

111th CONGRESS

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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;

(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.); and

(3) to provide protection to the waters of the United States to the maximum extent of the legislative authority of Congress under the Constitution.

SEC. 3. FINDINGS.

Congress finds that--

(1) water is a unique and precious resource used not only to sustain human, animal, and plant life, but is also economically important for agriculture, transportation, flood control, energy production, recreation, fishing and shellfishing, and municipal and commercial uses;

(2) 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;

(3) in 1972, Congress enacted the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92-500; 86 Stat. 816), which amended the Federal Water Pollution Act (33 U.S.C. 1251 et seq.) in its entirety, in order to meet the national objective of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters;

(4) prior to the date of enactment of that Act in 1972, State approaches and previous Federal legislation proved ineffective in protecting the Nation's waters;

(5) the enactment of that Act in 1972 established uniform, minimum national water quality and other clean water protection programs to restore and maintain aquatic ecosystems of the United States that serve as critical drinking water sources, water supplies for municipal, industrial, and agricultural uses, flood reduction, recreation, habitat for fish and wildlife, and many other uses;

(6) in establishing broad, uniform, and minimum Federal standards and programs under the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) in 1972, Congress recognized, preserved, and protected the responsibility and right of the States and Indian tribes to prevent, reduce, and eliminate pollution of waters by preserving for States and Indian tribes the ability to manage grant, research, and permitting programs by assuming implementation of portions of the Act to prevent, reduce, and eliminate pollution, and to establish standards and programs that are more protective than Federal standards and programs, for waters of the United States within the borders of each State or on land under the jurisdiction of the Indian tribe;

(7) since the 1970s, the definitions of `waters of the United States' in regulations of the Environmental Protection Agency and the Corps of Engineers have properly established the scope of waters that require protection by the Federal Water Pollution Control Act in order to meet the national objective described in paragraph (3);

(8) this Act will treat, as `waters of the United States', those features that were treated as such pursuant to the regulations of the Environmental Protection Agency and the Corps of Engineers in existence before the dates of the decisions referred to in paragraph (10), including--

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

(B) all interstate waters, including interstate wetlands;

(C) 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;

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

(E) tributaries of the aforementioned waters;

(F) the territorial seas; and

(G) wetlands adjacent to the aforementioned waters;

(9) '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;

(10) the ability to meet the national objective described in paragraph (3) 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 described in paragraph (8);

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

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

(13)(A) as set forth in section 6, nothing in this Act modifies or otherwise affects the amendments made by the Clean Water Act of 1977 (Public Law 95-217; 91 Stat. 1566) to the Federal Water Pollution Control Act that exempted certain activities, such as farming, silviculture, and ranching activities, as well as agricultural stormwater discharges and return flows from oil, gas, and mining operations and irrigated agriculture, from particular permitting requirements;

(B) furthermore, the definition of the term 'point source' under section 502 of that Act (33 U.S.C. 1362) excludes agricultural stormwater discharges and return flows from irrigated agriculture; and

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

(14)(A) through agency rulemaking, the term 'waters of the United States' did not include--

(i) prior converted cropland used for agriculture; or

(ii) manmade waste treatment systems neither created in waters of the United States nor resulting from the impoundment of waters of the United States; and

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

(15) 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.';

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

(17) the regulation of discharges of pollutants into intrastate waters is an integral part of the comprehensive clean water regulatory program of the United States;

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

(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;

(19) 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;

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

(21)(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;

(22) 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;

(23) 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;

(24)(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;

(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;

(C) annually, 34,000,000 hunters and anglers spend more than \$76,600,000,000 on hunting- and fishing-related products and activities, including approximately 2,000,000 waterfowl hunters who account for about \$2,300,000,000 in annual economic growth;

(25) 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;

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

(27) 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;

(28) 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;

(29) approximately half of North American migratory birds depend upon or are associated with wetlands and intermittent or ephemeral streams;

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

(31) 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;

(32) 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

(33) 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.

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- 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 and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.'

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 affects the authority of the Administrator of the Environmental Protection Agency or the Secretary of the Army under the following provisions of the Federal Water Pollution Control Act:

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

(2) Section 402(l)(2) (33 U.S.C. 1342(l)(2)), relating to discharges of stormwater runoff from certain oil, gas, and mining operations composed entirely of flows from precipitation runoff conveyances, which are not contaminated by or in contact with specified materials.

(3) Section 404(f)(1)(A) (33 U.S.C. 1344(f)(1)(A)), relating to discharges of dredged or fill materials from normal farming, silviculture, and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices.

(4) Section 404(f)(1)(B) (33 U.S.C. 1344(f)(1)(B)), relating to discharges of dredged or fill materials for the purpose of maintenance of currently serviceable structures.

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

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

(7) Section 404(f)(1)(E) (33 U.S.C. 1344(f)(1)(E)), relating to discharges of dredged or fill materials for the purpose of construction or maintenance of farm roads or forest roads or temporary roads for moving mining equipment in accordance with best management practices.

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

END