

115TH CONGRESS
2D SESSION

S. 3760

To amend the Federal Water Pollution Control Act to clarify the definition of navigable waters, and for other purposes.

IN THE SENATE OF THE UNITED STATES

DECEMBER 17, 2018

Mr. PAUL (for himself, Mr. CRUZ, and Mr. GRASSLEY) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To amend the Federal Water Pollution Control Act to clarify the definition of navigable waters, 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 “Defense of Environ-
5 ment and Property Act of 2018”.

6 **SEC. 2. NAVIGABLE WATERS.**

7 (a) IN GENERAL.—Section 502 of the Federal Water
8 Pollution Control Act (33 U.S.C. 1362) is amended by
9 striking paragraph (7) and inserting the following:

10 “(7) NAVIGABLE WATERS.—

1 “(A) IN GENERAL.—The term ‘navigable
2 waters’ means the waters of the United States,
3 including the territorial seas, that are—

4 “(i) navigable-in-fact; or

5 “(ii) permanent, standing, or continu-
6 ously flowing bodies of water that form
7 geographical features commonly known as
8 streams, oceans, rivers, and lakes that are
9 connected to waters that are navigable-in-
10 fact.

11 “(B) EXCLUSIONS.—The term ‘navigable
12 waters’ does not include (including by regula-
13 tion)—

14 “(i) waters that—

15 “(I) do not physically abut
16 waters described in subparagraph (A);
17 and

18 “(II) lack a continuous surface
19 water connection to navigable waters;

20 “(ii) man-made or natural structures
21 or channels—

22 “(I) through which water flows
23 intermittently or ephemerally; or

24 “(II) that periodically provide
25 drainage for rainfall; or

1 “(iii) wetlands without a continuous
2 surface connection to bodies of water that
3 are waters of the United States.

4 “(C) EPA AND CORPS ACTIVITIES.—An
5 activity carried out by the Administrator or the
6 Corps of Engineers shall not, without explicit
7 State authorization, impinge upon the tradi-
8 tional and primary power of States over land
9 and water use.

10 “(D) AGGREGATION; WETLANDS.—

11 “(i) AGGREGATION.—Aggregation of
12 wetlands or waters not described in clauses
13 (i) through (iii) of subparagraph (B) shall
14 not be used to determine or assert Federal
15 jurisdiction.

16 “(ii) WETLANDS.—Wetlands described
17 in subparagraph (B)(iii) shall not be con-
18 sidered to be under Federal jurisdiction.

19 “(E) JUDICIAL REVIEW.—If a jurisdic-
20 tional determination by the Administrator or
21 the Secretary of the Army would affect the abil-
22 ity of a State or individual property owner to
23 plan the development and use (including res-
24 toration, preservation, and enhancement) of
25 land and water resources, the State or indi-

vidual property owner may obtain expedited judicial review not later than 30 days after the date on which the determination is made in a district court of the United States, of appropriate jurisdiction and venue, that is located within the State seeking the review.

“(F) TREATMENT OF GROUND WATER.—

Ground water shall—

“(i) be considered to be State water;

and

“(ii) not be considered in determining

or asserting Federal jurisdiction over isolated or other waters, including intermittent or ephemeral water bodies.

“(G) PROHIBITION ON USE OF NEXUS

TEST.—Notwithstanding any other provision of law, the Administrator may not use a significant nexus test (as used by the Administrator in the final rule described in section 3(a)(2) of the Defense of Environment and Property Act of 2018) to determine Federal jurisdiction over navigable waters and waters of the United States.”.

1 (b) APPLICABILITY.—Nothing in this section or the
 2 amendments made by this section affects or alters any ex-
 3 emption under—

4 (1) section 402(l) of the Federal Water Pollu-
 5 tion Control Act (33 U.S.C. 1342(l)); or

6 (2) section 404(f) of the Federal Water Pollu-
 7 tion Control Act (33 U.S.C. 1344(f)).

8 **SEC. 3. APPLICABILITY OF AGENCY REGULATIONS AND**
 9 **GUIDANCE.**

10 (a) IN GENERAL.—The following regulations and
 11 guidance shall have no force or effect:

12 (1) The final rule of the Corps of Engineers en-
 13 titled “Final Rule for Regulatory Programs of the
 14 Corps of Engineers” (51 Fed. Reg. 41206 (Novem-
 15 ber 13, 1986)).

16 (2) The final rule issued by the Administrator
 17 of the Environmental Protection Agency and the
 18 Secretary of the Army entitled “Clean Water Rule:
 19 Definition of ‘Waters of the United States’” (80
 20 Fed. Reg. 37054 (June 29, 2015)).

21 (3) The guidance document entitled “Clean
 22 Water Act Jurisdiction Following the U.S. Supreme
 23 Court’s Decision in ‘Rapanos v. United States’ &
 24 ‘Carabell v. United States’” and dated December 2,
 25 2008 (relating to the definition of waters under the

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

3 (4) Any subsequent regulation of or guidance
4 issued by any Federal agency that defines or inter-
5 prets the terms “navigable waters” or “waters of the
6 United States”.

7 (b) PROHIBITION.—The Secretary of the Army, act-
8 ing through the Chief of Engineers, and the Administrator
9 of the Environmental Protection Agency shall not promul-
10 gate any rules or issue any guidance that expands or inter-
11 prets the definition of navigable waters unless expressly
12 authorized by Congress.

13 **SEC. 4. STATE REGULATION OF WATER.**

14 Nothing in this Act affects, amends, or supersedes—

15 (1) the right of a State to regulate waters in
16 the State; or

17 (2) the duty of a landowner to adhere to any
18 State nuisance laws (including regulations) relating
19 to waters in the State.

20 **SEC. 5. CONSENT FOR ENTRY BY FEDERAL REPRESENTA-**
21 **TIVES.**

22 Section 308 of the Federal Water Pollution Control
23 Act (33 U.S.C. 1318) is amended by striking subsection
24 (a) and inserting the following:

25 “(a) IN GENERAL.—

1 “(1) ENTRY BY FEDERAL AGENCY.—A rep-
 2 resentative of a Federal agency shall only enter pri-
 3 vate property to collect information about navigable
 4 waters if the owner of that property—

5 “(A) has consented to the entry in writing;

6 “(B) is notified regarding the date of the
 7 entry; and

8 “(C) is given access to any data collected
 9 from the entry.

10 “(2) ACCESS.—If a landowner consents to entry
 11 under paragraph (1), the landowner shall have the
 12 right to be present at the time any data collection
 13 on the property of the landowner is carried out.”.

14 **SEC. 6. COMPENSATION FOR REGULATORY TAKING.**

15 (a) IN GENERAL.—If a Federal regulation relating
 16 to the definition of “navigable waters” or “waters of the
 17 United States” diminishes the fair market value or eco-
 18 nomic viability of a property, as determined by an inde-
 19 pendent appraiser, the Federal agency issuing the regula-
 20 tion shall pay the affected property owner an amount
 21 equal to twice the value of the loss.

22 (b) ADMINISTRATION.—Any payment provided under
 23 subsection (a) shall be made from the amounts made avail-
 24 able to the relevant agency head for general operations
 25 of the Federal agency.

1 (c) APPLICABILITY.—A Federal regulation described
2 in subsection (a) shall have no force or effect until the
3 date on which each landowner with a claim under this sec-
4 tion relating to that regulation has been compensated in
5 accordance with this section.

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