

S.787

Clean Water Restoration Act (Introduced in Senate)

S 787 IS

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S. 787

To amend the Federal Water Pollution Control Act to clarify the jurisdiction of the United States over waters of the United States.

IN THE SENATE OF THE UNITED STATES

April 2, 2009

Mr. FEINGOLD (for himself, Mrs. BOXER, Mr. CARDIN, Mr. BROWN, Ms. CANTWELL, Mr. CARPER, Mr. DODD, Mr. DURBIN, Mrs. GILLIBRAND, Mr. KERRY, Mr. KOHL, Mr. LAUTENBERG, Mr. LEAHY, Mr. LEVIN, Mr. LIEBERMAN, Mr. MENENDEZ, Mr. MERKLEY, Mr. REED, Mr. SANDERS, Mr. SCHUMER, Mrs. SHAHEEN, Ms. STABENOW, Mr. WHITEHOUSE, and Mr. WYDEN) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To amend the Federal Water Pollution Control Act to clarify the jurisdiction of the United States over waters of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Clean Water Restoration Act'.

SEC. 2. PURPOSES.

The purposes of this Act are--

- (1) to reaffirm the original intent of Congress in enacting the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92-500; 86 Stat. 816) to restore and maintain the chemical, physical, and biological integrity of the waters of the United States; and

(2) to clearly define the waters of the United States that are subject to the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) as those features that were treated as such pursuant to the final rule (including the preamble to that final rule) published at 53 Fed Reg. 20764 (June 6, 1988) and 51 Fed. Reg. 41206 (November 13, 1986), and other applicable rules and interpretations as in effect on January 8, 2001.

SEC. 3. FINDINGS.

Congress finds that--

(1) water is transported through interconnected hydrological cycles, and the pollution, impairment, or destruction of any part of an aquatic system may affect the chemical, physical, and biological integrity of other parts of the aquatic system;

(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;

(3) the ability to meet the national objective of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) has been undermined by the decisions of the United States Supreme Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (January 9, 2001) and *Rapanos v. United States*, 547 U.S. 715 (June 19, 2006), which have resulted in confusion, permitting delays, increased costs, litigation, and reduced protections for waters of the United States;

(4) this Act reaffirms federal jurisdiction over all waters of the United States, as the Federal Water Pollution Control Act was applied and interpreted in the regulations, guidance, and interpretations of the Environmental Protection Agency and the Corps of Engineers prior to the rulings of the United States Supreme Court in *Solid waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (January 9, 2001) and *Rapanos v. United States*, 574 U.S. 715 (June 19, 2006) and overturns the decisions of the Supreme Court in those cases;

(5) Congress supports the policy in effect under section 101(g) of the Federal Water Pollution Control Act (33 U.S.C. 1251(g)), which states that 'the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.';

(6) protection of intrastate waters is necessary, including geographically isolated waters, to restore and maintain the chemical, physical, and biological integrity of all waters in the United States;

(7) the regulation of discharges of pollutants into intrastate waters is an integral part of the comprehensive clean water regulatory program of the United States;
(8) small and intermittent streams, including ephemeral streams, which have been jeopardized by the decisions referred to in paragraph (3)--

- (A) comprise the majority of all stream miles in the United States;
- (B) serve critical biological and hydrological functions that affect entire watersheds;
- (C) reduce the introduction of pollutants to large streams and rivers;
- (D) provide and purify drinking water supplies;
- (E) are especially important to the life cycles of aquatic organisms; and
- (F) aid in flood prevention, including reducing the flow of higher-order streams;

(9) the pollution or other degradation of waters of the United States, individually and in the aggregate, has a substantial relation to and effect on interstate commerce;

(10) protection of intrastate waters is necessary to prevent substantial harm to interstate commerce and sustain a robust system of interstate commerce in the future;

(11)(A) waters, including streams and wetlands, provide protection from flooding; and

(B) draining or filling intrastate wetlands and channelizing or filling intrastate streams can cause or exacerbate flooding that causes billions of dollars of damages annually, placing a significant burden on interstate commerce;

(12) millions of individuals in the United States depend on streams, wetlands, and other waters of the United States to filter water and recharge surface and subsurface drinking water supplies, protect human health, and create economic opportunity;

(13) source water protection areas containing small or intermittent streams provide water to public drinking water supplies serving more than 110,000,000 individuals in the United States;

(14)(A) millions of individuals in the United States enjoy recreational activities that depend on intrastate waters, such as waterfowl hunting, bird watching, fishing, and photography; and

(B) those activities and associated travel generate hundreds of billions of dollars of income each year for the travel, tourism, recreation, and sporting sectors of the economy of the United States;

(15) activities that result in the discharge of pollutants into waters of the United States are commercial or economic in nature, and, in the aggregate, have a substantial effect on interstate commerce;

(16) a substantial number of the sources regulated under the Federal Water Pollution Control Act discharge into headwater streams that may be intermittent or seasonal;

(17) more than 40 percent of those sources, or 14,800 facilities with individual permits issued in accordance with the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), including industrial plants and municipal sewage treatment systems, discharge into small or intermittent streams;

- (18) protecting the quality of and regulating activities affecting the waters of the United States is a necessary and proper means of implementing treaties to which the United States is a party, including treaties protecting species of fish, birds, and other wildlife;
- (19) approximately half of North American migratory birds depend upon or are associated with wetlands and small and intermittent streams, including ephemeral streams;
- (20) approximately half of all threatened and endangered species in the United States depend on wetlands;
- (21) for those reasons, the protection of wetlands and other waters providing breeding, feeding, and sheltering habitat for migratory birds and endangered species is essential to enable the United States to fulfill the obligations of the United States under international treaties for the conservation of those species;
- (22) protecting the quality of and regulating activities affecting the waters of the United States is a necessary and proper means of protecting Federal land, including hundreds of millions of acres of parkland, refuge land, and other land under Federal ownership and the wide array of waters encompassed by that land; and
- (23) protecting the quality of and regulating activities affecting the waters of the United States is necessary to protect Federal land and waters from discharges of pollutants and other forms of degradation; and
- (24) nothing in this Act or any amendment made by this Act establishes any new right of access to private property for recreational purposes.

SEC. 4. DEFINITION OF WATERS OF THE UNITED STATES.

Section 502 of the Federal Water Pollution Control Act (33 U.S.C. 1362) is amended--

- (1) by striking paragraph (7);
- (2) by redesignating paragraphs (8) through (25) as paragraphs (7) through (24), respectively; and
- (3) by adding at the end the following:
- “(25) **WATERS OF THE UNITED STATES-**
- (A) **In General** – The term ‘waters of the United States’ means all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters, 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 forgoing.
- (B) **Exclusions** –
- (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.
- (ii) **Waste Treatment Systems** – 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.

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 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'.

Sec. 6 Savings Clause

Nothing in this Act (or an amendment made by this act) affects the applicability of the following provisions of the Federal Water Pollution Control Act.

- (1) Section 402(l)(1) (33 U.S.C. 1342 (l)(1))
- (2) Section 402 (l)(2) (33 U.S.C. 1342 (l)(2))
- (3) Section 404(f)(1)(A) (33 U.S.C. 1344(f)(1)(A))
- (4) Section 404(f)(1)(B) (33 U.S.C. 1344(f)(1)(B)) (5) Section 404(f)(1)(C) (33 U.S.C. 1344(f)(1)(C))
- (6) Section 404(f)(1)(D) (33 U.S.C. 1344(f)(1)(D))
- (7) Section 404(f)(1)(E) (33 U.S.C. 1344(f)(1)(E))
- (8) Section 404(f)(1)(F) (33 U.S.C. 1344(f)(1)(F))

Sec. 7. 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 the Act, as interpreted and applied by the Environmental Protection Agency and the Corps of Engineers prior to January 9, 2001 (included pursuant to the final rules and preambles published at 53 Fed. Reg. 20764 (June 6, 1988) and 51 Fed. Reg. 41206 (November 13, 1986)); and
- (2) the legislative authority of Congress under the Constitution.