding Congress’s constitutional authority to enact the CWA.

CWRA is intended to restore CWA jurisdiction to the breadth intended by Congress in 1972 and 1977. When Congress passed the Clean Water Act in 1972, its intention was to assert federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause to prevent pollution at its source and to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” At the time, and indeed throughout most of the 20th century, the Commerce Clause was the constitutional authority most relied upon for federal regulation in the public health and environment arena, and it has been broadly interpreted.

ELI notes in its recently-released paper, *Anchoring the Clean Water Act*:

The Commerce Clause has served as the basis for nearly every major environmental and public health law passed by Congress, including the Clean Water Act. Despite repeated legal challenges to the constitutionality of these laws—including laws that of necessity regulate local, intrastate activities affecting land and water resources—neither the Supreme Court nor federal appellate courts have ever struck down an environmental statute as exceeding Congress’s power under the Commerce Clause.

The ELI paper adds, “Congress’s Commerce Clause power to regulate activities, including purely intrastate activities that substantially affect interstate commerce, continues to be a robust source of constitutional authority,” and that “a principled reading of the relevant cases—from *Wickard* through *Hodel* and *Raich*—suggests that a comprehensive legislative scheme to protect all of the Nation’s waters should be upheld as constitutional.”

It was not until the *SWANCC* decision in 2001 that the Supreme Court raised questions about how broadly Congress intended to use its Commerce Clause constitutional power to assert Clean Water Act jurisdiction, and even that decision did not hold that Congress could not protect the

Nation's waters fully. Instead, the Court's opinion signaled that Congress should enact a clear statement of its intention to regulate to the fullest extent of its constitutional power (something many thought Congress had already done in 1972). CWRA would provide such a clear statement. It identifies the features to be considered "waters of the United States," deriving the categories from regulations that have been in place for decades, and clearly states its intention to regulate those waters -- in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" -- "to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution."

4. Claim that CWRA encroaches on States' rights regarding land use and water allocation.

CWRA does not expand historic protections or interfere with State or local government rights over such issues as water allocation or zoning. The fact is, states overwhelmingly support broad Clean Water Act protections. State water protection programs commonly depend on the Clean Water Act, which has provided a nationwide minimum level of pollution control for water bodies – including wholly intrastate waters – since the 1970s. In fact, almost all states have assumed administration of one of the CWA's most important pollution control permitting programs (the "NDPES" program). Some State laws limit whether and how the State can adopt protections stricter than federal law.

Not surprisingly, the vast majority of States, including Minnesota, opposed rollbacks of the regulations on which CWRA is based when they were suggested in 2003, and over 30 States, including Minnesota, urged the Supreme Court last year to uphold broad protections for small streams and their adjacent wetlands. Since its introduction, CWRA already has gained the endorsement of state officials across the country as well as the Association of State Wetland Managers and the Association of State Floodplain Managers.

5. Claim that CWRA eliminates regulatory exemptions for prior converted croplands and waste treatment systems.

CWRA does not eliminate these regulatory exemptions. Indeed, CWRA includes a clear congressional finding that expresses Congress's view of the existing regulations defining "waters of the United States: "Since the 1970s, the definition of 'waters of the United States' in the regulations of the Environmental Protection Agency and the Corps of Engineers have properly established the scope of waters to be protected under the Federal Water Pollution Control Act...." Sec. 3, para. 3.

On the other hand, these regulatory exemptions for specific categories of waters – prior converted cropland and waste treatment systems – are complex and confusing to apply in regulatory practice. Consequently, these technical exemptions and their application should remain the province of the regulatory agencies.

6. Claim that CWRA puts “critical regulatory decisions in the hands of constitutional lawyers” and “results in costly litigation.”

CWRA is needed to correct exactly the situation that WAC disingenuously claims it will cause! It is counsel for WAC member organizations and the Pacific Legal Foundation that have brought “costly litigation regarding the scope of ‘intrastate waters,’ the extent of ‘activities affecting these waters,’ and the limit of Congress’s authority under the Constitution, and in so doing have placed “critical regulatory decisions in the hands of constitutional lawyers.” And recent court actions indicate that these groups fully intend to continue to use costly litigation and the current legal confusion to attempt to further erode and confound the scope of the CWA.

Also, it is hard to imagine a more fertile breeding ground for litigation than the present situation. There is the Court’s 5-4 decision in *SWANCC*, questioning jurisdiction over intrastate, non-navigable, “isolated” waters used by migratory birds, that has been interpreted narrowly by most lower courts but broadly in a vague 2003 guidance from EPA and the Corps. Then, a 4-1-4 split decision in *Rapanos*, with three different rulings and a new policy guidance and 87-page manual to try to implement the new guidance – which is in addition to, not instead of, the 2003 guidance. It is virtually impossible for the public, regulated entities, state program managers – and probably even most EPA and Corps officials – to say with any certainty which waters (aside from those that are “relatively permanently flowing”) are still being covered by the law.

By offering a clear statement of congressional intent to restore the historic scope of CWA jurisdiction and to do so to the full extent of its constitutional authority, CWRA will clarify the scope of “intrastate waters” and Congress’s constitutional authority, reducing costly litigation and placing critical regulatory decisions back in the hands of experienced professional resource managers where they belong.

7. The Savings Clause does not exempt any waters from CWRA’s definition of “waters of the United States”; only activities.

The Clean Water Act has never exempted any particular waters from regulation. It has only exempted certain activities that Congress considered to be relatively minimal in impact. The purpose of the Savings Clause was simply to make clear that CWRA did nothing to disturb those pre-existing Clean Water Act statutory exemptions for specific activities. With or without the savings clause, those statutory exemptions remain in place and are not disturbed. It is particularly ironic that opponents are raising apparent objections to a provision meant to ensure the preservation of existing statutory leeway to undertake certain polluting activities without complying with some Clean Water Act requirements.

8. The Savings Clause fails to adopt regulatory exemptions for prior converted cropland and waste treatment systems.

The purpose of the Savings Clause was simply to make clear that CWRA did nothing to disturb those pre-existing statutory Clean Water Act exemptions for specific activities. It is also clear from the findings in the bill that the legislation acknowledges the scope of existing regulations. As noted above, regulatory exemptions for particular categories of waters, such as prior

converted croplands and waste treatment systems, are not disturbed by the bill, one way or the other; that is, they are not overridden, but they are not “elevated” in status to be codified in statute, which would be a change from current law. Also, as previously discussed, the scope of these regulatory exemptions should be left to the expert agencies that created them.

9. Claim that the Savings Clause limits the agencies’ ability to adopt future regulatory exemptions.

There is not rational basis for this claim. Again, the purpose of the Savings Clause is simply to make clear that CWRA did nothing to disturb those pre-existing Clean Water Act exemptions for specific activities. The Savings Clause is silent with regard to any current or future regulatory exemptions. With or without the savings clause, the statutory exemptions remain in place and are not disturbed. So, if WAC considers the savings clause a “problem,” then there would be no harm in striking it from the bill.

10. Claim that because the Savings Clause paraphrases the existing statutory exemptions, it raises questions about the scope of existing statutory exemptions.

Again, the purpose of the Savings Clause is simply to make clear that CWRA did nothing to disturb those pre-existing Clean Water Act exemptions for specific activities. With or without the savings clause, the statutory exemptions remain in place and are not disturbed.