









# The Baucus-Klobuchar-Boxer Amendment to the Clean Water Restoration Act: Restoring America's clean waters and wetlands while protecting property rights and agriculture

Congress must act now to restore Clean Water Act protections for waters of the United States protected prior to the Supreme Court's intervention in 2001. America's rivers, lakes, wetlands and streams are losing Clean Water Act protections in the wake of Supreme Court decisions in 2001 (SWANCC) and 2006 (Rapanos) and subsequent Corps of Engineers and Environmental Protection Agency guidance. The confusion created by these decisions is causing wasteful delays and undermining national clean up and restoration initiatives.

The Baucus-Klobuchar-Boxer amendment to the Clean Water Restoration Act (S. 787), approved by the Senate Environment and Public Works Committee on June 18, 2009, restores these critical clean water protections and:

- clearly limits "waters of the United States" to those protected prior to 2001
- specifically delineates the water features to be protected as "waters of the United States"
- strikes all references to "activities" and "fullest extent" of Congress's legislative power
- includes exemptions for prior converted cropland and man-made waste treatment systems
- preserves long-standing statutory exemptions for agriculture and forestry

#### The amended Clean Water Restoration Act...

### Limits Clean Water Act protections to those waters protected prior to 2001.

The amendment explicitly limits the term "waters of the United States" to those waters treated as such by the EPA and the Corps prior to January 9, 2001, the date of the *SWANCC* decision. This explicit limitation is stated as a purpose, as a finding, and as a specific, binding rule of construction for the definition of waters of the United States. These statements clearly preclude any expansion beyond the pre-2001 scope of the Clean Water Act.

In addition, the Baucus-Klobuchar-Boxer amendment strikes earlier Restoration Act language interpreted by some to expand Clean Water Act jurisdiction. The bill no longer contains language that waters are covered "to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution."

## Delineates the water features Congress intends to protect as "waters of the United States."

This definition of "waters of the United States," along with the rules of construction, clarifies that waters of the United States means lakes, rivers, streams, wetlands, natural ponds, their tributaries and other similar natural water features that were protected pursuant to Corps and EPA regulations prior to 2001.

By explicitly limiting "waters of the United States" to specified water features protected prior to 2001, the amended Restoration Act clearly excludes streets, gutters, and most ditches, ponds, waste treatment systems, and other man-made water features excavated on dry land.

The original Clean Water Act commonly protected certain man-made ditches and altered stream channels against unregulated pollution before 2001, and these continue to be protected under the

amended Restoration Act. Such ditches typically connect streams and function as tributaries to downstream waters. Because they can transport pollutants downstream, including to drinkingwater sources, waste discharges from most point sources into ditches should be, and historically have been, regulated.

## Deletes the word "navigable" because it confuses rather than clarifies "waters of the United States."

The term "navigable" is the source of the confusion caused by the SWANCC and Rapanos decisions. It does not clarify which waters are covered by the Clean Water Act, nor does it provide a meaningful limitation on the scope of the Act. The amended Restoration Act deletes this term and relies instead on "waters of the United States" to clearly define the scope of the Clean Water Act and reaffirm that Congress' primary concern in 1972 was to protect the nation's waters from pollution rather than just sustain the navigability of waterways.

Clean Water Act opponents seek to retain the word "navigable" in an effort to *roll back* the scope of the Clean Water Act to traditionally navigable waterways and adjacent waters – waters protected for navigation at the dawn of the 20<sup>th</sup> century. But Congress passed the Clean Water Act "to restore and maintain the chemical, physical and biological integrity of the Nation's waters," not just to protect navigation. Congress recognized then, as now, that small streams and wetlands play a vital role by filtering the water that eventually flows into larger rivers and lakes. If "non-navigable" headwaters are polluted, water quality in navigable downstream waters will suffer.

## Preserves the Clean Water Act's long-standing exemptions for farming, ranching, mining and forestry.

The amended Restoration Act preserves existing agricultural and forestry exemptions, and does not expand regulation of normal, on-going agricultural or forestry activities. The Act preserves existing exemptions for: established, normal farming activities; agricultural return flows; maintenance of drainage ditches; construction and maintenance of irrigation ditches; construction and maintenance of farm or stock ponds; and construction and maintenance of farm roads. The Restoration Act also excludes prior converted cropland from the definition of "waters of the United States," strengthening this existing protection for agriculture by codifying it in the Clean Water Act. The National Farmers Union, the National Association of Wheat Growers and other agricultural groups support the Baucus-Klobuchar-Boxer amendment.

Reaffirms State authority over water allocation and clarifies that ground waters are not "waters of the United States."

#### Is supported by the states.

The Environmental Council of States, the Association of Fish and Wildlife Agencies, the Association of State and Interstate Water Pollution Control Administrators and many other state water resource leaders have endorsed the Baucus-Klobuchar-Boxer amendment. More than 40 states have publicly opposed rolling back Clean Water Act protections. Many state water protection programs depend on Clean Water Act regulations, and many states prohibit their own laws from being stricter than federal law. Some of the same industry groups claiming that regulation should be left to the states have been working to thwart state protections for waters and wetlands. The amended CWRA respects and reinforces states' rights over water.

#### For more information on the Clean Water Restoration Act, please contact:

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