

111TH CONGRESS  
1ST SESSION

# S. 787

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

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## 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

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## A BILL

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

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Clean Water Restora-  
5 tion Act”.

6 **SEC. 2. PURPOSES.**

7 The purposes of this Act are—

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

7           (2) to clearly define the waters of the United  
8           States that are subject to the Federal Water Pollu-  
9           tion Control Act (33 U.S.C. 1251 et seq.); and

10          (3) to provide protection to the waters of the  
11          United States to the maximum extent of the legisla-  
12          tive authority of Congress under the Constitution.

13 **SEC. 3. FINDINGS.**

14          Congress finds that—

15           (1) water is a unique and precious resource  
16           used not only to sustain human, animal, and plant  
17           life, but is also economically important for agri-  
18           culture, transportation, flood control, energy produc-  
19           tion, recreation, fishing and shellfishing, and munic-  
20           ipal and commercial uses;

21           (2) water is transported through interconnected  
22           hydrological cycles, and the pollution, impairment, or  
23           destruction of any part of an aquatic system may af-  
24           fect the chemical, physical, and biological integrity  
25           of other parts of the aquatic system;

1           (3) in 1972, Congress enacted the Federal  
2 Water Pollution Control Act Amendments of 1972  
3 (Public Law 92–500; 86 Stat. 816), which amended  
4 the Federal Water Pollution Act (33 U.S.C. 1251 et  
5 seq.) in its entirety, in order to meet the national  
6 objective of restoring and maintaining the chemical,  
7 physical, and biological integrity of the Nation’s wa-  
8 ters;

9           (4) prior to the date of enactment of that Act  
10 in 1972, State approaches and previous Federal leg-  
11 islation proved ineffective in protecting the Nation’s  
12 waters;

13           (5) the enactment of that Act in 1972 estab-  
14 lished uniform, minimum national water quality and  
15 other clean water protection programs to restore and  
16 maintain aquatic ecosystems of the United States  
17 that serve as critical drinking water sources, water  
18 supplies for municipal, industrial, and agricultural  
19 uses, flood reduction, recreation, habitat for fish and  
20 wildlife, and many other uses;

21           (6) in establishing broad, uniform, and min-  
22 imum Federal standards and programs under the  
23 Federal Water Pollution Control Act (33 U.S.C.  
24 1251 et seq.) in 1972, Congress recognized, pre-  
25 served, and protected the responsibility and right of

1 the States and Indian tribes to prevent, reduce, and  
2 eliminate pollution of waters by preserving for  
3 States and Indian tribes the ability to manage grant,  
4 research, and permitting programs by assuming im-  
5 plementation of portions of the Act to prevent, re-  
6 duce, and eliminate pollution, and to establish stand-  
7 ards and programs that are more protective than  
8 Federal standards and programs, for waters of the  
9 United States within the borders of each State or on  
10 land under the jurisdiction of the Indian tribe;

11 (7) since the 1970s, the definitions of “waters  
12 of the United States” in regulations of the Environ-  
13 mental Protection Agency and the Corps of Engi-  
14 neers have properly established the scope of waters  
15 that require protection by the Federal Water Pollu-  
16 tion Control Act in order to meet the national objec-  
17 tive described in paragraph (3);

18 (8) this Act will treat, as “waters of the United  
19 States”, those features that were treated as such  
20 pursuant to the regulations of the Environmental  
21 Protection Agency and the Corps of Engineers in ex-  
22 istence before the dates of the decisions referred to  
23 in paragraph (10), including—

24 (A) all waters which are subject to the ebb  
25 and flow of the tide;

1 (B) all interstate waters, including inter-  
2 state wetlands;

3 (C) all other waters, such as intrastate  
4 lakes, rivers, streams (including intermittent  
5 streams), mudflats, sandflats, wetlands,  
6 sloughs, prairie potholes, wet meadows, playa  
7 lakes, or natural ponds;

8 (D) all impoundments of waters of the  
9 United States;

10 (E) tributaries of the aforementioned wa-  
11 ters;

12 (F) the territorial seas; and

13 (G) wetlands adjacent to the aforemen-  
14 tioned waters;

15 (9) “ground waters” are treated separately  
16 from “waters of the United States” for purposes of  
17 the Federal Water Pollution Control Act and are not  
18 considered “waters of the United States” under this  
19 Act;

20 (10) the ability to meet the national objective  
21 described in paragraph (3) has been undermined by  
22 the decisions of the United States Supreme Court in  
23 Solid Waste Agency of Northern Cook County v.  
24 United States Army Corps of Engineers, 531 U.S.  
25 159 (January 9, 2001) and Rapanos v. United

1 States, 547 U.S. 715 (June 19, 2006), which have  
2 resulted in confusion, permitting delays, increased  
3 costs, litigation, and reduced protections for waters  
4 of the United States described in paragraph (8);

5 (11) to restore original protections, Congress is  
6 the only entity that can reaffirm the geographical  
7 scope of waters that are protected under the Federal  
8 Water Pollution Control Act;

9 (12) the intent of Congress with the enactment  
10 of this Act is to restore geographical jurisdiction of  
11 the Federal Water Pollution Control Act to that  
12 which was in existence before the dates of the deci-  
13 sions referred to in paragraph (10);

14 (13)(A) as set forth in section 6, nothing in this  
15 Act modifies or otherwise affects the amendments  
16 made by the Clean Water Act of 1977 (Public Law  
17 95–217; 91 Stat. 1566) to the Federal Water Pollu-  
18 tion Control Act that exempted certain activities,  
19 such as farming, silviculture, and ranching activities,  
20 as well as agricultural stormwater discharges and re-  
21 turn flows from oil, gas, and mining operations and  
22 irrigated agriculture, from particular permitting re-  
23 quirements;

24 (B) furthermore, the definition of the term  
25 “point source” under section 502 of that Act (33

1 U.S.C. 1362) excludes agricultural stormwater dis-  
2 charges and return flows from irrigated agriculture;  
3 and

4 (C) this Act does not modify or otherwise affect  
5 any of the provisions described in subparagraphs (A)  
6 and (B);

7 (14)(A) through agency rulemaking, the term  
8 “waters of the United States” did not include—

9 (i) prior converted cropland used for agri-  
10 culture; or

11 (ii) manmade waste treatment systems nei-  
12 ther created in waters of the United States nor  
13 resulting from the impoundment of waters of  
14 the United States; and

15 (B) this Act does not modify or otherwise affect  
16 either of the provisions described in subparagraph  
17 (A);

18 (15) Congress supports the policy in effect  
19 under section 101(g) of the Federal Water Pollution  
20 Control Act (33 U.S.C. 1251(g)), which states that  
21 “the authority of each State to allocate quantities of  
22 water within its jurisdiction shall not be superseded,  
23 abrogated or otherwise impaired by this Act. It is  
24 the further policy of Congress that nothing in this  
25 Act shall be construed to supersede or abrogate

1 rights to quantities of water which have been estab-  
2 lished by any State. Federal agencies shall co-oper-  
3 ate with State and local agencies to develop com-  
4 prehensive solutions to prevent, reduce and eliminate  
5 pollution in concert with programs for managing  
6 water resources.”;

7 (16) protection of intrastate waters is necessary  
8 to restore and maintain the chemical, physical, and  
9 biological integrity of all waters in the United  
10 States;

11 (17) the regulation of discharges of pollutants  
12 into intrastate waters is an integral part of the com-  
13 prehensive clean water regulatory program of the  
14 United States;

15 (18) small and intermittent streams, including  
16 ephemeral and seasonal streams, which have been  
17 jeopardized by the decisions referred to in paragraph  
18 (10)—

19 (A) comprise the majority of all stream  
20 miles in the United States;

21 (B) serve critical biological and  
22 hydrological functions that affect entire water-  
23 sheds;

24 (C) reduce the introduction of pollutants to  
25 large streams and rivers;



1 (D) provide and purify drinking water sup-  
2 plies;

3 (E) are especially important to the life cy-  
4 cles of aquatic organisms; and

5 (F) aid in flood prevention, including re-  
6 ducing the flow of higher-order streams;

7 (19) the pollution or other degradation of wa-  
8 ters of the United States, individually and in the ag-  
9 gregate, has a substantial relation to and effect on  
10 interstate commerce;

11 (20) protection of intrastate waters is necessary  
12 to prevent significant harm to interstate commerce  
13 and sustain a robust system of interstate commerce  
14 in the future;

15 (21)(A) waters, including streams and wetlands,  
16 provide protection from flooding; and

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

22 (22) millions of individuals in the United States  
23 depend on streams, wetlands, and other waters of  
24 the United States to filter water and recharge sur-

1 face and subsurface drinking water supplies, protect  
2 human health, and create economic opportunity;

3 (23) source water protection areas containing  
4 small or intermittent streams provide water to public  
5 drinking water supplies serving more than  
6 110,000,000 individuals in the United States;

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

11 (B) those activities and associated travel gen-  
12 erate hundreds of billions of dollars of income each  
13 year for the travel, tourism, recreation, and sporting  
14 sectors of the economy of the United States;

15 (C) annually, 34,000,000 hunters and anglers  
16 spend more than \$76,600,000,000 on hunting- and  
17 fishing-related products and activities, including ap-  
18 proximately 2,000,000 waterfowl hunters who ac-  
19 count for about \$2,300,000,000 in annual economic  
20 growth;

21 (25) activities that result in the discharge of  
22 pollutants into waters of the United States are com-  
23 mercial or economic in nature, and, in the aggre-  
24 gate, have a substantial effect on interstate com-  
25 merce;

1           (26) a substantial number of the sources regu-  
2           lated under the Federal Water Pollution Control Act  
3           discharge into headwater streams that may be inter-  
4           mittent or seasonal;

5           (27) more than 40 percent of those sources, or  
6           14,800 facilities with individual permits issued in ac-  
7           cordance with the Federal Water Pollution Control  
8           Act (33 U.S.C. 1251 et seq.), including industrial  
9           plants and municipal sewage treatment systems, dis-  
10          charge into small or intermittent streams;

11          (28) protecting the quality of and regulating ac-  
12          tivities affecting the waters of the United States is  
13          a necessary and proper means of implementing trea-  
14          ties to which the United States is a party, including  
15          treaties protecting species of fish, birds, and other  
16          wildlife;

17          (29) approximately half of North American mi-  
18          gratory birds depend upon or are associated with  
19          wetlands and intermittent or ephemeral streams;

20          (30) approximately half of all threatened and  
21          endangered species in the United States depend on  
22          wetlands;

23          (31) for those reasons, the protection of wet-  
24          lands and other waters providing breeding, feeding,  
25          and sheltering habitat for migratory birds and en-

1       dangered species is essential to enable the United  
2       States to fulfill the obligations of the United States  
3       under international treaties for the conservation of  
4       those species;

5               (32) protecting the quality of and regulating ac-  
6       tivities affecting the waters of the United States is  
7       a necessary and proper means of protecting Federal  
8       land, including hundreds of millions of acres of  
9       parkland, refuge land, and other land under Federal  
10      ownership and the wide array of waters encompassed  
11      by that land; and

12              (33) protecting the quality of and regulating ac-  
13      tivities affecting the waters of the United States is  
14      necessary to protect Federal land and waters from  
15      discharges of pollutants and other forms of degrada-  
16      tion.

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

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

20              (1) by striking paragraph (7);

21              (2) by redesignating paragraphs (8) through  
22      (25) as paragraphs (7) through (24), respectively;  
23      and

24              (3) by adding at the end the following:

1           “(25) WATERS OF THE UNITED STATES.—The  
2 term ‘waters of the United States’ means all waters  
3 subject to the ebb and flow of the tide, the territorial  
4 seas, and all interstate and intrastate waters and  
5 their tributaries, including lakes, rivers, streams (in-  
6 cluding intermittent streams), mudflats, sandflats,  
7 wetlands, sloughs, prairie potholes, wet meadows,  
8 playa lakes, natural ponds, and all impoundments of  
9 the foregoing, to the fullest extent that these waters,  
10 or activities affecting these waters, are subject to the  
11 legislative power of Congress under the Constitu-  
12 tion.”.

13 **SEC. 5. CONFORMING AMENDMENTS.**

14           The Federal Water Pollution Control Act (33 U.S.C.  
15 1251 et seq.) is amended—

16           (1) by striking “navigable waters of the United  
17 States” each place it appears and inserting “waters  
18 of the United States”;

19           (2) in section 304(l)(1) by striking “NAVIGABLE  
20 WATERS” in the heading and inserting “WATERS OF  
21 THE UNITED STATES”; and

22           (3) by striking “navigable waters” each place it  
23 appears and inserting “waters of the United  
24 States”.

1 **SEC. 6. SAVINGS CLAUSE.**

2 Nothing in this Act affects the authority of the Ad-  
3 ministrator of the Environmental Protection Agency or  
4 the Secretary of the Army under the following provisions  
5 of the Federal Water Pollution Control Act:

6 (1) Section 402(l)(1) (33 U.S.C. 1342(l)(1)),  
7 relating to discharges composed entirely of return  
8 flows from irrigated agriculture.

9 (2) Section 402(l)(2) (33 U.S.C. 1342(l)(2)),  
10 relating to discharges of stormwater runoff from cer-  
11 tain oil, gas, and mining operations composed en-  
12 tirely of flows from precipitation runoff conveyances,  
13 which are not contaminated by or in contact with  
14 specified materials.

15 (3) Section 404(f)(1)(A) (33 U.S.C.  
16 1344(f)(1)(A)), relating to discharges of dredged or  
17 fill materials from normal farming, silviculture, and  
18 ranching activities, such as plowing, seeding, culti-  
19 vating, minor drainage, harvesting for the produc-  
20 tion of food, fiber, and forest products, or upland  
21 soil and water conservation practices.

22 (4) Section 404(f)(1)(B) (33 U.S.C.  
23 1344(f)(1)(B)), relating to discharges of dredged or  
24 fill materials for the purpose of maintenance of cur-  
25 rently serviceable structures.

1           (5)    Section    404(f)(1)(C)    (33    U.S.C.  
2    1344(f)(1)(C)), relating to discharges of dredged or  
3    fill materials for the purpose of construction or  
4    maintenance of farm or stock ponds or irrigation  
5    ditches and maintenance of drainage ditches.

6           (6)    Section    404(f)(1)(D)    (33    U.S.C.  
7    1344(f)(1)(D)), relating to discharges of dredged or  
8    fill materials for the purpose of construction of tem-  
9    porary sedimentation basins on construction sites,  
10   which do not include placement of fill material into  
11   the waters of the United States.

12          (7)    Section    404(f)(1)(E)    (33    U.S.C.  
13    1344(f)(1)(E)), relating to discharges of dredged or  
14    fill materials for the purpose of construction or  
15    maintenance of farm roads or forest roads or tem-  
16    porary roads for moving mining equipment in ac-  
17    cordance with best management practices.

18          (8)    Section    404(f)(1)(F)    (33    U.S.C.  
19    1344(f)(1)(F)), relating to discharges of dredged or  
20    fill materials resulting from activities with respect to  
21    which a State has an approved program under sec-  
22    tion 208(b)(4) of that Act (33 U.S.C. 1288(b)(4))  
23    meeting the requirements of subparagraphs (B) and  
24    (C) of that section.

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