

116TH CONGRESS
1ST SESSION

S. 376

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

FEBRUARY 7, 2019

Mr. PAUL (for himself, Mr. RUBIO, Mr. CRUZ, and Mr. LEE) 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 2019”.

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 (b) JURISDICTION OF EPA AND CORPS OF ENGI-
 5 NEERS.—Title V of the Federal Water Pollution Control
 6 Act (33 U.S.C. 1361 et seq.) is amended—

7 (1) by redesignating section 519 as section 520;
 8 and

9 (2) by inserting after section 518 the following:

10 **“SEC. 519. JURISDICTION OF THE ADMINISTRATOR AND**
 11 **SECRETARY OF THE ARMY.**

12 “(a) EPA AND CORPS ACTIVITIES.—An activity car-
 13 ried out by the Administrator or the Corps of Engineers
 14 shall not, without explicit State authorization, impinge
 15 upon the traditional and primary power of States over
 16 land and water use.

17 “(b) AGGREGATION; WETLANDS.—

18 “(1) AGGREGATION.—Aggregation of wetlands
 19 or waters not described in clauses (i) through (iii) of
 20 section 502(7)(B) shall not be used to determine or
 21 assert Federal jurisdiction.

22 “(2) WETLANDS.—Wetlands described in sec-
 23 tion 502(7)(B)(iii) shall not be considered to be
 24 under Federal jurisdiction.

1 “(c) JUDICIAL REVIEW.—If a jurisdictional deter-
 2 mination by the Administrator or the Secretary of the
 3 Army would affect the ability of a State or individual prop-
 4 erty owner to plan the development and use (including res-
 5 toration, preservation, and enhancement) of land and
 6 water resources, the State or individual property owner
 7 may obtain expedited judicial review not later than 30
 8 days after the date on which the determination is made
 9 in a district court of the United States, of appropriate ju-
 10 risdiction and venue, that is located within the State seek-
 11 ing the review.

12 “(d) TREATMENT OF GROUND WATER.—Ground
 13 water shall—

14 “(1) be considered to be State water; and

15 “(2) not be considered in determining or assert-
 16 ing Federal jurisdiction over isolated or other
 17 waters, including intermittent or ephemeral water
 18 bodies.

19 “(e) PROHIBITION ON USE OF NEXUS TEST.—Not-
 20 withstanding any other provision of law, the Administrator
 21 may not use a significant nexus test (as used by the Ad-
 22 ministrator in the final rule described in section 3(a)(2)
 23 of the Defense of Environment and Property Act of 2019)
 24 to determine Federal jurisdiction over navigable waters
 25 and waters of the United States.”.

1 (c) 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 or the amendments made by this
15 Act affects, amends, or supersedes—

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

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

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

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

1 “(a) IN GENERAL.—

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

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

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

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

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

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

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

23 (b) ADMINISTRATION.—Any payment provided under
24 subsection (a) shall be made from the amounts made avail-

1 able to the relevant agency head for general operations
2 of the Federal agency.

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

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