

111TH CONGRESS
1ST SESSION

S. _____

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

Mr. FEINGOLD introduced the following bill; which was read twice and referred to the Committee on _____

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 of 2009”.

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
10 Amendments of 1972 (Public Law 92–500; 86 Stat.

1 816) to restore and maintain the chemical, physical,
2 and biological integrity of the waters of the United
3 States;

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

7 (3) to provide protection to the waters of the
8 United States to the maximum extent of the legisla-
9 tive authority of Congress under the Constitution.

10 **SEC. 3. FINDINGS.**

11 Congress finds that—

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

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

23 (3) in 1972, Congress enacted the Federal
24 Water Pollution Control Act Amendments of 1972
25 (Public Law 92–500; 86 Stat. 816), which amended

1 the Federal Water Pollution Act (33 U.S.C. 1251 et
2 seq.) in its entirety, in order to meet the national
3 objective of restoring and maintaining the chemical,
4 physical, and biological integrity of the waters of the
5 United States;

6 (4) prior to the date of enactment of that Act
7 in 1972, patchwork State approaches and previous
8 Federal legislation proved ineffective in protecting
9 the waters of the United States;

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

18 (6) the establishment of broad, uniform, and
19 minimum Federal standards and programs under
20 the Federal Water Pollution Control Act (33 U.S.C.
21 1251 et seq.) recognizes that States and Indian
22 tribes have the responsibility and right to prevent,
23 reduce, and eliminate pollution of waters;

24 (7) that Act preserves for States and Indian
25 tribes the ability to manage permitting, grant, and

1 research programs to prevent, reduce, and eliminate
2 pollution, and to establish standards and programs
3 that are more protective of waters of the United
4 States within the borders of each State or on land
5 under the jurisdiction of the Indian tribe than Fed-
6 eral standards and programs;

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

14 (9) this Act will treat, as “waters of the United
15 States”, those features that were treated as such
16 pursuant to the regulations of the Environmental
17 Protection Agency and the Corps of Engineers, in-
18 cluding—

19 (A) all intrastate waters, including inter-
20 state wetland;

21 (B) all other waters, such as intrastate
22 lakes, rivers, streams (including intermittent
23 streams), mudflats, sandflats, wetland, sloughs,
24 prairie potholes, wet meadows, playa lakes, or
25 natural ponds;

1 (C) all impoundments, tributaries, and the
2 territorial seas; and

3 (D) wetland adjacent to those waters;

4 (10) groundwater is treated separately for pur-
5 poses of the Federal Water Pollution Control Act
6 and is considered neither “navigable waters” nor
7 “waters of the United States” under that Act;

8 (11) the ability to meet the national objective
9 described in paragraph (3) has been undermined by
10 the decisions of the United States Supreme Court in
11 *Solid Waste Agency of Northern Cook County v.*
12 *United States Army Corps of Engineers*, 531 U.S.
13 159 (January 9, 2001) and *Rapanos v. United*
14 *States*, 547 U.S. 715 (June 19, 2006)), which have
15 resulted in onerous tests leading to delays in permit-
16 ting, confusion over which waters are protected, and
17 reduced protections;

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

22 (13) the intent of Congress with the enactment
23 of this Act is to restore geographical jurisdiction of
24 the Federal Water Pollution Control Act to that in

1 existence before the dates of the decisions referred
2 to in paragraph (11);

3 (14)(A) in amendments to the Federal Water
4 Pollution Control Act, certain activities, such as ag-
5 riculture, silviculture, and ranching activities, as well
6 agricultural stormwater discharges and return flows
7 from oil, gas, and mining operations and irrigated
8 agriculture, were exempted from particular permit-
9 ting requirements;

10 (B) furthermore, the definition of the term
11 “point source” under section 502 of that Act (33
12 U.S.C. 1362) excludes agricultural stormwater dis-
13 charges and return flows from irrigated agriculture;
14 and

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

18 (15)(A) through agency rulemaking, the term
19 “waters of the United States” did not include—

20 (i) prior converted cropland used for agri-
21 culture; or

22 (ii) manmade waste treatment systems nei-
23 ther created in waters of the United States nor
24 resulting from the impoundment of waters of
25 the United States; and

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

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

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

12 (18) small and intermittent streams, including
13 ephemeral and seasonal streams—

14 (A) comprise the majority of all stream
15 miles in the United States;

16 (B) serve critical biological and
17 hydrological functions that affect entire water-
18 sheds;

19 (C) reduce the introduction of pollutants to
20 large streams and rivers;

21 (D) provide and purify drinking water sup-
22 plies; and

23 (E) are especially important to the life cy-
24 cles of aquatic organisms and the flow of higher
25 order streams during floods;

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

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

9 (21)(A) waters, including streams and wetlands,
10 provide protection from flooding; and

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

16 (22) millions of individuals in the United States
17 depend on streams, wetlands, and other waters of
18 the United States to filter water and recharge sur-
19 face and subsurface drinking water supplies, protect
20 human health, and create economic opportunity;

21 (23) source water protection areas containing
22 small or intermittent streams provide water to public
23 drinking water supplies serving more than
24 110,000,000 individuals in the United States;

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

5 (B) those activities and associated travel gen-
6 erate hundreds of billions of dollars of income each
7 year for the travel, tourism, recreation, and sporting
8 sectors of the economy of the United States;

9 (C) annually, 34,000,000 hunters and anglers
10 spend more than \$76,600,000,000 on hunting- and
11 fishing-related products and activities, including ap-
12 proximately 2,000,000 waterfowl hunters who ac-
13 count for about \$2,300,000,000 in annual economic
14 growth;

15 (25) activities that result in the discharge of
16 pollutants into waters of the United States are com-
17 mercial or economic in nature, and, in the aggre-
18 gate, have a substantial effect on interstate com-
19 merce;

20 (26) a substantial number of the sources regu-
21 lated under the Federal Water Pollution Control Act
22 discharge into headwater streams that may be inter-
23 mittent or seasonal;

24 (27) more than 40 percent of those sources, or
25 14,800 facilities with individual permits issued in ac-

1 cordance with the Federal Water Pollution Control
2 Act (33 U.S.C. 1251 et seq.), including industrial
3 plants and municipal sewage treatment systems, dis-
4 charge into small or intermittent streams;

5 (28) protecting the quality of and regulating ac-
6 tivities affecting the waters of the United States is
7 a necessary and proper means of implementing trea-
8 ties to which the United States is a party, including
9 treaties protecting species of fish, birds, and other
10 wildlife;

11 (29) more than $\frac{1}{3}$ of all migratory birds in the
12 United States, or approximately half of North Amer-
13 ican migratory birds, depend upon or are associated
14 with wetland and intermittent or ephemeral streams;

15 (30) approximately half of all threatened and
16 endangered species in the United States depend on
17 wetland;

18 (31) for those reasons, the protection of wet-
19 land and other waters providing breeding, feeding,
20 and sheltering habitat for migratory birds and en-
21 dangered species is essential to enable the United
22 States to fulfill the obligations of the United States
23 under international treaties for the conservation of
24 those species;

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

8 (33) protecting the quality of and regulating ac-
9 tivities affecting the waters of the United States is
10 necessary to protect Federal land and waters from
11 discharges of pollutants and other forms of degrada-
12 tion.

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

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

16 (1) by striking paragraph (7);

17 (2) by redesignating paragraphs (8) through
18 (25) as paragraphs (7) through (24), respectively;

19 and

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

21 “(25) WATERS OF THE UNITED STATES.—

22 “(A) IN GENERAL.—The term ‘waters of
23 the United States’ means all waters subject to
24 the ebb and flow of the tide, the territorial seas,
25 and all interstate and intrastate waters (includ-

1 ing tributaries of those waters), to the max-
2 imum extent that those waters, or activities af-
3 fecting those waters, are subject to the legisla-
4 tive power of Congress under the Constitution.

5 “(B) INCLUSIONS.—The term ‘waters of
6 the United States’ includes lakes, rivers,
7 streams (including intermittent streams),
8 mudflats, sandflats, wetlands, sloughs, prairie
9 potholes, wet meadows, playa lakes, and natural
10 ponds, and all impoundments of those waters.”.

11 **SEC. 5. CONFORMING AMENDMENTS.**

12 The Federal Water Pollution Control Act (33 U.S.C.
13 1251 et seq.) is amended—

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

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

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

23 **SEC. 6. SAVINGS CLAUSE.**

24 Nothing in this Act affects the authority of the Ad-
25 ministrators of the Environmental Protection Agency or

1 the Secretary of the Army under the following provisions
2 of the Federal Water Pollution Control Act:

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

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

12 (3) Section 404(f)(1)(A) (33 U.S.C.
13 1344(f)(1)(A)), relating to discharges of dredged or
14 fill materials from normal farming, silviculture, and
15 ranching activities.

16 (4) Section 404(f)(1)(B) (33 U.S.C.
17 1344(f)(1)(B)), relating to discharges of dredged or
18 fill materials for the purpose of maintenance of cur-
19 rently serviceable structures.

20 (5) Section 404(f)(1)(C) (33 U.S.C.
21 1344(f)(1)(C)), relating to discharges of dredged or
22 fill materials for the purpose of construction or
23 maintenance of farm or stock ponds or irrigation
24 ditches and maintenance of drainage ditches.

1 (6) Section 404(f)(1)(D) (33 U.S.C.
2 1344(f)(1)(D)), relating to discharges of dredged or
3 fill materials for the purpose of construction of tem-
4 porary sedimentation basins on construction sites,
5 which do not include placement of fill material into
6 the waters of the United States.

7 (7) Section 404(f)(1)(E) (33 U.S.C.
8 1344(f)(1)(E)), relating to discharges of dredged or
9 fill materials for the purpose of construction or
10 maintenance of farm roads or forest roads or tem-
11 porary roads for moving mining equipment in ac-
12 cordance with best management practices.

13 (8) Section 404(f)(1)(F) (33 U.S.C.
14 1344(f)(1)(F)), relating to discharges of dredged or
15 fill materials resulting from activities with respect to
16 which a State has an approved program under sec-
17 tion 208(b)(4) of that Act (33 U.S.C. 1288(b)(4))
18 meeting the requirements of subparagraphs (B) and
19 (C) of that section.