

115TH CONGRESS  
2D SESSION

# S. 2663

To modify and improve provisions relating to environmental requirements for agriculture and agricultural producers, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

APRIL 12, 2018

Mr. BARRASSO (for himself, Mrs. CAPITO, Mr. CRAPO, Mr. COTTON, Mr. ENZI, Mrs. FISCHER, Mr. GRASSLEY, Mr. INHOFE, Mr. RISCH, and Mr. ROBERTS) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

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## A BILL

To modify and improve provisions relating to environmental requirements for agriculture and agricultural producers, 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 “Agriculture Creates  
5 Real Employment Act” or the “ACRE Act”.

6 **SEC. 2. DEFINITIONS.**

7 In this Act:

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

4           (2) DIRECTOR.—The term “Director” means  
5           the Director of the United States Fish and Wildlife  
6           Service.

7 **SEC. 3. PREDATORY AND OTHER WILD ANIMALS.**

8           Section 1 of the Act of March 2, 1931 (7 U.S.C.  
9           8351), is amended—

10           (1) in the second sentence, by striking “The  
11           Secretary” and inserting the following:

12           “(b) ADMINISTRATION.—The Secretary”;

13           (2) in the first sentence, by striking “The Sec-  
14           retary” and inserting the following:

15           “(a) IN GENERAL.—The Secretary”; and

16           (3) by adding at the end the following:

17           “(c) ACTION BY FWS.—The Director of the United  
18           States Fish and Wildlife Service shall use the most expedi-  
19           tious procedure practicable to process and administer per-  
20           mits for take of—

21           “(1) a depredating eagle under the Act of June  
22           8, 1940 (commonly known as the ‘Bald Eagle Pro-  
23           tection Act’) (54 Stat. 250, chapter 278; 16 U.S.C.  
24           668 et seq.), or sections 22.11 through 22.32 of title  
25           50, Code of Federal Regulations (or successor regu-

1 lations) (including depredation of livestock, wildlife,  
2 and species protected under the Endangered Species  
3 Act of 1973 (16 U.S.C. 1531 et seq.) or any other  
4 Federal management program); or

5 “(2) a migratory bird included on the list under  
6 section 10.13 of title 50, Code of Federal Regula-  
7 tions (or successor regulations) that is posing a con-  
8 flict.”.

9 **SEC. 4. EXEMPTION OF EXPORTATION OF CERTAIN**  
10 **ECHINODERMS FROM PERMISSION AND LI-**  
11 **CENSING REQUIREMENTS.**

12 (a) EXEMPTION.—Not later than 30 days after the  
13 date of enactment of this Act, the Director shall amend  
14 section 14.92 of title 50, Code of Federal Regulations, to  
15 clarify that—

16 (1) fish or wildlife described in subsection (b)  
17 are fishery products exempt from the export permis-  
18 sion requirements of section 9(d)(1) of the Endan-  
19 gered Species Act of 1973 (16 U.S.C. 1538(d)(1));  
20 and

21 (2) any person may engage in business as an  
22 exporter of fish or wildlife described in subsection  
23 (b) without procuring—

1 (A) permission under section 9(d)(1) of the  
2 Endangered Species Act of 1973 (16 U.S.C.  
3 1538(d)(1)); or

4 (B) an export license under subpart I of  
5 part 14 of title 50, Code of Federal Regulations  
6 (or successor regulations).

7 (b) COVERED FISH OR WILDLIFE.—The fish or wild-  
8 life referred to in subsection (a) are members of the phy-  
9 lum Echinodermata that are commonly known as sea ur-  
10 chins and sea cucumbers (including any products of those  
11 members of the phylum Echinodermata) that—

12 (1) do not require a permit under part 16, 17,  
13 or 23 of title 50, Code of Federal Regulations (or  
14 successor regulations);

15 (2)(A) are harvested in waters under the juris-  
16 diction of the United States; or

17 (B) are processed in the United States; and

18 (3) are—

19 (A) exported for purposes of human or ani-  
20 mal consumption; or

21 (B) taken in waters under the jurisdiction  
22 of the United States or on the high seas for  
23 recreational purposes.

1 **SEC. 5. BAITING OF MIGRATORY GAME BIRDS.**

2 Section 3 of the Migratory Bird Treaty Act (16  
3 U.S.C. 704) is amended by striking subsection (b) and in-  
4 serting the following:

5 “(b) PROHIBITION OF BAITING.—

6 “(1) DEFINITIONS.—In this subsection:

7 “(A) BAITED AREA.—

8 “(i) IN GENERAL.—The term ‘baited  
9 area’ means—

10 “(I) any area on which salt,  
11 grain, or other feed has been placed,  
12 exposed, deposited, distributed, or  
13 scattered, if the salt, grain, or feed  
14 could lure or attract migratory game  
15 birds; and

16 “(II) in the case of waterfowl,  
17 cranes (family Gruidae), and coots  
18 (family Rallidae), a standing, unhar-  
19 vested crop that has been manipulated  
20 through activities such as mowing,  
21 discing, or rolling, unless the activities  
22 are normal agricultural practices.

23 “(ii) EXCLUSIONS.—An area shall not  
24 be considered to be a ‘baited area’ if the  
25 area—

1                   “(I) has been treated with a nor-  
2                   mal agricultural practice;

3                   “(II) has standing crops that  
4                   have not been manipulated; or

5                   “(III) has standing crops that  
6                   have been or are flooded.

7                   “(B) BAITING.—The term ‘baiting’ means  
8                   the direct or indirect placing, exposing, depos-  
9                   iting, distributing, or scattering of salt, grain,  
10                  or other feed that could lure or attract migra-  
11                  tory game birds to, on, or over any areas on  
12                  which a hunter is attempting to take migratory  
13                  game birds.

14                  “(C) MIGRATORY GAME BIRD.—The term  
15                  ‘migratory game bird’ means migratory bird  
16                  species—

17                  “(i) that are within the taxonomic  
18                  families of Anatidae, Columbidae, Gruidae,  
19                  Rallidae, and Scolopacidae; and

20                  “(ii) for which open seasons are pre-  
21                  scribed by the Secretary of the Interior.

22                  “(D) NORMAL AGRICULTURAL PRAC-  
23                  TICE.—

1           “(i) IN GENERAL.—The term ‘normal  
2           agricultural practice’ means any practice in  
3           1 annual growing season that—

4                   “(I) is carried out in order to  
5                   produce a marketable crop, including  
6                   planting, harvest, post-harvest, or soil  
7                   conservation practices; and

8                   “(II) is recommended for the  
9                   successful harvest of a given crop by  
10                  the applicable State office of the Co-  
11                  operative Extension System of the De-  
12                  partment of Agriculture, in consulta-  
13                  tion with, and if requested, the con-  
14                  currence of, the head of the applicable  
15                  State department of fish and wildlife.

16           “(ii) INCLUSIONS.—

17                   “(I) IN GENERAL.—Subject to  
18                   subclause (II), the term ‘normal agri-  
19                   cultural practice’ includes the destruc-  
20                   tion of a crop in accordance with  
21                   practices required by the Federal  
22                   Crop Insurance Corporation for agri-  
23                   cultural producers to obtain crop in-  
24                   surance under the Federal Crop In-  
25                   surance Act (7 U.S.C. 1501 et seq.)

1 on land on which a crop during the  
2 current or immediately preceding crop  
3 year was not harvestable due to a nat-  
4 ural disaster (including any hurricane,  
5 storm, tornado, flood, high water,  
6 wind-driven water, tidal wave, tsu-  
7 nami, earthquake, volcanic eruption,  
8 landslide, mudslide, drought, fire,  
9 snowstorm, or other catastrophe that  
10 is declared a major disaster by the  
11 President in accordance with section  
12 401 of the Robert T. Stafford Dis-  
13 aster Relief and Emergency Assist-  
14 ance Act (42 U.S.C. 5170)).

15 “(II) LIMITATIONS.—The term  
16 ‘normal agricultural practice’ only in-  
17 cludes a crop described in subclause  
18 (I) that has been destroyed or manip-  
19 ulated through activities that include  
20 (but are not limited to) mowing,  
21 discing, or rolling if the Federal Crop  
22 Insurance Corporation certifies that  
23 flooding was not an acceptable method  
24 of destruction to obtain crop insur-



1                   ance under the Federal Crop Insur-  
2                   ance Act (7 U.S.C. 1501 et seq.).

3                   “(E) WATERFOWL.—The term ‘waterfowl’  
4                   means native species of the family Anatidae.

5                   “(2) PROHIBITION.—It shall be unlawful for  
6                   any person—

7                   “(A) to take any migratory game bird by  
8                   baiting or on or over any baited area, if the  
9                   person knows or reasonably should know that  
10                  the area is a baited area; or

11                  “(B) to place or direct the placement of  
12                  bait on or adjacent to an area for the purpose  
13                  of causing, inducing, or allowing any person to  
14                  take or attempt to take any migratory game  
15                  bird by baiting or on or over the baited area.

16                  “(3) REGULATIONS.—The Secretary of the In-  
17                  terior may promulgate regulations to implement this  
18                  subsection.

19                  “(4) ANNUAL REPORTS.—The Secretary of Ag-  
20                  riculture shall submit to the Secretary of the Inte-  
21                  rior an annual report that describes any changes to  
22                  normal agricultural practices across the range of  
23                  crops grown by agricultural producers in each region  
24                  of the United States in which the recommendations  
25                  are provided to agricultural producers.”.

1 **SEC. 6. USE OF AUTHORIZED PESTICIDES; DISCHARGES OF**  
 2 **PESTICIDES; REPORT.**

3 (a) USE OF AUTHORIZED PESTICIDES.—Section 3(f)  
 4 of the Federal Insecticide, Fungicide, and Rodenticide Act  
 5 (7 U.S.C. 136a(f)) is amended by adding at the end the  
 6 following:

7 “(5) USE OF AUTHORIZED PESTICIDES.—Ex-  
 8 cept as provided in subsection (s) of section 402 of  
 9 the Federal Water Pollution Control Act (33 U.S.C.  
 10 1342), the Administrator or a State shall not re-  
 11 quire a permit under that Act for a discharge from  
 12 a point source into navigable waters of—

13 “(A) a pesticide authorized for sale, dis-  
 14 tribution, or use under this Act; or

15 “(B) the residue of the pesticide, resulting  
 16 from the application of the pesticide.”.

17 (b) DISCHARGES OF PESTICIDES.—Section 402 of  
 18 the Federal Water Pollution Control Act (33 U.S.C. 1342)  
 19 is amended by adding at the end the following:

20 “(s) DISCHARGES OF PESTICIDES.—

21 “(1) NO PERMIT REQUIREMENT.—Except as  
 22 provided in paragraph (2), a permit shall not be re-  
 23 quired by the Administrator or a State under this  
 24 Act for a discharge from a point source into navi-  
 25 gable waters of—

1           “(A) a pesticide authorized for sale, dis-  
2           tribution, or use under the Federal Insecticide,  
3           Fungicide, and Rodenticide Act (7 U.S.C. 136  
4           et seq.); or

5           “(B) the residue of the pesticide, resulting  
6           from the application of the pesticide.

7           “(2) EXCEPTIONS.—Paragraph (1) shall not  
8           apply to the following discharges of a pesticide or  
9           pesticide residue:

10           “(A) A discharge resulting from the appli-  
11           cation of a pesticide in violation of a provision  
12           of the Federal Insecticide, Fungicide, and  
13           Rodenticide Act (7 U.S.C. 136 et seq.) relevant  
14           to protecting water quality if—

15           “(i) the discharge would not have oc-  
16           curred without the violation; or

17           “(ii) the quantity of pesticide or pes-  
18           ticide residue in the discharge is greater  
19           than would have occurred without the vio-  
20           lation.

21           “(B) Stormwater discharges subject to reg-  
22           ulation under subsection (p).

23           “(C) The following discharges subject to  
24           regulation under this section:

1                   “(i) Manufacturing or industrial efflu-  
2                   ent.

3                   “(ii) Treatment works effluent.

4                   “(iii) Discharges incidental to the nor-  
5                   mal operation of a vessel, including a dis-  
6                   charge resulting from ballasting operations  
7                   or vessel biofouling prevention.”.

8           (c) REPORT.—Not later than 1 year after the date  
9 of enactment of this Act, the Administrator, in consulta-  
10 tion with the Secretary of Agriculture, shall submit a re-  
11 port to the Committee on Environment and Public Works  
12 and the Committee on Agriculture, Nutrition, and For-  
13 estry of the Senate and the Committee on Transportation  
14 and Infrastructure and the Committee on Agriculture of  
15 the House of Representatives that includes—

16                   (1) the status of intra-agency coordination be-  
17                   tween the Office of Water and the Office of Pes-  
18                   ticide Programs of the Environmental Protection  
19                   Agency regarding streamlining information collec-  
20                   tion, standards of review, and data use relating to  
21                   water quality impacts from the registration and use  
22                   of pesticides;

23                   (2) an analysis of the effectiveness of current  
24                   regulatory actions relating to pesticide registration  
25                   and use aimed at protecting water quality; and

1           (3) any recommendations on how the Federal  
2           Insecticide, Fungicide, and Rodenticide Act (7  
3           U.S.C. 136 et seq.) can be modified to better protect  
4           water quality and human health.

5 **SEC. 7. FARMER IDENTITY PROTECTION.**

6           (a) DEFINITIONS.—In this section:

7           (1) AGENCY.—The term “Agency” means the  
8           Environmental Protection Agency.

9           (2) LIVESTOCK OPERATION.—The term “live-  
10          stock operation” includes any operation involved in  
11          the raising or finishing of livestock and poultry.

12          (b) PROCUREMENT AND DISCLOSURE OF INFORMA-  
13          TION.—

14           (1) PROHIBITION.—Except as provided in para-  
15          graph (2), the Administrator, any officer or em-  
16          ployee of the Agency, or any contractor or coop-  
17          erator of the Agency, shall not disclose the informa-  
18          tion of any owner, operator, or employee of a live-  
19          stock operation provided to the Agency by a live-  
20          stock producer or a State agency in accordance with  
21          the Federal Water Pollution Control Act (33 U.S.C.  
22          1251 et seq.) or any other law, including—

23                   (A) names;

24                   (B) telephone numbers;

25                   (C) email addresses;

- 1 (D) physical addresses;
- 2 (E) Global Positioning System coordinates;
- 3 (F) financial information, including busi-
- 4 ness records and production data; or
- 5 (G) other identifying information regarding
- 6 the location of the owner, operator, livestock, or
- 7 employee.

8 (2) EFFECT.—Nothing in this section affects—

9 (A) the disclosure of information described

10 in paragraph (1) if—

11 (i) the information has been trans-

12 formed into a statistical or aggregate form

13 at the county level or higher without any

14 information that identifies the agricultural

15 operation or agricultural producer; or

16 (ii) the livestock producer consents to

17 the disclosure;

18 (B) the authority of any State agency to

19 collect information on livestock operations; or

20 (C) the authority of the Agency to disclose

21 the information on livestock operations to State

22 or other Federal governmental agencies.

23 (3) CONDITION OF PERMIT OR OTHER PRO-

24 GRAMS.—The approval of any permit, practice, or

25 program administered by the Administrator shall not

1 be conditioned on the consent of the livestock pro-  
2 ducer under paragraph (2)(A)(ii).

3 **SEC. 8. PRIVACY OF AGRICULTURAL PRODUCERS.**

4 (a) DEFINITIONS.—In this section:

5 (1) ADMINISTRATOR.—The term “Adminis-  
6 trator” means—

7 (A) the Administrator; and

8 (B) in the case of an action taken pursu-  
9 ant to a permit program approved under section  
10 402 of the Federal Water Pollution Control Act  
11 (33 U.S.C. 1342), the head of the State agency  
12 administering the program.

13 (2) AERIAL SURVEILLANCE.—The term “aerial  
14 surveillance” means any surveillance from the air,  
15 including—

16 (A) surveillance conducted from manned or  
17 unmanned aircraft; or

18 (B) the use of aerial or satellite images, re-  
19 gardless of whether the images are publicly  
20 available.

21 (3) AGRICULTURAL LAND.—

22 (A) IN GENERAL.—The term “agricultural  
23 land” means land used primarily for agricul-  
24 tural production.

1 (B) INCLUSIONS.—The term “agricultural  
2 land” includes—

- 3 (i) cropland;  
4 (ii) grassland;  
5 (iii) prairie land;  
6 (iv) improved pastureland;  
7 (v) rangeland;  
8 (vi) cropped woodland;  
9 (vii) marshes;  
10 (viii) reclaimed land;  
11 (ix) fish or other aquatic species habi-  
12 tat;  
13 (x) land used for—  
14 (I) agroforestry; or  
15 (II) the production of livestock;  
16 and  
17 (xi) land that contains existing infra-  
18 structure used for—  
19 (I) the production of livestock; or  
20 (II) another agricultural oper-  
21 ation.

22 (b) LIMITATION ON USE OF AERIAL SURVEIL-  
23 LANCE.—

24 (1) IN GENERAL.—Subject to paragraph (2), in  
25 exercising any authority under the Federal Water



1 Pollution Control Act (33 U.S.C. 1251 et seq.), the  
2 Administrator may not conduct aerial surveillance of  
3 agricultural land.

4 (2) EXCEPTIONS.—The Administrator may con-  
5 duct aerial surveillance of agricultural land under  
6 the Federal Water Pollution Control Act (33 U.S.C.  
7 1251 et seq.) if the Administrator—

8 (A) has obtained the voluntary written  
9 consent of the owner or operator of the land to  
10 be surveilled in accordance with subsection (c);  
11 or

12 (B) has obtained a certification of reason-  
13 able suspicion in accordance with subsection  
14 (d).

15 (c) VOLUNTARY WRITTEN CONSENT.—

16 (1) CONSENT REQUIRED.—In order to conduct  
17 aerial surveillance under subsection (b)(2)(A), the  
18 Administrator shall obtain from the owner or oper-  
19 ator of the land to be surveilled written consent to  
20 such surveillance.

21 (2) CONTENTS.—The Administrator shall en-  
22 sure that any written consent required under para-  
23 graph (1)—

1 (A) specifies the period during which the  
2 consent is effective, which may not exceed 1  
3 year;

4 (B) contains a specific description of the  
5 geographical area to be surveilled; and

6 (C) on the request of the owner or oper-  
7 ator of the land to be surveilled, contains limi-  
8 tations on the days and times during which the  
9 surveillance may be conducted.

10 (3) ASSURANCE OF VOLUNTARY CONSENT.—

11 The Administrator—

12 (A) shall ensure that any written consent  
13 required under paragraph (1) is granted volun-  
14 tarily by the owner or operator of the land to  
15 be surveilled; and

16 (B) may not threaten additional, more de-  
17 tailed, or more thorough inspections, or other-  
18 wise coerce or entice the owner or operator, in  
19 order to obtain written consent.

20 (d) CERTIFICATION OF REASONABLE SUSPICION.—

21 (1) IN GENERAL.—In order to conduct aerial  
22 surveillance under subsection (b)(2)(B), the Admin-  
23 istrator shall obtain from a United States district  
24 court of competent jurisdiction (referred to in this

1 subsection as a “Court”) a certification of reason-  
2 able suspicion in accordance with this subsection.

3 (2) CERTIFICATION REQUIREMENTS.—A Court  
4 may issue to the Administrator a certification of rea-  
5 sonable suspicion if—

6 (A) the Administrator submits to the  
7 Court an affidavit setting forth specific and  
8 articulable facts that would indicate to a rea-  
9 sonable person that a violation of the Federal  
10 Water Pollution Control Act (33 U.S.C. 1251 et  
11 seq.) exists in the area to be surveilled; and

12 (B) the Court finds that the Administrator  
13 has shown reasonable suspicion that an owner  
14 or operator of agricultural land in the area to  
15 be surveilled has violated the Federal Water  
16 Pollution Control Act (33 U.S.C. 1251 et seq.).

17 (e) DISCLOSURE OF INFORMATION.—

18 (1) IN GENERAL.—Except as provided in para-  
19 graph (3), or for the purposes of an investigation or  
20 prosecution by the Administrator as described in  
21 subsection (f), the Administrator may not disclose  
22 information collected through aerial surveillance con-  
23 ducted under subsection (b)(2).

24 (2) APPLICABILITY OF FOIA.—Section 552 of  
25 title 5, United States Code, shall not apply to any

1 information collected through aerial surveillance con-  
2 ducted under subsection (b)(2).

3 (3) RIGHT TO PETITION.—The owner or oper-  
4 ator of land surveilled under this section has the  
5 right to petition for copies of the information col-  
6 lected through such surveillance.

7 (f) DESTRUCTION OF INFORMATION.—The Adminis-  
8 trator shall destroy information collected through aerial  
9 surveillance conducted under subsection (b)(2) not later  
10 than 30 days after collection, unless the information is  
11 pertinent to an active investigation or prosecution by the  
12 Administrator.

13 (g) RULE OF CONSTRUCTION.—Nothing in this Act  
14 expands the power of the Administrator to inspect, mon-  
15 itor, or conduct surveillance of agricultural land pursuant  
16 to the Federal Water Pollution Control Act (33 U.S.C.  
17 1251 et seq.) or any other Federal law.

18 **SEC. 9. REGULATIONS RELATING TO THE TAKING OF DOU-**

19 **BLE-CRESTED CORMORANTS.**

20 (a) FORCE AND EFFECT.—

21 (1) IN GENERAL.—Subject to subsection (b),  
22 sections 21.47 and 21.48 of title 50, Code of Fed-  
23 eral Regulations (as in effect on January 1, 2016),  
24 shall have the force and effect of law.

1           (2) PUBLIC NOTICE.—The Secretary of the In-  
2           terior (referred to in this section as the “Sec-  
3           retary”), acting through the Director of the United  
4           States Fish and Wildlife Service (referred to in this  
5           section as the “Director”), shall notify the public of  
6           the authority provided by paragraph (1) in a manner  
7           determined to be appropriate by the Secretary.

8           (b) SUNSET.—The authority provided by subsection  
9           (a)(1) shall terminate on the effective date of a regulation  
10          promulgated by the Director after the date of enactment  
11          of this Act to control depredation of double-crested cor-  
12          morant populations.

13          (c) RULE OF CONSTRUCTION.—Nothing in this sec-  
14          tion limits the authority of the Director to promulgate reg-  
15          ulations relating to the taking of double-crested cor-  
16          morants under any other law.

17          **SEC. 10. APPLICABILITY OF SPILL PREVENTION, CONTROL,**  
18                                  **AND COUNTERMEASURE RULE.**

19          Section 1049 of the Water Resources Reform and De-  
20          velopment Act of 2014 (33 U.S.C. 1361 note; 128 Stat.  
21          1257; 130 Stat. 1902) is amended—

22                  (1) in subsection (b)—

23                          (A) in paragraph (1)(B), by striking  
24                          “20,000” and inserting “42,000”;

1 (B) in paragraph (2), by striking subpara-  
2 graph (A) and inserting the following:

3 “(A) an aggregate aboveground storage ca-  
4 pacity greater than 10,000 gallons but less than  
5 42,000 gallons; and”;

6 (C) in paragraph (3)—

7 (i) by striking subparagraph (A) and  
8 inserting the following:

9 “(A) with an aggregate aboveground stor-  
10 age capacity of less than or equal to 10,000  
11 gallons; and”;

12 (ii) in subparagraph (B), by striking  
13 “; and” and inserting a period; and

14 (D) by striking paragraph (4);

15 (2) in subsection (c)(2)(A)—

16 (A) in clause (i), by striking “1,000” and  
17 inserting “1,320”; and

18 (B) in clause (ii), by striking “2,500” and  
19 inserting “3,000”; and

20 (3) by striking subsection (d).

○