

Offered by Senators Baucus,
Klobuchar and Boxer

AMENDMENT NO. _____ Calendar No. _____

Purpose: In the nature of a substitute.

IN THE SENATE OF THE UNITED STATES—111th Cong., 1st Sess.

S. 787

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

Referred to the Committee on _____ and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended to be proposed by _____

Viz:

1 Strike all after the enacting clause and insert the following:
2

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Clean Water Restoration Act".
5

6 **SEC. 2. PURPOSES.**

7 The purposes of this Act are—

8 (1) to reaffirm the original intent of Congress
9 in enacting the Federal Water Pollution Control Act

1 Amendments of 1972 (Public Law 92–500; 86 Stat.
2 816) to restore and maintain the chemical, physical,
3 and biological integrity of the waters of the United
4 States; and

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

14 **SEC. 3. FINDINGS.**

15 Congress finds that—

16 (1) water is transported through interconnected
17 hydrological cycles, and the pollution, impairment, or
18 destruction of any part of an aquatic system may af-
19 fect the chemical, physical, and biological integrity
20 of other parts of the aquatic system;

21 (2) “ground waters” are treated separately
22 from “waters of the United States” for purposes of
23 the Federal Water Pollution Control Act and are not
24 considered “waters of the United States” under this
25 Act;

1 (3) the ability to meet the national objective of
2 the Federal Water Pollution Control Act (33 U.S.C.
3 1251 et seq.) has been undermined by the decisions
4 of the United States Supreme Court in *Solid Waste*
5 *Agency of Northern Cook County v. United States*
6 *Army Corps of Engineers*, 531 U.S. 159 (January
7 9, 2001) and *Rapanos v. United States*, 547 U.S.
8 715 (June 19, 2006), which have resulted in confu-
9 sion, permitting delays, increased costs, litigation,
10 and reduced protections for waters of the United
11 States;

12 (4) this Act reaffirms Federal jurisdiction over
13 all waters of the United States, as the Federal
14 Water Pollution Control Act was applied and inter-
15 preted in the regulations, guidance, and interpreta-
16 tions of the Environmental Protection Agency and
17 the Corps of Engineers prior to the rulings of the
18 United States Supreme Court in *Solid Waste Agency*
19 *of Northern Cook County v. United States Army*
20 *Corps of Engineers*, 531 U.S. 159 (January 9,
21 2001), and *Rapanos v. United States*, 547 U.S. 715
22 (June 19, 2006) and overturns the decisions of the
23 Supreme Court in those cases;

24 (5) Congress supports the policy in effect under
25 section 101(g) of the Federal Water Pollution Con-

1 trol Act (33 U.S.C. 1251(g)), which states that “the
2 authority of each State to allocate quantities of
3 water within its jurisdiction shall not be superseded,
4 abrogated or otherwise impaired by this Act. It is
5 the further policy of Congress that nothing in this
6 Act shall be construed to supersede or abrogate
7 rights to quantities of water which have been estab-
8 lished by any State. Federal agencies shall co-oper-
9 ate with State and local agencies to develop com-
10 prehensive solutions to prevent, reduce and eliminate
11 pollution in concert with programs for managing
12 water resources.”;

13 (6) protection of intrastate waters, including
14 geographically isolated waters, is necessary to re-
15 store and maintain the chemical, physical, and bio-
16 logical integrity of all waters in the United States;

17 (7) the regulation of discharges of pollutants
18 into intrastate waters is an integral part of the com-
19 prehensive clean water regulatory program of the
20 United States;

21 (8) small and intermittent streams, including
22 ephemeral streams, which have been jeopardized by
23 the decisions referred to in paragraph (3)—

24 (A) comprise the majority of all stream
25 miles in the United States;

1 (B) serve critical biological and
2 hydrological functions that affect entire water-
3 sheds;

4 (C) reduce the introduction of pollutants to
5 large streams and rivers;

6 (D) provide and purify drinking water sup-
7 plies;

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

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

12 (9) the pollution or other degradation of waters
13 of the United States, individually and in the aggre-
14 gate, has a substantial relation to and effect on
15 interstate commerce;

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

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

22 (B) draining or filling intrastate wetlands and
23 channelizing or filling intrastate streams can cause
24 or exacerbate flooding that causes billions of dollars

1 of damages annually, placing a significant burden on
2 interstate commerce;

3 (12) millions of individuals in the United States
4 depend on streams, wetlands, and other waters of
5 the United States to filter water and recharge sur-
6 face and subsurface drinking water supplies, protect
7 human health, and create economic opportunity;

8 (13) source water protection areas containing
9 small or intermittent streams provide water to public
10 drinking water supplies serving more than
11 110,000,000 individuals in the United States;

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

16 (B) those activities and associated travel gen-
17 erate hundreds of billions of dollars of income each
18 year for the travel, tourism, recreation, and sporting
19 sectors of the economy of the United States;

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

1 (16) 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 (17) 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 (18) 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 (19) approximately half of North American mi-
18 gratory birds depend upon or are associated with
19 wetlands and small and intermittent streams, includ-
20 ing ephemeral streams;

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

24 (21) for those reasons, the protection of wet-
25 lands and other waters providing breeding, feeding,

1 and sheltering habitat for migratory birds and en-
2 dangered species is essential to enable the United
3 States to fulfill the obligations of the United States
4 under international treaties for the conservation of
5 those species;

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

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

18 (24) nothing in this Act or any amendment
19 made by this Act establishes any new right of access
20 to private property for recreational purposes.

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

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

24 (1) by striking paragraph (7);

1 (2) by redesignating paragraphs (8) through
2 (25) as paragraphs (7) through (24), respectively;
3 and

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

5 “(25) WATERS OF THE UNITED STATES.—

6 “(A) IN GENERAL.—The term ‘waters of
7 the United States’ means all waters subject to
8 the ebb and flow of the tide, the territorial seas,
9 and all interstate and intrastate waters, includ-
10 ing lakes, rivers, streams (including intermit-
11 tent streams), mudflats, sandflats, wetlands,
12 sloughs, prairie potholes, wet meadows, playa
13 lakes, and natural ponds, all tributaries of any
14 of the above waters, and all impoundments of
15 the foregoing.

16 “(B) EXCLUSIONS.—

17 “(i) PRIOR CONVERTED CROPLAND.—

18 Waters of the United States do not include
19 prior converted cropland. Notwithstanding
20 the determination of an area’s status as
21 prior converted cropland by any other Fed-
22 eral agency, for the purposes of this Act,
23 the final authority regarding jurisdiction
24 under this Act remains with the Environ-
25 mental Protection Agency.

1 “(ii) WASTE TREATMENT SYSTEMS.—
2 Waste treatment systems, including treat-
3 ment ponds or lagoons designed to meet
4 the requirements of this Act (other than
5 cooling ponds which also meet the criteria
6 of this definition) are not waters of the
7 United States. This exclusion applies only
8 to manmade bodies of water which neither
9 were originally created in waters of the
10 United States (such as disposal areas in
11 wetlands) nor resulted from the impound-
12 ment of waters of the United States.”.

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 (or an amendment made by this
3 Act) affects the applicability of the following provisions of
4 the Federal Water Pollution Control Act:

5 (1) Section 402(l)(1) (33 U.S.C. 1342(l)(1)).

6 (2) Section 402(l)(2) (33 U.S.C. 1342(l)(2)).

7 (3) Section 404(f)(1)(A) (33 U.S.C.
8 1344(f)(1)(A)).

9 (4) Section 404(f)(1)(B) (33 U.S.C.
10 1344(f)(1)(B)).

11 (5) Section 404(f)(1)(C) (33 U.S.C.
12 1344(f)(1)(C)).

13 (6) Section 404(f)(1)(D) (33 U.S.C.
14 1344(f)(1)(D)).

15 (7) Section 404(f)(1)(E) (33 U.S.C.
16 1344(f)(1)(E)).

17 (8) Section 404(f)(1)(F) (33 U.S.C.
18 1344(f)(1)(F)).

19 **SEC. 7. REGULATIONS.**

20 (a) **PROMULGATION.**—Not later than 18 months
21 after the date of enactment of this Act, the Administrator
22 of the Environmental Protection Agency and the Secretary
23 of the Army shall promulgate such regulations as are nec-
24 essary to implement this Act and the amendments made
25 by this Act.

1 (b) RULES OF CONSTRUCTION.—Subject to the exclu-
2 sions in paragraph (25)(B) of section 502 of the Federal
3 Water Pollution Control Act (33 U.S.C. 1362) (as amend-
4 ed by section 4), the term “waters of the United States”
5 shall be construed consistently with—

6 (1) the scope of Federal jurisdiction under that
7 Act, as interpreted and applied by the Environ-
8 mental Protection Agency and the Corps of Engi-
9 neers prior to January 9, 2001 (including pursuant
10 to the final rules and preambles published at 53
11 Fed. Reg. 20764 (June 6, 1988) and 51 Fed. Reg.
12 41206 (November 13, 1986)); and

13 (2) the legislative authority of Congress under
14 the Constitution.