

114TH CONGRESS
1ST SESSION

S. _____

To require the Secretary of the Army and the Administrator of the Environmental Protection Agency to propose a regulation revising the definition of the term “waters of the United States”, and for other purposes.

IN THE SENATE OF THE UNITED STATES

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

A BILL

To require the Secretary of the Army and the Administrator of the Environmental Protection Agency to propose a regulation revising the definition of the term “waters of the United States”, and for other purposes.

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 “Water Quality Protec-
5 tion Act”.

6 **SEC. 2. FINDINGS.**

7 Congress finds that—

1 (1) in section 101(b) of the Federal Water Pol-
2 lution Control Act (33 U.S.C. 1251(b)), Congress
3 adopted the principle of cooperative federalism and
4 limited Federal authority, recognizing that “[i]t is
5 the policy of the Congress to recognize, preserve,
6 and protect the primary responsibilities and rights of
7 States to prevent, reduce, and eliminate pollution, to
8 plan the development and use (including restoration,
9 preservation, and enhancement) of land and water
10 resources, and to consult with the Administrator in
11 the exercise of his authority under this Act”;

12 (2) adequate consultation with States and local
13 governments and affected entities is necessary—

14 (A) to ensure that Federal departments
15 and agencies understand the scope and impacts
16 of regulatory proposals;

17 (B) to maintain the cooperative federalism
18 foundation of the Federal Water Pollution Con-
19 trol Act (33 U.S.C. 1251 et seq.); and

20 (C) to respect the limits on Federal au-
21 thority; and

22 (3) subchapter II of chapter 5, and chapter 7,
23 of title 5, United States Code (commonly known as
24 the “Administrative Procedure Act”), requires each

1 agency to provide notice and an opportunity to com-
2 ment regarding—

3 (A) information, including scientific and
4 technical findings, on which the agency relies in
5 taking a regulatory action; and

6 (B) definitions, exclusions, and standards
7 that determine the limits of Federal regulation.

8 **SEC. 3. DEFINITIONS.**

9 In this Act:

10 (1) ADMINISTRATOR.—The term “Adminis-
11 trator” means the Administrator of the Environ-
12 mental Protection Agency.

13 (2) BODY OF WATER.—The term “body of
14 water” means a traditional navigable water, terri-
15 torial sea, river, stream, lake, pond, or wetland.

16 (3) ISOLATED.—The term “isolated”, with re-
17 spect to a body of water, means the absence of a
18 surface hydrologic connection to a traditional navi-
19 gable water.

20 (4) MUNICIPALITY.—The term “municipality”
21 means a city, town, borough, county, parish, district,
22 association, or other public entity that—

23 (A) was established by, or pursuant to,
24 State law; and

1 (B) has authority over the distribution of
2 water or the disposal of sewage, industrial
3 waste, or any other waste.

4 (5) POINT SOURCE.—The term “point source”
5 has the meaning given the term in section 502 of the
6 Federal Water Pollution Control Act (33 U.S.C.
7 1362).

8 (6) SECRETARY.—The term “Secretary” means
9 the Secretary of the Army.

10 (7) STREAM.—The term “stream” means a nat-
11 ural channel formed by the flow of water that has
12 a bed, bank, and ordinary high water mark (as de-
13 fined in section 328.3(e) of title 33, Code of Federal
14 Regulations (as in effect on the date of enactment
15 of this Act)).

16 (8) SURFACE HYDROLOGIC CONNECTION.—

17 (A) IN GENERAL.—The term “surface hy-
18 drologic connection” means a continuous sur-
19 face connection through which water moves
20 within a body of water or from 1 body of water
21 to another.

22 (B) EXCLUSION.—The term “surface hy-
23 drologic connection” does not include—

24 (i) overland flow of water outside a
25 body of water (including sheetflow); or

1 (ii) the movement of water below the
2 surface of the land (including through soil
3 or groundwater).

4 (C) DETERMINATION OF CONTINUOUS-
5 NESS.—For purposes of this paragraph, a sur-
6 face hydrologic connection shall be considered
7 to be continuous if the connection is continuous,
8 even if water is not always present, and regard-
9 less of whether water is conveyed for a short
10 distance from 1 part of a body of water to an-
11 other through a manmade feature, such as a
12 culvert, pipe, or dam.

13 (9) TRADITIONAL NAVIGABLE WATER.—The
14 term “traditional navigable water” means the water
15 described in section 328.3(a)(1) of title 33, Code of
16 Federal Regulations (as in effect on the date of en-
17 actment of this Act).

18 (10) WETLAND.—The term “wetland” has the
19 meaning given the term “wetlands” in section
20 328.3(b) of title 33, Code of Federal Regulations (as
21 in effect on the date of enactment of this Act).

22 **SEC. 4. REVISED DEFINITION; PRINCIPLES AND PROCESS.**

23 (a) REVISED DEFINITION.—A revision to or guidance
24 on a regulatory definition of the term “navigable waters”
25 or “waters of the United States” promulgated or issued

1 pursuant to the Federal Water Pollution Control Act (33
2 U.S.C. 1251 et seq.) after February 4, 2015, shall have
3 no force or effect—

4 (1) unless the revision adheres to the principles
5 under subsection (b); and

6 (2) until after the Secretary and the Adminis-
7 trator carry out each action described in subsection
8 (c).

9 (b) PRINCIPLES.—In promulgating a revised regu-
10 latory definition pursuant to this subsection, the Secretary
11 and the Administrator shall adhere to the following prin-
12 ciples:

13 (1) The Federal Water Pollution Control Act
14 (33 U.S.C. 1251 et seq.) is an Act to protect tradi-
15 tional navigable waters from water pollution.

16 (2) The term “waters of the United States”
17 under the Federal Water Pollution Control Act (33
18 U.S.C. 1251 et seq.) should include—

19 (A) the reach of a stream that is—

20 (i) identified on a map created by the
21 Administrator before February 4, 2015,
22 using the United States Geological Service
23 National Hydrology Dataset Plus at the
24 1:100,000 scale from Reach Address Data-
25 base Version 3.1; and

1 (ii) included within the 347,404
2 stream miles identified by the Adminis-
3 trator using 1 or more maps described in
4 clause (i) as a potential source of water for
5 public drinking water systems; and

6 (B) wetland situated next to a water of the
7 United States that protects the water quality of
8 a navigable water by preventing the movement
9 of pollutants to a navigable water.

10 (3) The term “waters of the United States”
11 under the Federal Water Pollution Control Act (33
12 U.S.C. 1251 et seq.) should not include—

13 (A) water that is located below the surface
14 of the land, including soil water and ground-
15 water;

16 (B) water that is not located within a body
17 of water;

18 (C) an isolated pond, whether natural or
19 manmade, including a farm pond, fish pond,
20 quarry, mine pit, ornamental pond, swimming
21 pool, construction pit, fire control pond, sedi-
22 ment pond, and any other isolated facility or
23 system that holds water;

1 (D) a system constructed or used for the
2 purpose of collecting, conveying, holding, or
3 treating—

4 (i) stormwater or floodwater within
5 the boundaries of a State, tribal, munic-
6 ipal, industrial, agricultural, silvicultural,
7 residential, or Federal facility or operation,
8 including ditches along agricultural fields,
9 roads, runways, parking lots, and other in-
10 frastructure;

11 (ii) wastewater within the boundaries
12 of a State, tribal, municipal, industrial,
13 commercial, agricultural, silvicultural, resi-
14 dential, or Federal facility or operation;

15 (iii) municipal and industrial water
16 supplies within the boundaries of a State,
17 tribal, municipal, industrial, commercial,
18 agricultural, silvicultural, residential, or
19 Federal facility or operation—

20 (I) including spreading basins for
21 aquifer storage and recovery or aqui-
22 fer recharge and recovery; but

23 (II) not including instream res-
24 ervoirs or other instream facilities; or

1 (iv) water for agricultural or silvicultural
2 tural purposes by a municipality or at an
3 agricultural or silvicultural facility or operation,
4 including irrigation water, a fish
5 production pond, livestock watering pond,
6 irrigated field, cranberry growing field, rice
7 production field, manure lagoon, and farm
8 pond;

9 (E) a reach of a stream not identified
10 under paragraph (2)(A) unless the reach,
11 through a surface hydrologic connection, contributes
12 in a typical year for that stream flow
13 to a traditional navigable water of sufficient
14 volume, duration, and frequency that pollutants
15 in the channel could degrade the water quality
16 of the traditional navigable water, based on a
17 quantifiable and statistically valid measure of
18 flow established by the Secretary, after providing
19 public notice and an opportunity for
20 comment;

21 (F) prior-converted cropland (as defined in
22 section 12.2(a) of title 7, Code of Federal Regulations
23 (as in effect on the date of enactment
24 of this Act)); and

1 (G) any water that is no longer a water of
2 the United States pursuant to a permit issued
3 under—

4 (i) section 10 of the Act of March 3,
5 1899 (commonly known as the “Rivers and
6 Harbors Appropriation Act of 1899”) (33
7 U.S.C. 403); or

8 (ii) section 404 of the Federal Water
9 Pollution Control Act (33 U.S.C. 1344).

10 (4) For purposes of the Federal Water Pollu-
11 tion Control Act (33 U.S.C. 1251 et seq.), the term
12 “waters of the United States” should include a sys-
13 tem described in paragraph (3)(D), or a component
14 of such a system, if the Secretary or the Adminis-
15 trator demonstrates that the construction or use of
16 the system or component—

17 (A) violated Federal law because the con-
18 struction or use took place within a body of
19 water that was considered to be waters of the
20 United States under Federal law in effect on
21 the date of the commencement of construction
22 or use without applicable Federal permits, if
23 any; or

24 (B) took place within a body of water that,
25 on the date of the commencement of construc-

1 tion or use, would have been defined as a tradi-
2 tional navigable water if the definition had been
3 in effect on the date of commencement of con-
4 struction or use, unless—

5 (i) the system is identified as a point
6 source in a permit issued under section
7 402 of the Federal Water Pollution Con-
8 trol Act (33 U.S.C. 1342);

9 (ii) the water managed in the system
10 is—

11 (I) irrigation return flow exempt
12 from permitting under section
13 402(*l*)(1) of that Act (33 U.S.C.
14 1342(*l*)(1)); or

15 (II) agricultural stormwater or
16 return flows from irrigated agriculture
17 exempt from permitting under section
18 502(14) of that Act (33 U.S.C.
19 1362(14));

20 (iii) the construction or use of the sys-
21 tem is described in subparagraphs (A) and
22 (C) of section 404(f)(1) of that Act (33
23 U.S.C. 1344(f)(1)); or

24 (iv) the system is a waste treatment
25 system.

1 (5) In promulgating a revised definition of
2 waters of the United States, the Secretary or the
3 Administrator shall take into consideration that—

4 (A) the use of a body of water by an orga-
5 nism, including a migratory bird—

6 (i) is not an effect on water quality;

7 and

8 (ii) does not provide a basis for estab-
9 lishing Federal jurisdiction under the Fed-
10 eral Water Pollution Control Act (33
11 U.S.C. 1251 et seq.);

12 (B) the supply of water to a groundwater
13 aquifer and the storage of water in an isolated
14 body of water are issues that—

15 (i) pertain to the use of water re-
16 sources that shall not be superseded, abro-
17 gated, or otherwise impaired by the Fed-
18 eral Water Pollution Control Act (33
19 U.S.C. 1251 et seq.) pursuant to sections
20 101(g) and 510(2) of that Act (33 U.S.C.
21 1251(g), 1370(2)); and

22 (ii) do not provide a basis for estab-
23 lishing Federal jurisdiction under that Act
24 (33 U.S.C. 1251 et seq.);

1 (C) evaporation, transpiration, condensa-
2 tion, precipitation, the overland flow of water,
3 and the movement of water underground are all
4 part of the water cycle and may connect all
5 water over sufficiently long periods of time and
6 distances, but do not provide a basis for estab-
7 lishing Federal jurisdiction under the Federal
8 Water Pollution Control Act (33 U.S.C. 1251 et
9 seq.); and

10 (D) until the Secretary establishes a meas-
11 ure of flow under paragraph (3)(E) that identi-
12 fies which stream reaches are part of the tribu-
13 tary system, the tributary system should be
14 identified in accordance with paragraph (2)(A).

15 (6) Waters that are waters of the United States
16 should be identified on maps provided by the Sec-
17 retary and the Administrator to promote certainty
18 and transparency in jurisdictional determinations.

19 (c) CONSIDERATION, CONSULTATION, AND RE-
20 PORT.—

21 (1) CONSIDERATION OF PUBLIC COMMENTS.—
22 Before issuing a proposed regulation pursuant to
23 subsection (a), the Secretary and the Administrator
24 shall make available to the public, review, and pub-
25 lish a response to each comment filed regarding the

1 proposed rule entitled “Definition of ‘Waters of the
2 United States’ Under the Clean Water Act” of the
3 Corps of Engineers and the Environmental Protec-
4 tion Agency (79 Fed. Reg. 22188 (April 21, 2014)).

5 (2) FEDERALISM.—

6 (A) IN GENERAL.—In proposing and pro-
7 mulgating a regulation pursuant to subsection
8 (a), the Secretary and the Administrator shall
9 ensure compliance with the federalism policy-
10 making criteria and consultation in accordance
11 with Executive Order 13132 (64 Fed. Reg.
12 43255 (August 4, 1999)), regardless of whether
13 the Secretary and the Administrator determine
14 that the regulation would have any substantial
15 and direct effect on—

16 (i) States;

17 (ii) the relationship between the Fed-
18 eral Government and the States; or

19 (iii) the distribution of power and re-
20 sponsibilities among the various levels of
21 government.

22 (B) CONSULTATION.—To be meaningful
23 consultation under section 101(b) of the Fed-
24 eral Water Pollution Control Act (33 U.S.C.
25 1251(b)), consultation shall include discussion

1 of alternative approaches and a request for
2 input and advice on the approaches before pub-
3 lication of a proposed rule.

4 (3) REGULATORY FLEXIBILITY.—In proposing
5 and promulgating a regulation pursuant to sub-
6 section (a), and regardless of whether the Secretary
7 and the Administrator determine that the regulation
8 would have a significant impact on a substantial
9 number of small entities, the Secretary and the Ad-
10 ministrator shall—

11 (A) carry out the actions described in sec-
12 tions 603, 604, and 609 of title 5, United
13 States Code; and

14 (B) in carrying out those actions, take into
15 consideration the costs of all programs under
16 the Federal Water Pollution Control Act (33
17 U.S.C. 1251 et seq.), regardless of whether the
18 Secretary and the Administrator consider the
19 costs of the proposed regulation to be direct or
20 indirect.

21 (4) UNFUNDED MANDATES.—In proposing and
22 promulgating a regulation pursuant to subsection
23 (a), the Secretary and the Administrator shall evalu-
24 ate the intergovernmental and private sector impacts
25 of the regulation, in accordance with title II of the

1 Unfunded Mandates Reform Act of 1995 (2 U.S.C.
2 1531 et seq.), regardless of whether the Secretary
3 and the Administrator—

4 (A) consider the impacts of the proposed
5 regulation to be direct or indirect; or

6 (B) determine that expenditures resulting
7 from the proposed regulation would meet the
8 monetary thresholds established in that Act (2
9 U.S.C. 1501 et seq.).

10 (5) IMPROVING REGULATION AND REGULATORY
11 REVIEW.—In proposing and promulgating a regula-
12 tion pursuant to subsection (a), the Secretary and
13 the Administrator shall ensure that the regulation
14 meets the requirements of—

15 (A) Executive Order 12866 (5 U.S.C. 601
16 note; relating to regulatory planning and re-
17 view); and

18 (B) Executive Order 13563 (76 Fed. Reg.
19 3821 (January 18, 2011)).

20 (6) IMPROVING PERFORMANCE OF FEDERAL
21 PERMITTING AND REVIEW OF INFRASTRUCTURE
22 PROJECTS.—In proposing and promulgating a regu-
23 lation pursuant to subsection (a), the Secretary and
24 the Administrator shall consider—

1 (A) Executive Order 13604 (5 U.S.C. 601
2 note; relating to improving performance of Fed-
3 eral permitting and review of infrastructure
4 projects); and

5 (B) the goal of reducing the time to make
6 decisions in the permitting and review of infra-
7 structure projects by the Federal Government.

8 (7) REPORT.—Not later than the date that is
9 90 days before the date of issuance of a proposed
10 regulation pursuant to subsection (a), the Secretary
11 and the Administrator shall submit to the Com-
12 mittee on Environment and Public Works of the
13 Senate and the Committee on Transportation and
14 Infrastructure of the House of Representatives a re-
15 port that—

16 (A) describes the means by which the pro-
17 posed regulation, if finalized, would achieve
18 compliance with—

19 (i) Executive Order 12866 (5 U.S.C.
20 601 note; relating to regulatory planning
21 and review), including the means by
22 which—

23 (I) the regulation would impose
24 the least burden on society, consistent
25 with obtaining regulatory objectives,

1 taking into account, among other
2 things, and to the maximum extent
3 practicable, the costs of cumulative
4 regulations; and

5 (II) the Secretary and the Ad-
6 ministrator identified and assessed
7 available alternatives to direct regula-
8 tion;

9 (ii) section 2(i) of Executive Order
10 13132 (64 Fed. Reg. 43256 (August 4,
11 1999)), which requires agencies to “act
12 only with the greatest caution where State
13 or local governments have identified uncer-
14 tainties regarding the constitutional or
15 statutory authority of the national govern-
16 ment”;

17 (iii) section 3 of that Executive order
18 (64 Fed. Reg. 43256 (August 4, 1999)),
19 which requires agencies—

20 (I) to strictly adhere to constitu-
21 tional principles and statutory author-
22 ity;

23 (II) to take action limiting the
24 policymaking discretion of the States
25 only in cases in which there exists

1 constitutional and statutory authority
2 for the action;

3 (III) to provide States with max-
4 imum administrative discretion prac-
5 ticable, without intrusive Federal
6 oversight; and

7 (IV) to rely on State policies to
8 the maximum extent practicable; and

9 (iv) Executive Order 13563 (76 Fed.
10 Reg. 3821 (January 18, 2011)), including
11 the public participation requirements of
12 section 2 of that Executive order, which re-
13 quire an opportunity for public comment
14 regarding all pertinent parts of the rule-
15 making docket, including relevant scientific
16 and technical findings and seeking the
17 views of those who are likely to be affected
18 before issuing a notice of proposed rule-
19 making;

20 (B) includes the Federalism summary im-
21 pact statement required by section 3 of Execu-
22 tive Order 13132 (64 Fed. Reg. 43256 (August
23 4, 1999));

24 (C) includes the regulatory flexibility anal-
25 yses required under section 603 of title 5,

1 United States Code, and the report of the re-
2 view panel required under section 609 of that
3 title;

4 (D) describes the small government agency
5 plan, and the State, local, and tribal input
6 under sections 203 and 204 of the Unfunded
7 Mandates Reform Act of 1995 (2 U.S.C. 1533,
8 1534);

9 (E) describes the means by which the pro-
10 posed regulation is the least costly, most cost-
11 effective, or least burdensome alternative, in ac-
12 cordance with section 205 of the Unfunded
13 Mandates Reform Act of 1995 (2 U.S.C. 1535);

14 (F) describes whether the Secretary and
15 the Administrator will provide funding to State,
16 local, and tribal governments to meet the inter-
17 governmental mandates imposed by the pro-
18 posed regulation; and

19 (G) describes how the proposed rule will
20 achieve the goal stated in section 1 of Executive
21 Order 13604 (5 U.S.C. 601 note; relating to
22 improving performance of Federal permitting
23 and review of infrastructure projects) that the
24 time to make decisions in the permitting and

1 review of infrastructure projects by the Federal
2 Government be reduced.

3 **SEC. 5. APPROPRIATE EXTENT OF DEFINITION OF NAVI-**
4 **GABLE WATERS.**

5 Notwithstanding the opinion of the Attorney General
6 dated September 5, 1979 (42 Op. Att’y Gen. 197 (1979)),
7 the Secretary shall determine the appropriate extent of the
8 definition of the term “navigable waters” for purposes of
9 implementing section 404 of the Federal Water Pollution
10 Control Act (33 U.S.C. 1344).

11 **SEC. 6. REPORT TO CONGRESS.**

12 Not later than the date that is 3 years after the date
13 of promulgation of a regulation pursuant to section 4, and
14 not less frequently than once every 3 years thereafter, the
15 Comptroller General of the United States, after consulta-
16 tion with State, local, and tribal governments and other
17 affected entities, shall—

18 (1) review the jurisdictional determinations
19 made during the applicable period by the Secretary
20 and the Administrator; and

21 (2) submit to Congress a report that de-
22 scribes—

23 (A) the interpretations of the regulation
24 by—

1 (i) districts of the Corps of Engineers;

2 and

3 (ii) regional offices of the Environ-
4 mental Protection Agency;

5 (B) whether those interpretations are con-
6 sistent;

7 (C) if any inconsistency exists, the meas-
8 ures carried out by the Secretary and the Ad-
9 ministrator to reduce the inconsistency or an
10 explanation of the geographic differences that
11 make the inconsistency appropriate; and

12 (D) the impacts of those interpretations on
13 Federal permitting and review of infrastructure
14 projects, and the goal stated in section 1 of Ex-
15 ecutive Order 13604 (5 U.S.C. 601 note; relat-
16 ing to improving performance of Federal per-
17 mitting and review of infrastructure projects)
18 that the time to make decisions in the permit-
19 ting and review of infrastructure projects by the
20 Federal Government be reduced.

21 **SEC. 7. EFFECT OF ACT.**

22 (a) PERMITTING AUTHORITY.—Nothing in this Act
23 limits the authority of the Secretary or the Adminis-
24 trator—

1 (1) to require a permit for any discharge under
2 the Federal Water Pollution Control Act (33 U.S.C.
3 1251 et seq.); or

4 (2) to take any enforcement action with respect
5 to an unpermitted discharge under that Act.

6 (b) WATER TRANSFERS.—Nothing in this Act affects
7 a determination regarding whether the transfer of water
8 from 1 body of water to another requires a permit under
9 section 402 of the Federal Water Pollution Control Act
10 (33 U.S.C. 1342).

11 (c) RETENTION OF STATE AUTHORITY.—Nothing in
12 this Act places any limitation on the scope of water subject
13 to State jurisdiction under State law.