

**Calendar No. 153**114TH CONGRESS  
1ST SESSION**S. 1140****[Report No. 114–84]**

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.

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**IN THE SENATE OF THE UNITED STATES**

APRIL 30, 2015

Mr. BARRASSO (for himself, Mr. DONNELLY, Mr. INHOFE, Ms. HEITKAMP, Mr. ROBERTS, Mr. MANCHIN, Mr. SULLIVAN, Mr. ROUNDS, Mr. BLUNT, Mr. MCCONNELL, Mrs. CAPITO, Mrs. FISCHER, Mr. HOEVEN, Mr. VITTER, Mr. CRAPO, Mr. BOOZMAN, Mr. FLAKE, Mr. COTTON, Mr. PERDUE, Ms. MURKOWSKI, Mr. COCHRAN, Mr. WICKER, Mr. MORAN, Mr. THUNE, Mr. SCOTT, Mr. HATCH, Mr. RISCH, Mr. GRASSLEY, Mr. MCCAIN, Mr. ISAKSON, Mr. TILLIS, Mr. ALEXANDER, Mr. DAINES, Mr. COATS, Mr. CORNYN, Mr. HELLER, Mr. LEE, Mr. CASSIDY, Mrs. ERNST, Mr. JOHNSON, Mr. SASSE, Mr. SHELBY, and Mr. ENZI) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

JULY 16, 2015

Reported by Mr. INHOFE, with an amendment

[Strike out all after the enacting clause and insert the part printed in *italie*]

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**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 “Federal Water Quality  
 5       Protection Act”.

6       **SEC. 2. FINDINGS.**

7       Congress finds that—

8               (1) in section 101(b) of the Federal Water Pol-  
 9       lution Control Act (33 U.S.C. 1251(b)), Congress  
 10      adopted the principle of cooperative federalism, rec-  
 11      ognizing that “[i]t is the policy of the Congress to  
 12      recognize, preserve, and protect the primary respon-  
 13      sibilities and rights of States to prevent, reduce, and  
 14      eliminate pollution, to plan the development and use  
 15      (including restoration, preservation, and enhance-  
 16      ment) of land and water resources, and to consult  
 17      with the Administrator in the exercise of his author-  
 18      ity under this Act”;

19              (2) adequate consultation with States and local  
 20      governments and affected entities is necessary—

21                      (A) to ensure that Federal departments  
 22                      and agencies understand the scope and impacts  
 23                      of regulatory proposals;

1           (B) to maintain the cooperative federalism  
 2           foundation of the Federal Water Pollution Con-  
 3           trol Act (~~33~~ U.S.C. 1251 et seq.); and

4           (C) to respect the limits on Federal au-  
 5           thority;

6           ~~(3)(A)~~ States have robust water quality protec-  
 7           tion programs capable of greater regulatory controls  
 8           on waters not covered by Federal jurisdiction; and

9           ~~(B)~~ an exclusion of waters from Federal juris-  
 10          diction does not mean that excluded waters will be  
 11          exempt from regulation and protection; but rather,  
 12          it recognizes the limits of Federal jurisdiction under  
 13          the Federal Water Pollution Control Act (~~33~~ U.S.C.  
 14          1251 et seq.) and the primary role of States in pro-  
 15          tecting State waters; and

16          ~~(4)~~ subchapter H of chapter 5, and chapter 7,  
 17          of title 5, United States Code (commonly known as  
 18          the “Administrative Procedure Act”); requires each  
 19          agency to provide notice and an opportunity to com-  
 20          ment regarding—

21               (A) information, including scientific and  
 22               technical findings, on which the agency relies in  
 23               taking a regulatory action; and

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

1 **SEC. 3. DEFINITIONS.**

2 In this Act:

3 (1) ADMINISTRATOR.—The term “Adminis-  
4 trator” means the Administrator of the Environ-  
5 mental Protection Agency.

6 (2) BODY OF WATER.—The term “body of  
7 water” means a traditional navigable water, terri-  
8 torial sea, river, stream, lake, pond, or wetlands.

9 (3) INTERSTATE WATERS.—The term “inter-  
10 state waters” means the water described in section  
11 328.3(a)(2) of title 33, Code of Federal Regulations  
12 (as in effect on the day before the date of enactment  
13 of this Act).

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

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

21 (A) was established by, or pursuant to,  
22 State law; and

23 (B) has authority over the distribution of  
24 water or the disposal of sewage, industrial  
25 waste, or any other waste.

1           (6) NORMAL YEAR.—The term “normal year”  
2       means—

3           (A) the 30-year hydrologic normal, as that  
4       term is used by the Natural Resources Con-  
5       servaion Service of the Department of Agri-  
6       culture, based on data from a specific geo-  
7       graphic area; or

8           (B) if less than 30 years of data described  
9       in subparagraph (A) are available, the average  
10      of the observed monthly data from a specific ge-  
11      ographic area over the period of record.

12          (7) POINT SOURCE.—The term “point source”  
13      has the meaning given the term in section 502 of the  
14      Federal Water Pollution Control Act (33 U.S.C.  
15      1362).

16          (8) PUBLIC NOTICE AND AN OPPORTUNITY FOR  
17      COMMENT.—

18           (A) IN GENERAL.—The term “public no-  
19      tice and an opportunity for comment” means  
20      notice and opportunity for comment that meets  
21      the requirements of subchapter II of chapter 5,  
22      and chapter 7, of title 5, United States Code  
23      (commonly known as the “Administrative Pro-  
24      cedure Act”).

1           (B) INCLUSION.—The term “public notice  
2           and an opportunity for comment” includes the  
3           opportunity for public hearings in different geo-  
4           graphic regions with different hydrology, includ-  
5           ing separate meetings in the arid West.

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

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

14          (11) SURFACE HYDROLOGIC CONNECTION.—

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

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

22                       (i) overland flow of water outside a  
23                       body of water (including sheetflow); or

1                   (ii) the movement of water through  
2                   soil, subsurface tiles, or a groundwater aq-  
3                   uifer.

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                   regardless of whether—

9                   (i) water is not always present; and

10                  (ii) there is a break in the ordinary  
11                  high water mark of a stream that is unre-  
12                  lated to the flow regime of the stream, in-  
13                  cluding a break caused by a culvert, pipe,  
14                  dam, or by the flow of the stream under-  
15                  ground for a short distance, such as  
16                  through a cave.

17                  (12) TRADITIONAL NAVIGABLE WATER.—The  
18                  term “traditional navigable water” means the water  
19                  described in section 328.3(a)(1) of title 33, Code of  
20                  Federal Regulations (as in effect on the date of en-  
21                  actment of this Act).

22                  (13) WETLANDS.—The term “wetlands” has  
23                  the meaning given the term in section 328.3(b) of  
24                  title 33, Code of Federal Regulations (as in effect on  
25                  the date of enactment of this Act).

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

2       (a) ~~REVISED DEFINITION.~~—A revision to or guidance  
3 on a regulatory definition of the term “navigable waters”  
4 or “waters of the United States” promulgated or issued  
5 pursuant to the Federal Water Pollution Control Act (33  
6 U.S.C. 1251 et seq.) after February 4, 2015, shall have  
7 no force or effect—

8           (1) unless the revision adheres to the principles  
9 under subsection (b); and

10          (2) until after the Secretary and the Adminis-  
11 trator carry out each action described in subsection  
12 (c).

13       (b) ~~PRINCIPLES.~~—In promulgating a revised regu-  
14 latory definition pursuant to this subsection, the Secretary  
15 and the Administrator shall adhere to the following prin-  
16 ciples:

17           (1) The Federal Water Pollution Control Act  
18 (33 U.S.C. 1251 et seq.) is an Act to protect tradi-  
19 tional navigable waters from water pollution.

20           (2) The term “waters of the United States”  
21 under the Federal Water Pollution Control Act (33  
22 U.S.C. 1251 et seq.) should identify bodies of water  
23 subject to Federal jurisdiction, and, except as pro-  
24 vided in paragraph (3), should include—

25           (A) traditional navigable waters and inter-  
26 state waters;



(B) the reach of a stream that is—

(i) identified on 1 or more maps created using the United States Geological Survey National Hydrology Dataset Plus at the 1:100,000 scale from Reach Address Database Version 3.1, consistent with the scale and reach address database used by the Administrator during July 2009, in conjunction with information on drinking water source protection areas, to identify potential sources of water for public drinking water systems; or

(ii) for any State for which a map at the scale described in clause (i) is not available, identified on a map using the United States Geological Survey National Hydrology Dataset Plus at the available scale that is closest to the scale described in clause (i);

(C) the reach of a stream that, through a surface hydrologic connection, contributes flow in a normal year to a traditional navigable water of sufficient volume, duration, and frequency that pollutants in that reach would degrade the water quality of the traditional navi-

1 gable water, based on a quantifiable and statis-  
2 tically valid measure of flow for that geographic  
3 area; and

4 ~~(D)~~ wetlands situated next to a water of  
5 the United States that, in a normal year, pro-  
6 tect the water quality of a navigable water by  
7 preventing the movement of pollutants to a nav-  
8 igable water.

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

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

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

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

23 ~~(D)~~ a system constructed or used for the  
24 purpose of collecting, conveying, holding, or  
25 treating—

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

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

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

17 (I) including spreading basins for  
18 aquifer storage and recovery or aqui-  
19 fer recharge and recovery; but

20 (II) not including instream res-  
21 ervoirs or other instream facilities; or

22 (iv) water for agricultural or silvicult-  
23 tural purposes by a municipality or at an  
24 agricultural or silvicultural facility or oper-  
25 ation, including irrigation water, a fish

1 production pond, livestock watering pond,  
 2 irrigated field, cranberry growing field, rice  
 3 production field, manure lagoon, and farm  
 4 pond;

5 (E) the reach of a stream that, through a  
 6 surface hydrologic connection, does not con-  
 7 tribute flow in a normal year to a traditional  
 8 navigable water of sufficient volume, duration,  
 9 and frequency that pollutants in that reach  
 10 would degrade the water quality of the tradi-  
 11 tional navigable water, based on a quantifiable  
 12 and statistically valid measure of flow for that  
 13 geographic area;

14 (F) prior-converted cropland (as defined in  
 15 section 12.2(a) of title 7, Code of Federal Reg-  
 16 ulations (as in effect on the date of enactment  
 17 of this Act)); and

18 (G) any water that is no longer a water of  
 19 the United States pursuant to a permit issued  
 20 under—

21 (i) section 10 of the Act of March 3,  
 22 1899 (commonly known as the “Rivers and  
 23 Harbors Appropriation Act of 1899”) (33  
 24 U.S.C. 403); or

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

3                   (4) Unless a subparagraph of paragraph (3)  
4                   other than subparagraph (D) applies, for purposes  
5                   of the Federal Water Pollution Control Act (33  
6                   U.S.C. 1251 et seq.), the term “waters of the United  
7                   States” should include a system described in para-  
8                   graph (3)(D), or a component of such a system, if  
9                   the Secretary or the Administrator demonstrates  
10                  that—

11                  (A) the system was a water of the United  
12                  States that was converted for use for the pur-  
13                  pose described in paragraph (3)(D) after Octo-  
14                  ber 18, 1972, without a permit under section  
15                  404 of that Act (33 U.S.C. 1344), unless the  
16                  construction or use of the system—

17                         (i) is described in subparagraph (A)  
18                         or (C) of section 404(f)(1) of that Act (33  
19                         U.S.C. 1344(f)(1)); or

20                         (ii) was otherwise exempt from per-  
21                         mitting under that Act; or

22                  (B) the system was a traditional navigable  
23                  water that was converted for use for the pur-  
24                  pose described in paragraph (3)(D), unless—

1 (i) the system is identified as a point  
 2 source in a permit issued under section  
 3 402 of the Federal Water Pollution Con-  
 4 trol Act (33 U.S.C. 1342);

5 (ii) the water managed in the system  
 6 is—

7 (I) irrigation return flow exempt  
 8 from permitting under section  
 9 402(l)(1) of that Act (33 U.S.C.  
 10 1342(l)(1)); or

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

16 (iii) the construction or use of the sys-  
 17 tem is described in subparagraph (A) or  
 18 (C) of section 404(f)(1) of that Act (33  
 19 U.S.C. 1344(f)(1)); or

20 (iv) the system is a waste treatment  
 21 system.

22 (5) In promulgating a revised definition of  
 23 waters of the United States, the Secretary or the  
 24 Administrator shall take into consideration that—

1           (A) the use of a body of water by an orga-  
2           nism, including a migratory bird, does not pro-  
3           vide a basis for establishing Federal jurisdiction  
4           under the Federal Water Pollution Control Act  
5           (33 U.S.C. 1251 et seq.);

6           (B) the supply of water to a groundwater  
7           aquifer and the storage of water in an isolated  
8           body of water are issues that—

9           (i) pertain to the use of water re-  
10          sources that shall not be superseded, abro-  
11          gated, or otherwise impaired by the Fed-  
12          eral Water Pollution Control Act (33  
13          U.S.C. 1251 et seq.) pursuant to sections  
14          101(g) and 510(2) of that Act (33 U.S.C.  
15          1251(g), 1370(2)); and

16          (ii) do not provide a basis for estab-  
17          lishing Federal jurisdiction under that Act  
18          (33 U.S.C. 1251 et seq.); and

19          (C) evaporation, transpiration, condensa-  
20          tion, precipitation, the overland flow of water,  
21          and the movement of water in an aquifer are all  
22          part of the water cycle and may connect all  
23          water over sufficiently long periods of time and  
24          distances, but do not provide a basis for estab-  
25          lishing Federal jurisdiction under the Federal

1           Water Pollution Control Act (33 U.S.C. 1251 et  
2           seq.).

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

7           (c) CONSIDERATION, CONSULTATION, AND RE-  
8           PORT.—

9           (1) CONSIDERATION OF PUBLIC COMMENTS.—

10          Before issuing a proposed regulation pursuant to  
11          subsection (a), the Secretary and the Administrator  
12          shall make available to the public, review, and pub-  
13          lish a response to comments filed regarding the pro-  
14          posed rule entitled “Definition of ‘Waters of the  
15          United States’ Under the Clean Water Act” of the  
16          Corps of Engineers and the Environmental Protec-  
17          tion Agency (79 Fed. Reg. 22188 (April 21, 2014)).

18          (2) FEDERALISM.—

19               (A) IN GENERAL.—In proposing and pro-  
20          mulgating a regulation pursuant to subsection  
21          (a), the Secretary and the Administrator shall  
22          ensure compliance with the federalism policy-  
23          making criteria and consultation in accordance  
24          with Executive Order 13132 (64 Fed. Reg.  
25          43255 (August 4, 1999)), regardless of whether



the Secretary and the Administrator determine that the regulation would have any substantial and direct effect on—

(i) States;

(ii) the relationship between the Federal Government and the States; or

(iii) the distribution of power and responsibilities among the various levels of government.

~~(B) CONSULTATION.—~~

~~(i) IN GENERAL.—To be considered meaningful consultation described in section 101(b) of the Federal Water Pollution Control Act (33 U.S.C. 1251(b)), before publication of a proposed rule under this section, consultation shall include a discussion of alternative approaches with and a request for input and advice on the approaches from States, including—~~

~~(I) Governors;~~

~~(II) State departments with authority over water supply and water quality;~~

~~(III) State departments of agriculture; and~~

1           (IV) local governments, including  
 2           elected officials, local governmental  
 3           entities with authority over water sup-  
 4           ply, stormwater, waste water, and  
 5           flood control, irrigation districts, and  
 6           conservation districts.

7           (ii) TOPICS.—The topics to be ad-  
 8           dressed in the consultation under this  
 9           paragraph should include—

10           (I) categories of waters, in addi-  
 11           tion to those discussed in paragraphs  
 12           (2) and (3) of subsection (b), that  
 13           should be subject to Federal jurisdic-  
 14           tion or should be subject solely to  
 15           State regulation;

16           (II) what is the role of States in  
 17           the identification of waters subject to  
 18           Federal jurisdiction; and

19           (III) whether channels in which  
 20           water is present only during or for a  
 21           short time after a precipitation event  
 22           are correctly categorized as  
 23           geomorphological features rather than  
 24           hydrologic features.

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

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

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

18           (4) UNFUNDED MANDATES.—In proposing and  
 19           promulgating a regulation pursuant to subsection  
 20           (a), the Secretary and the Administrator shall evalu-  
 21           ate the intergovernmental and private sector impacts  
 22           of the regulation, in accordance with title II of the  
 23           Unfunded Mandates Reform Act of 1995 (2 U.S.C.  
 24           1531 et seq.), regardless of whether the Secretary  
 25           and the Administrator—

1           (A) consider the impacts of the proposed  
2 regulation to be direct or indirect; or

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

7           (5) IMPROVING REGULATION AND REGULATORY  
8 REVIEW.—In proposing and promulgating a regula-  
9 tion pursuant to subsection (a), regardless of wheth-  
10 er the Secretary and the Administrator consider the  
11 regulation to be a significant regulatory action or  
12 significantly affect State, local, and tribal govern-  
13 ments, the Secretary and the Administrator shall en-  
14 sure that the regulation 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           ~~30 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 Exec-  
22 utive 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 ~~(8) TIMING.—In carrying out this section, the~~  
4 Secretary and the Administrator shall use best ef-  
5 forts—

6 ~~(A) to provide not less than 180 days for~~  
7 the consultation described in paragraph ~~(2)~~;

8 ~~(B) to provide a comment period on the re-~~  
9 ~~vised proposed rule of not less than 120 days;~~  
10 and

11 ~~(C) to publish a final rule not later than~~  
12 ~~December 31, 2016.~~

13 **SEC. 5. MEASURE OF FLOW.**

14 After providing public notice and an opportunity for  
15 comment, the Secretary shall establish quantifiable and  
16 statistically valid measures of the volume, duration, and  
17 frequency of flow in streams in different geographic areas  
18 that would, in a normal year, allow pollutants in reaches  
19 of streams in those geographic areas to flow to and de-  
20 grade the water quality of a traditional navigable water.

21 **SEC. 6. REPORT TO CONGRESS.**

22 Not later than the date that is 3 years after the date  
23 of promulgation of a regulation pursuant to section 4, and  
24 not less frequently than once every 3 years thereafter, the  
25 Comptroller General of the United States, after consulta-

1 tion with State, local, and tribal governments and other  
 2 affected entities, shall—

3       (1) review the jurisdictional determinations  
 4 made during the applicable period by the Secretary  
 5 and the Administrator; and

6       (2) submit to Congress a report that de-  
 7 scribes—

8           (A) the interpretations of the regulation  
 9 by—

10               (i) districts of the Corps of Engineers;

11               and

12               (ii) regional offices of the Environ-  
 13 mental Protection Agency;

14           (B) whether those interpretations are con-  
 15 sistent;

16           (C) if any inconsistency exists, the meas-  
 17 ures carried out by the Secretary and the Ad-  
 18 ministrator to reduce the inconsistency or an  
 19 explanation of the geographic differences that  
 20 make the inconsistency appropriate; and

21           (D) the impacts of those interpretations on  
 22 Federal permitting and review of infrastructure  
 23 projects; and the goal stated in section 1 of Ex-  
 24 ecutive Order 13604 (5 U.S.C. 601 note; relat-  
 25 ing to improving performance of Federal per-

1           mitting and review of infrastructure projects)  
 2           that the time to make decisions in the permit-  
 3           ting and review of infrastructure projects by the  
 4           Federal Government be reduced.

5 **SEC. 7. EFFECT OF ACT.**

6       (a) PERMITTING AUTHORITY.—Nothing in this Act  
 7 limits the authority of the Secretary or the Adminis-  
 8 trator—

9           (1) to require a permit for any discharge of pol-  
 10       lutants to a navigable water under the Federal  
 11       Water Pollution Control Act (33 U.S.C. 1251 et  
 12       seq.); or

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

15       (b) WATER TRANSFERS.—Nothing in this Act affects  
 16 a determination regarding whether the transfer of water  
 17 from 1 body of water to another requires a permit under  
 18 section 402 of the Federal Water Pollution Control Act  
 19 (33 U.S.C. 1342).

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

23 **SECTION 1. SHORT TITLE.**

24       *This Act may be cited as the “Federal Water Quality*  
 25 *Protection Act”.*

1 **SEC. 2. FINDINGS.**

2 *Congress finds that—*

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

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

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

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

21 *(C) to respect the limits on Federal author-*  
 22 *ity;*

23 *(3)(A) States have robust water quality protec-*  
 24 *tion programs capable of greater regulatory controls*  
 25 *on waters not covered by Federal jurisdiction; and*

1           (B) an exclusion of waters from Federal jurisdic-  
 2           tion does not mean that excluded waters will be ex-  
 3           empt from regulation and protection, but rather, it  
 4           recognizes the limits of Federal jurisdiction under the  
 5           Federal Water Pollution Control Act (33 U.S.C. 1251  
 6           et seq.) and the primary role of States in protecting  
 7           State waters; and

8           (4) subchapter II of chapter 5, and chapter 7, of  
 9           title 5, United States Code (commonly known as the  
 10          “Administrative Procedure Act”), requires each agen-  
 11          cy to provide notice and an opportunity to comment  
 12          regarding—

13                 (A) information, including scientific and  
 14                 technical findings, on which the agency relies in  
 15                 taking a regulatory action; and

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

18 **SEC. 3. DEFINITIONS.**

19         In this Act:

20                 (1) **ADMINISTRATOR.**—The term “Adminis-  
 21                 trator” means the Administrator of the Environ-  
 22                 mental Protection Agency.

23                 (2) **BODY OF WATER.**—The term “body of water”  
 24                 means a traditional navigable water, territorial sea,  
 25                 river, stream, lake, pond, or wetlands.

1           (3) *INTERSTATE WATERS.*—*The term “interstate*  
 2           *waters” means the water described in section*  
 3           *328.3(a)(2) of title 33, Code of Federal Regulations*  
 4           *(as in effect on the day before the date of enactment*  
 5           *of this Act).*

6           (4) *ISOLATED.*—*The term “isolated”, with re-*  
 7           *spect to a body of water, means the absence of a sur-*  
 8           *face hydrologic connection to a traditional navigable*  
 9           *water.*

10          (5) *MUNICIPALITY.*—*The term “municipality”*  
 11          *means a city, town, borough, county, parish, district,*  
 12          *association, or other public entity that—*

13                 (A) *was established by, or pursuant to,*  
 14                 *State law; and*

15                 (B) *has authority over the distribution of*  
 16                 *water or the disposal of sewage, industrial waste,*  
 17                 *or any other waste.*

18          (6) *NORMAL YEAR.*—*The term “normal year”*  
 19          *means—*

20                 (A) *the 30-year hydrologic normal, as that*  
 21                 *term is used by the Natural Resources Conserva-*  
 22                 *tion Service of the Department of Agriculture,*  
 23                 *based on data from a specific geographic area; or*

24                 (B) *if less than 30 years of data described*  
 25                 *in subparagraph (A) are available, the average*

1           *of the observed monthly data from a specific geo-*  
 2           *graphic area over the period of record.*

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

7           (8) *PUBLIC NOTICE AND AN OPPORTUNITY FOR*  
 8           *COMMENT.*—

9                   (A) *IN GENERAL.*—*The term “public notice*  
 10           *and an opportunity for comment” means notice*  
 11           *and opportunity for comment that meets the re-*  
 12           *quirements of subchapter II of chapter 5, and*  
 13           *chapter 7, of title 5, United States Code (com-*  
 14           *monly known as the “Administrative Procedure*  
 15           *Act”).*

16                   (B) *INCLUSION.*—*The term “public notice*  
 17           *and an opportunity for comment” includes the*  
 18           *opportunity for public hearings in different geo-*  
 19           *graphic regions with different hydrology, includ-*  
 20           *ing separate meetings in the arid West.*

21           (9) *SECRETARY.*—*The term “Secretary” means*  
 22           *the Secretary of the Army.*

23           (10) *STREAM.*—*The term “stream” means a nat-*  
 24           *ural channel formed by the flow of water that has a*  
 25           *bed, bank, and ordinary high water mark (as defined*

1        *in section 328.3(e) of title 33, Code of Federal Regula-*  
 2        *tions (as in effect on the date of enactment of this*  
 3        *Act)).*

4            (11) *SURFACE HYDROLOGIC CONNECTION.—*

5            (A) *IN GENERAL.—The term “surface hy-*  
 6        *drologic connection” means a continuous surface*  
 7        *connection through which water moves within a*  
 8        *body of water or from 1 body of water to an-*  
 9        *other.*

10          (B) *EXCLUSION.—The term “surface hydro-*  
 11        *logic connection” does not include—*

12            (i) *overland flow of water outside a*  
 13        *body of water (including sheetflow); or*

14            (ii) *the movement of water through*  
 15        *soil, subsurface tiles, or a groundwater aqu-*  
 16        *ifer.*

17          (C) *DETERMINATION OF CONTINUOUS-*  
 18        *NESS.—For purposes of this paragraph, a sur-*  
 19        *face hydrologic connection shall be considered to*  
 20        *be continuous if the connection is continuous, re-*  
 21        *gardless of whether—*

22            (i) *water is not always present; and*

23            (ii) *there is a break in the ordinary*  
 24        *high water mark of a stream that is unre-*  
 25        *lated to the flow regime of the stream, in-*



1                   cluding a break caused by a culvert, pipe,  
 2                   dam, or by the flow of the stream under-  
 3                   ground for a short distance, such as through  
 4                   a cave.

5                   (12) *TRADITIONAL NAVIGABLE WATER.*—*The*  
 6                   *term “traditional navigable water” means the water*  
 7                   *described in section 328.3(a)(1) of title 33, Code of*  
 8                   *Federal Regulations (as in effect on the date of enact-*  
 9                   *ment of this Act).*

10                  (13) *WETLANDS.*—*The term “wetlands” has the*  
 11                  *meaning given the term in section 328.3(b) of title 33,*  
 12                  *Code of Federal Regulations (as in effect on the date*  
 13                  *of enactment of this Act).*

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

15                  (a) *REVISED DEFINITION.*—*A revision to or guidance*  
 16                  *on a regulatory definition of the term “navigable waters”*  
 17                  *or “waters of the United States” promulgated or issued pur-*  
 18                  *suant to the Federal Water Pollution Control Act (33*  
 19                  *U.S.C. 1251 et seq.) after February 4, 2015, shall have no*  
 20                  *force or effect—*

21                   (1) *unless the revision adheres to the principles*  
 22                   *under subsection (b); and*

23                   (2) *until after the Secretary and the Adminis-*  
 24                   *trator carry out each action described in subsection*  
 25                   *(c).*

1       (b) *PRINCIPLES.*—*In promulgating a revised regu-*  
 2 *latory definition pursuant to this subsection, the Secretary*  
 3 *and the Administrator shall adhere to the following prin-*  
 4 *ciples:*

5           (1) *The Federal Water Pollution Control Act (33*  
 6 *U.S.C. 1251 et seq.) is an Act to protect traditional*  
 7 *navigable waters from water pollution.*

8           (2) *The term “waters of the United States”*  
 9 *under the Federal Water Pollution Control Act (33*  
 10 *U.S.C. 1251 et seq.) should identify bodies of water*  
 11 *subject to Federal jurisdiction, and, except as pro-*  
 12 *vided in paragraph (3), should include—*

13           (A) *traditional navigable waters and inter-*  
 14 *state waters;*

15           (B) *the reach of a stream that is—*

16           (i) *identified on 1 or more maps cre-*  
 17 *ated using the United States Geological*  
 18 *Survey National Hydrology Dataset Plus at*  
 19 *the 1:100,000 scale from Reach Address*  
 20 *Database Version 3.1, consistent with the*  
 21 *scale and reach address database used by*  
 22 *the Administrator during July 2009, in*  
 23 *conjunction with information on drinking*  
 24 *water source protection areas, to identify*

1                   *potential sources of water for public drink-*  
2                   *ing water systems; or*

3                   *(ii) for any State for which a map at*  
4                   *the scale described in clause (i) is not avail-*  
5                   *able, identified on a map using the United*  
6                   *States Geological Survey National Hydrol-*  
7                   *ogy Dataset Plus at the available scale that*  
8                   *is closest to the scale described in clause (i);*

9                   *(C) the reach of a stream that, through a*  
10                  *surface hydrologic connection, contributes flow in*  
11                  *a normal year to a traditional navigable water*  
12                  *of sufficient volume, duration, and frequency*  
13                  *that pollutants in that reach would degrade the*  
14                  *water quality of the traditional navigable water,*  
15                  *based on a quantifiable and statistically valid*  
16                  *measure of flow for that geographic area; and*

17                  *(D) wetlands situated next to a water of the*  
18                  *United States that, in a normal year, protect the*  
19                  *water quality of a navigable water by preventing*  
20                  *the movement of pollutants to a navigable water.*

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

1           (A) *water that is located below the surface*  
2           *of the land, including soil water and ground-*  
3           *water;*

4           (B) *water that is not located within a body*  
5           *of water;*

6           (C) *an isolated pond, whether natural or*  
7           *manmade, including a farm pond, fish pond,*  
8           *quarry, mine pit, ornamental pond, swimming*  
9           *pool, construction pit, fire control pond, sedi-*  
10          *ment pond, and any other isolated facility or*  
11          *system that holds water;*

12          (D) *a system constructed or used for the*  
13          *purpose of collecting, conveying, holding, or*  
14          *treating—*

15               (i) *stormwater or floodwater within the*  
16               *boundaries of a State, tribal, municipal, in-*  
17               *dustrial, agricultural, silvicultural, residen-*  
18               *tial, or Federal facility or operation, in-*  
19               *cluding ditches along agricultural fields,*  
20               *roads, runways, parking lots, and other in-*  
21               *frastructure;*

22               (ii) *wastewater within the boundaries*  
23               *of a State, tribal, municipal, industrial,*  
24               *commercial, agricultural, silvicultural, resi-*  
25               *dential, or Federal facility or operation;*

1                   (iii) municipal and industrial water  
 2                   supplies within the boundaries of a State,  
 3                   tribal, municipal, industrial, commercial,  
 4                   agricultural, silvicultural, residential, or  
 5                   Federal facility or operation—

6                   (I) including spreading basins for  
 7                   aquifer storage and recovery or aquifer  
 8                   recharge and recovery; but

9                   (II) not including instream res-  
 10                  ervoirs or other instream facilities; or

11                  (iv) water for agricultural or silvicultural purposes by a municipality or at an  
 12                  agricultural or silvicultural facility or operation, including irrigation water, a fish  
 13                  production pond, livestock watering pond,  
 14                  irrigated field, cranberry growing field, rice  
 15                  production field, manure lagoon, and farm  
 16                  pond;  
 17                  pond;

18                  (E) the reach of a stream that, through a  
 19                  surface hydrologic connection, does not contribute  
 20                  flow in a normal year to a traditional  
 21                  navigable water of sufficient volume, duration,  
 22                  and frequency that pollutants in that reach  
 23                  would degrade the water quality of the traditional  
 24                  navigable water, based on a quantifiable  
 25                  water;

1           *and statistically valid measure of flow for that*  
 2           *geographic area;*

3           *(F) prior-converted cropland (as defined in*  
 4           *section 12.2(a) of title 7, Code of Federal Regula-*  
 5           *tions (as in effect on the date of enactment of*  
 6           *this Act)); and*

7           *(G) any water that is no longer a water of*  
 8           *the United States pursuant to a permit issued*  
 9           *under—*

10           *(i) section 10 of the Act of March 3,*  
 11           *1899 (commonly known as the “Rivers and*  
 12           *Harbors Appropriation Act of 1899”) (33*  
 13           *U.S.C. 403); or*

14           *(ii) section 404 of the Federal Water*  
 15           *Pollution Control Act (33 U.S.C. 1344).*

16           *(4) Unless a subparagraph of paragraph (3)*  
 17           *other than subparagraph (D) applies, for purposes of*  
 18           *the Federal Water Pollution Control Act (33 U.S.C.*  
 19           *1251 et seq.), the term “waters of the United States”*  
 20           *should include a system described in paragraph*  
 21           *(3)(D), or a component of such a system, if the Sec-*  
 22           *retary or the Administrator demonstrates that—*

23           *(A) the system or component was a water of*  
 24           *the United States that was converted for use for*  
 25           *the purpose described in paragraph (3)(D) after*

1        *the effective date of initial regulations imple-*  
 2        *menting section 404 of that Act (33 U.S.C.*  
 3        *1344), without a permit under that section un-*  
 4        *less the construction or use of the system or com-*  
 5        *ponent—*

6                *(i) is described in subparagraph (A) or*  
 7                *(C) of section 404(f)(1) of that Act (33*  
 8                *U.S.C. 1344(f)(1)); or*

9                *(ii) was otherwise exempt from permit-*  
 10               *ting under that Act; or*

11               *(B) the system or component was a tradi-*  
 12               *tional navigable water that was converted for use*  
 13               *for the purpose described in paragraph (3)(D),*  
 14               *at any time unless—*

15               *(i) the system or component is identi-*  
 16               *fied as a point source in a permit issued*  
 17               *under section 402 of the Federal Water Pol-*  
 18               *lution Control Act (33 U.S.C. 1342);*

19               *(ii) the water managed in the system*  
 20               *or component is—*

21               *(I) irrigation return flow exempt*  
 22               *from permitting under section*  
 23               *402(l)(1) of that Act (33 U.S.C.*  
 24               *1342(l)(1)); or*

1                   (II) *agricultural stormwater or*  
 2                   *return flows from irrigated agriculture*  
 3                   *exempt from permitting under section*  
 4                   *502(14) of that Act (33 U.S.C.*  
 5                   *1362(14));*

6                   (iii) *the construction or use of the sys-*  
 7                   *tem or component is described in subpara-*  
 8                   *graph (A) or (C) of section 404(f)(1) of that*  
 9                   *Act (33 U.S.C. 1344(f)(1)); or*

10                  (iv) *the system or component is a*  
 11                  *waste treatment system.*

12                  (5) *In promulgating a revised definition of*  
 13                  *waters of the United States, the Secretary and the Ad-*  
 14                  *ministrator shall take into consideration that—*

15                   (A) *the use of a body of water by an orga-*  
 16                   *nism, including a migratory bird, does not pro-*  
 17                   *vide a basis for establishing Federal jurisdiction*  
 18                   *under the Federal Water Pollution Control Act*  
 19                   *(33 U.S.C. 1251 et seq.);*

20                   (B) *the supply of water to a groundwater*  
 21                   *aquifer and the storage of water in an isolated*  
 22                   *body of water are issues that—*

23                   (i) *pertain to the use of water resources*  
 24                   *that shall not be superseded, abrogated, or*  
 25                   *otherwise impaired by the Federal Water*



*Pollution Control Act (33 U.S.C. 1251 et seq.) pursuant to sections 101(g) and 510(2) of that Act (33 U.S.C. 1251(g), 1370(2)); and*

*(ii) do not provide a basis for establishing Federal jurisdiction under that Act (33 U.S.C. 1251 et seq.); and*

*(C) evaporation, transpiration, condensation, precipitation, the overland flow of water, and the movement of water in an aquifer are all part of the water cycle and may connect all water over sufficiently long periods of time and distances, but do not provide a basis for establishing Federal jurisdiction under the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).*

*(6) Waters that are waters of the United States should be identified on maps provided by the Secretary and the Administrator to promote certainty and transparency in jurisdictional determinations.*

*(c) CONSIDERATION, CONSULTATION, AND REPORT.—*

*(1) FEDERALISM.—*

*(A) IN GENERAL.—In proposing and promulgating a regulation pursuant to subsection (a), the Secretary and the Administrator shall*

1        *ensure compliance with the federalism policy-*  
 2        *making criteria and consultation in accordance*  
 3        *with Executive Order 13132 (64 Fed. Reg. 43255*  
 4        *(August 4, 1999)), regardless of whether the Sec-*  
 5        *retary and the Administrator determine that the*  
 6        *regulation would have any substantial and di-*  
 7        *rect effect on—*

8                *(i) States;*

9                *(ii) the relationship between the Fed-*  
 10                *eral Government and the States; or*

11                *(iii) the distribution of power and re-*  
 12                *sponsibilities among the various levels of*  
 13                *government.*

14                *(B) CONSULTATION.—*

15                *(i) IN GENERAL.—To be considered*  
 16                *meaningful consultation described in section*  
 17                *101(b) of the Federal Water Pollution Con-*  
 18                *trol Act (33 U.S.C. 1251(b)), before publica-*  
 19                *tion of a proposed rule under this section,*  
 20                *consultation shall include a discussion of al-*  
 21                *ternative approaches with and a request for*  
 22                *input and advice on the approaches from*  
 23                *States and political subdivisions of States,*  
 24                *including—*

25                *(I) Governors;*

1                   (II) *State departments with au-*  
 2                   *thority over water supply and water*  
 3                   *quality;*

4                   (III) *State departments of agri-*  
 5                   *culture; and*

6                   (IV) *local governments, including*  
 7                   *elected officials, local governmental en-*  
 8                   *tities with authority over water sup-*  
 9                   *ply, stormwater, waste water, flood-*  
 10                   *plain management, and flood control,*  
 11                   *irrigation districts, and conservation*  
 12                   *districts.*

13                  (ii) *TOPICS.—The topics to be ad-*  
 14                  *ressed in the consultation under this para-*  
 15                  *graph should include—*

16                   (I) *categories of waters, in addi-*  
 17                   *tion to those discussed in paragraphs*  
 18                   *(2) and (3) of subsection (b), that*  
 19                   *should be subject to Federal jurisdic-*  
 20                   *tion or should be subject solely to State*  
 21                   *or local regulation;*

22                   (II) *what is the role of States in*  
 23                   *the identification of waters subject to*  
 24                   *Federal jurisdiction; and*

1                   (III) *whether channels in which*  
2                   *water is present only during or for a*  
3                   *short time after a precipitation event*  
4                   *are correctly categorized as*  
5                   *geomorphological features rather than*  
6                   *hydrologic features.*

7           (2) *REGULATORY FLEXIBILITY.*—*In proposing*  
8           *and promulgating a regulation pursuant to subsection*  
9           *(a), and regardless of whether the Secretary and the*  
10          *Administrator determine that the regulation would*  
11          *have a significant impact on a substantial number of*  
12          *small entities, the Secretary and the Administrator*  
13          *shall—*

14                (A) *carry out the actions described in sec-*  
15                *tions 603, 604, and 609 of title 5, United States*  
16                *Code; and*

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

23           (3) *UNFUNDED MANDATES.*—*In proposing and*  
24           *promulgating a regulation pursuant to subsection (a),*  
25           *the Secretary and the Administrator shall evaluate*

1     *the intergovernmental and private sector impacts of*  
 2     *the regulation, in accordance with title II of the Un-*  
 3     *funded Mandates Reform Act of 1995 (2 U.S.C. 1531*  
 4     *et seq.), regardless of whether the Secretary and the*  
 5     *Administrator—*

6             *(A) consider the impacts of the proposed*  
 7             *regulation to be direct or indirect; or*

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

12            *(4) IMPROVING REGULATION AND REGULATORY*  
 13     *REVIEW.—In proposing and promulgating a regula-*  
 14     *tion pursuant to subsection (a), regardless of whether*  
 15     *the Secretary and the Administrator consider the reg-*  
 16     *ulation to be a significant regulatory action or sig-*  
 17     *nificantly affect State, local, and tribal governments,*  
 18     *the Secretary and the Administrator shall ensure that*  
 19     *the regulation meets the requirements of—*

20            *(A) Executive Order 12866 (5 U.S.C. 601*  
 21            *note; relating to regulatory planning and re-*  
 22            *view); and*

23            *(B) Executive Order 13563 (76 Fed. Reg.*  
 24            *3821 (January 18, 2011)).*

1           (5) *IMPROVING PERFORMANCE OF FEDERAL PER-*  
 2           *MITTING AND REVIEW OF INFRASTRUCTURE*  
 3           *PROJECTS.*—*In proposing and promulgating a regu-*  
 4           *lation pursuant to subsection (a), the Secretary and*  
 5           *the Administrator shall consider—*

6                     (A) *Executive Order 13604 (5 U.S.C. 601*  
 7                     *note; relating to improving performance of Fed-*  
 8                     *eral permitting and review of infrastructure*  
 9                     *projects); and*

10                    (B) *the goal of reducing the time to make*  
 11                    *decisions in the permitting and review of infra-*  
 12                    *structure projects by the Federal Government.*

13           (6) *REPORT.*—*Not later than the date that is 30*  
 14           *days before the date of issuance of a proposed regula-*  
 15           *tion pursuant to subsection (a), the Secretary and the*  
 16           *Administrator shall submit to the Committee on En-*  
 17           *vironment and Public Works of the Senate and the*  
 18           *Committee on Transportation and Infrastructure of*  
 19           *the House of Representatives a report that—*

20                    (A) *describes the means by which the pro-*  
 21                    *posed regulation, if finalized, would achieve com-*  
 22                    *pliance with—*

23                    (i) *Executive Order 12866 (5 U.S.C.*  
 24                    *601 note; relating to regulatory planning*

1           *and review), including the means by*  
2           *which—*

3                     *(I) the regulation would impose*  
4                     *the least burden on society, consistent*  
5                     *with obtaining regulatory objectives,*  
6                     *taking into account, among other*  
7                     *things, and to the maximum extent*  
8                     *practicable, the costs of cumulative reg-*  
9                     *ulations; and*

10                    *(II) the Secretary and the Admin-*  
11                    *istrator identified and assessed avail-*  
12                    *able alternatives to direct regulation;*

13                    *(ii) section 2(i) of Executive Order*  
14                    *13132 (64 Fed. Reg. 43256 (August 4,*  
15                    *1999)), which requires agencies to “act only*  
16                    *with the greatest caution where State or*  
17                    *local governments have identified uncertain-*  
18                    *ties regarding the constitutional or statu-*  
19                    *tory authority of the national government”;*

20                    *(iii) section 3 of that Executive order*  
21                    *(64 Fed. Reg. 43256 (August 4, 1999)),*  
22                    *which requires agencies—*

23                    *(I) to strictly adhere to constitu-*  
24                    *tional principles and statutory author-*  
25                    *ity;*

1                   (II) to take action limiting the  
 2                   policymaking discretion of the States  
 3                   only in cases in which there exists con-  
 4                   stitutional and statutory authority for  
 5                   the action;

6                   (III) to provide States with max-  
 7                   imum administrative discretion prac-  
 8                   ticable, without intrusive Federal over-  
 9                   sight; and

10                  (IV) to rely on State policies to  
 11                  the maximum extent practicable; and

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

23                  (B) includes the Federalism summary im-  
 24                  pact statement required by section 3 of Executive



1           *Order 13132 (64 Fed. Reg. 43256 (August 4,*  
2           *1999))*;

3           *(C) includes the regulatory flexibility anal-*  
4           *yses required under section 603 of title 5, United*  
5           *States Code, and the report of the review panel*  
6           *required under section 609 of that title;*

7           *(D) describes the small government agency*  
8           *plan, and the State, local, and tribal input*  
9           *under sections 203 and 204 of the Unfunded*  
10          *Mandates Reform Act of 1995 (2 U.S.C. 1533,*  
11          *1534)*;

12          *(E) describes the means by which the pro-*  
13          *posed regulation is the least costly, most cost-ef-*  
14          *fective, or least burdensome alternative, in ac-*  
15          *cordance with section 205 of the Unfunded Man-*  
16          *dates Reform Act of 1995 (2 U.S.C. 1535);*

17          *(F) describes whether the Secretary and the*  
18          *Administrator will provide funding to State,*  
19          *local, and tribal governments to meet the inter-*  
20          *governmental mandates imposed by the proposed*  
21          *regulation; and*

22          *(G) describes how the proposed rule will*  
23          *achieve the goal stated in section 1 of Executive*  
24          *Order 13604 (5 U.S.C. 601 note; relating to im-*  
25          *proving performance of Federal permitting and*

1           *review of infrastructure projects) that the time to*  
 2           *make decisions in the permitting and review of*  
 3           *infrastructure projects by the Federal Govern-*  
 4           *ment be reduced.*

5           (7) *TIMING.*—*In carrying out this section, the*  
 6           *Secretary and the Administrator shall use best ef-*  
 7           *forts—*

8                     *(A) to provide not less than 180 days for*  
 9                     *the consultation described in paragraph (2);*

10                    *(B) to provide a comment period on the re-*  
 11                    *vised proposed rule of not less than 120 days;*  
 12                    *and*

13                    *(C) to publish a final rule not later than*  
 14                    *December 31, 2016.*

15   **SEC. 5. MEASURE OF FLOW.**

16           *After providing public notice and an opportunity for*  
 17           *comment, the Secretary shall establish quantifiable and sta-*  
 18           *tistically valid measures of the volume, duration, and fre-*  
 19           *quency of flow in streams in different geographic areas that*  
 20           *would, in a normal year, allow pollutants in reaches of*  
 21           *streams in those geographic areas to flow to and degrade*  
 22           *the water quality of a traditional navigable water.*

23   **SEC. 6. REPORT TO CONGRESS.**

24           *Not later than the date that is 3 years after the date*  
 25           *of promulgation of a regulation pursuant to section 4, and*

1 *not less frequently than once every 3 years thereafter, the*  
2 *Comptroller General of the United States, after consultation*  
3 *with State, local, and tribal governments and other affected*  
4 *entities, shall—*

5       (1) *review the jurisdictional determinations*  
6       *made during the applicable period by the Secretary*  
7       *and the Administrator; and*

8       (2) *submit to Congress a report that describes—*

9           (A) *the interpretations of the regulation*  
10          *by—*

11               (i) *districts of the Corps of Engineers;*

12               *and*

13               (ii) *regional offices of the Environ-*  
14               *mental Protection Agency;*

15           (B) *whether those interpretations are con-*  
16           *sistent;*

17           (C) *if any inconsistency exists, the measures*  
18           *carried out by the Secretary and the Adminis-*  
19           *trator to reduce the inconsistency or an expla-*  
20           *nation of the geographic differences that make*  
21           *the inconsistency appropriate; and*

22           (D) *the impacts of those interpretations on*  
23           *Federal permitting and review of infrastructure*  
24           *projects, and the goal stated in section 1 of Exec-*  
25           *utive Order 13604 (5 U.S.C. 601 note; relating*

1           to improving performance of Federal permitting  
 2           and review of infrastructure projects) that the  
 3           time to make decisions in the permitting and re-  
 4           view of infrastructure projects by the Federal  
 5           Government be reduced.

6 **SEC. 7. EFFECT OF ACT.**

7           (a) *PERMITTING AUTHORITY*.—Nothing in this Act  
 8           limits the authority of the Secretary or the Administrator—

9                 (1) to require a permit for any discharge of pol-  
 10           lutants to a navigable water under the Federal Water  
 11           Pollution Control Act (33 U.S.C. 1251 et seq.); or

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

14           (b) *WATER TRANSFERS*.—Nothing in this Act affects  
 15           a determination regarding whether the transfer of water  
 16           from 1 body of water to another requires a permit under  
 17           section 402 of the Federal Water Pollution Control Act (33  
 18           U.S.C. 1342).

19           (c) *RETENTION OF STATE AUTHORITY*.—Nothing in  
 20           this Act places any limitation on the scope of water subject  
 21           to State jurisdiction under State law.



**Calendar No. 153**

114TH CONGRESS  
1ST Session

**S. 1140**

[Report No. 114-84]

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**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.

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JULY 16, 2015

Reported with an amendment