

Calendar No. 153114TH 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.

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*]

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 servation 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

production pond, livestock watering pond,
 irrigated field, cranberry growing field, rice
 production field, manure lagoon, and farm
 pond;

(E) the reach of a stream that, through a
 surface hydrologic connection, does not con-
 tribute 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 tradi-
 tional navigable water, based on a quantifiable
 and statistically valid measure of flow for that
 geographic area;

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

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

(i) section 10 of the Act of March 3,
 1899 (commonly known as the “Rivers and
 Harbors Appropriation Act of 1899”) (33
 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 (e) 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 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 ~~(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*

(B) an exclusion of waters from Federal jurisdiction does not mean that excluded waters will be exempt from regulation and protection, but rather, it recognizes the limits of Federal jurisdiction under the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) and the primary role of States in protecting State waters; and

(4) subchapter II of chapter 5, and chapter 7, of title 5, United States Code (commonly known as the “Administrative Procedure Act”), requires each agency to provide notice and an opportunity to comment regarding—

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

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

SEC. 3. DEFINITIONS.

In this Act:

(1) **ADMINISTRATOR.**—The term “Administrator” means the Administrator of the Environmental Protection Agency.

(2) **BODY OF WATER.**—The term “body of water” means a traditional navigable water, territorial sea, 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
 12 purposes by a municipality or at an
 13 agricultural or silvicultural facility or oper-
 14 ation, including irrigation water, a fish
 15 production pond, livestock watering pond,
 16 irrigated field, cranberry growing field, rice
 17 production field, manure lagoon, and farm
 18 pond;

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

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*

and review), including the means by which—

(I) the regulation would impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the maximum extent practicable, the costs of cumulative regulations; and

(II) the Secretary and the Administrator identified and assessed available alternatives to direct regulation;

(ii) section 2(i) of Executive Order 13132 (64 Fed. Reg. 43256 (August 4, 1999)), which requires agencies to “act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government”;

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

(I) to strictly adhere to constitutional principles and statutory authority;

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]

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.

JULY 16, 2015

Reported with an amendment