

REJECT SCORCHED-EARTH ATTACK ON CLEAN WATER
Dirty Water Resolution (S.J. Res. 22) Undermines Protections for Drinking Water
Supplies, Flood Buffers, and Fish and Wildlife Habitat

Background

Senator Joni Ernst (R-Iowa) has introduced a “Resolution of Disapproval” under the Congressional Review Act attacking the Clean Water Rule, the Obama administration’s landmark initiative to restore safeguards against pollution and destruction for lakes, streams, wetlands and other water bodies.

Why Senators Should Oppose the Dirty Water Resolution

- *Reason One: The Clean Water Rule is good policy.*

The Clean Water Rule restores important safeguards that once existed for a variety of water bodies. Those safeguards were eroded after a pair of Supreme Court decisions and by policies the Bush administration adopted, which left many water bodies inadequately protected or lacking the pollution control requirements of the Clean Water Act. These policies affected streams -- including headwater, seasonal, and rain-dependent streams -- that feed downstream waterways. These streams contribute to the drinking water supply of one in three Americans. The rule likewise restores prior protections for many critical wetlands, which curb flooding, filter pollution, and provide habitat for a wide variety of wildlife, including endangered species and wildfowl and fish prized by hunters and anglers.

Legal uncertainty over whether the Clean Water Act protects many of these waters has particularly hurt law enforcement. Major pollution investigations of companies that have contaminated lakes, rivers, and other waters have not been prosecuted. According to EPA enforcement staff, an estimated total of 489 enforcement cases in just a few-year period were adversely affected. For example, in one case, according to EPA, an operator of a Texas dairy farm discharged around 43,000 gallons of wastewater onto his property, where it flowed to a neighboring property and then entered a creek that flowed into a large, navigable-in-fact waterway. Although EPA spent over 300 hours on determining the legal status of the waters in question, the Assistant U.S. Attorney declined to prosecute the case because of concerns about the government’s authority.

Restored clean water protections enjoy broad support. In polling for the American Sustainable Business Council, eighty percent of small business owners — including 91% of Democrats, 73% of Independents and 78% of Republicans — said they supported the then-proposed Clean Water Rule. A strong majority, 71%, also said that clean water protections are necessary to ensure economic growth; only six percent said they were bad for growth. Similarly, a bipartisan research team polled hunters and anglers nationwide and discovered that 83% surveyed thought that the Environmental Protection Agency should apply the rules and standards of the Clean Water Act to smaller, headwater streams and wetlands. Support for this policy was strong across the political spectrum, with 77% of Republicans, 79% of Independents and 97% of Democrats in favor.

- *Reason Two: The Dirty Water Resolution pre-judges ongoing litigation.*

As is their right, a number of industry associations, individual companies, and states have sued to stop the Clean Water Rule, by arguing that it should not protect certain kinds of water bodies. The federal

courts are fully equipped to evaluate the agencies' compliance with the Clean Water Act, proper administrative procedure, and the Supreme Court's direction.

More than two dozen cases trying to weaken the rule have been filed, amply demonstrating that parties can get their claims heard that affording clean water protections to various waters is unlawful or improper. The federal courts are now determining where the challenges will be heard and will then turn to assessing the major legal claims in the cases.

Courts hearing challenges to the Clean Water Rule will be able to consider the full, voluminous record that the agencies compiled, including the input of over one million commenters (some 87% of which supported the proposed rule). As such, the courts will be able to assess whether the scientific evidence – which includes a peer-reviewed compilation of more than 1,200 peer-reviewed publications about the effects of various types of water bodies on one another – supports the core findings on which the Clean Water Rule is based.

- *Reason Three: The Dirty Water Resolution would not only kill existing rules, but prevent the adoption of future protections.*

The Dirty Water Resolution seeks to kill the Clean Water Rule using the Congressional Review Act, which goes far beyond stopping a disapproved administrative action. The Congressional Review Act says that an agency may not adopt “a new rule that is substantially the same” as the disapproved rule, and the breadth of that requirement is very unclear.

In the context of the Clean Water Rule, it could be read to prohibit EPA and the Army Corps from issuing any rule that establishes protections for waters that the Clean Water Rule protects, like lakes, streams, and wetlands. That would make any legal clarification of the scope of the law impossible. Even if the agencies were to conclude that a disapproval action does not prohibit them from developing replacement clean water rules, any such action would surely be challenged by polluting industries as violating this requirement of the Congressional Review Act. Consequently, the Dirty Water Resolution radically undermines the agencies' ability to clarify the clean water rules – despite urging from industry associations, conservation groups, members of Congress, state and local leaders, and Supreme Court justices for such a clarification.

- *Reason Four: The Dirty Water Resolution is a waste of time.*

Because this resolution kills a commonsense and modest rule containing scientifically-based and legally valid protections for the nation's waters, including critical drinking water supplies, and because it may curtail virtually any effort to provide similar safeguards for water bodies, it is certain to be vetoed by President Obama if it passes through Congress. And opponents of the Clean Water Rule in Congress don't have enough support to override the president's veto. Thus, if Congress pursues this pro-polluter resolution, rather than addressing other critical national priorities, it will reveal that its backers have no positive agenda of their own.

Additionally, even if the rule's opponents are right – which they aren't – that the Clean Water Rule protects too many water bodies from pollution and destruction, the rule is not now in effect, because a federal appeals court has stayed the rule nationwide, pending further proceedings in that case. As a result, no one has any present obligations under the Clean Water Rule, making the Dirty Water Resolution complete overkill.