

Summary of Concerns with H.R. 2421

Prepared by Committee on Transportation and Infrastructure Republican Staff

Many stakeholders have expressed serious concerns with H.R. 2421, and are seeking greater clarity and a balanced approach as to the scope of Clean Water Act jurisdiction. Congress has the responsibility to state clearly the jurisdictional limits of Federal regulatory programs, and not create more confusion and controversy, as would happen with H.R. 2421. Some of the concerns with H.R. 2421 include:

- H.R. 2421 would result in a vast expansion of Federal jurisdiction to **“all”** waters, and **all “activities affecting”** those waters, **“to the fullest extent under the Constitution,”** requiring regulation of virtually all wet areas in the country. H.R. 2421 would not provide jurisdictional certainty, and would not forestall litigation as the bill’s proponents say they intend.
- H.R. 2421 would allow EPA and the Corps to attempt to exercise unlimited regulatory authority over all intrastate waters (waters now considered entirely under state jurisdiction), even though H.R. 2421 proponents claim the bill would only “restore,” and not expand, jurisdiction. Under the bill, virtually anything wet (including ditches, gutters, desert drainages, lined conveyance channels, erosional features, and even groundwater) could be considered a water of the United States, and therefore subject to regulation.
- H.R. 2421 would upset the long-standing cooperative relationship that the Federal government and the states have had with regard to water management and water quality. Specifically, the bill would vastly expand Federal control while diminishing state control over water by expanding the scope of Federal jurisdiction to its maximum limits under the Constitution. State and local governments would be preempted from making many local land and water use decisions. This is contrary to the historic deference that Congress has afforded to the states in such matters, as recognized by the U.S. Supreme Court in several decisions.
- H.R. 2421 would, for the first time, regulate all **“activities affecting”** waters. This language could be read broadly to allow the regulation of any and all activities that “affect” waters. The fact that the activity may “affect” a “water” in some way would allow the activity to be regulated under the Clean Water Act. The introduction of undefined terminology such as “activities” and “affecting” adds further uncertainty into jurisdictional determinations, and provides Federal agencies and the courts (through enforcement actions and special interests’ citizen suits) with considerable room for expansive interpretation that could lead to the back-door regulation of land use, nonpoint sources, groundwater, and other resources.
- By expanding Federal jurisdiction to **all** “waters” and “activities affecting” those waters, H.R. 2421 would have the effect of vastly expanding Federal powers over private property and land use decisions, which traditionally have been within the purview of state and local governments.
- H.R. 2421’s impact would be far greater than just on Clean Water Act Section 404 regarding dredge and fill permits. The bill also would affect Section 303 regarding the

designation of water quality standards and the development of total maximum daily loads (TMDLs), Section 311 regarding oil and hazardous substance spill requirements, and Sections 401 and 402 regarding discharges and NPDES permits. An expanded Federal water program would impose an unfunded mandate on states by increasing the number of waters subject to the setting of water quality standards and TMDLs, and would expand the permitting workload of state-administered water programs.

- H.R. 2421 would, for the first time, expand jurisdiction under the Clean Water Act to cover *all* waters within the **“legislative power of Congress under the Constitution.”** Because it is unknown exactly what those maximum limits of Federal authority are under the Clean Water Act (because neither Congress nor the Courts have defined them), this uncertainty would be a matter for much speculation and much future litigation as the government and stakeholders struggle to clarify the uncertain scope of jurisdiction under the proposal.
- By replacing the term “navigable waters” with a newly defined term of “waters of the United States,” and expanding the scope of Federal jurisdiction to its maximum limits under the Constitution, H.R. 2421 would effectively erase decades of jurisprudence and invite the Federal courts (including the Supreme Court) to decide the constitutional limits of Federal authority under the Clean Water Act.
- Litigation, including third party citizen lawsuits by special interest groups, would increase under H.R. 2421, as the government and stakeholders struggle to clarify the uncertain scope of constitutional authority and the scope of “waters” and “activities” covered under H.R. 2421. If Congress leaves it up to the Federal courts to decide Clean Water Act jurisdiction, as would happen under H.R. 2421, the resulting litigation could lead to many unintended consequences.
- Under H.R. 2421, certain important regulatory exemptions from the definition of waters of the United States contained in the Corps and EPA regulations would be eliminated, including the exemption for prior converted croplands and waste treatment systems, including treatment ponds or lagoons.
- Expanded jurisdiction under H.R. 2421 would mean a huge increase in permit applications, leading to longer permitting delays.
- Far more resources would be needed to address the additional permit applications and defend the Federal regulatory program under H.R. 2421, exacerbating an existing Clean Water Act funding gap.
- Increased delays in securing permits under H.R. 2421 would impede a host of economic activities, including agriculture, transportation, needed infrastructure development, electric transmission, real estate activities, and mining.