114TH CONGRESS
1ST SESSION

S. _____

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

Mr. BARRASSO (for himself, _____) introduced the following bill; which was read twice and referred to the Committee on _____

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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Federal Water Quality Protection Act''.

SEC. 2. FINDINGS.

Congress finds that—

(1) in section 101(b) of the Federal Water Pollution Control Act (33 U.S.C. 1251(b)), Congress adopted the principle of cooperative federalism, recognizing that ''[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act'';

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

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

(B) to maintain the cooperative federalism foundation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.); and

(C) to respect the limits on Federal authority;

(3)(A) States have robust water quality protection programs capable of greater regulatory controls 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.

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

(4) ISOLATED.—The term ''isolated'', with respect to a body of water, means the absence of a surface hydrologic connection to a traditional navigable water.

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

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

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

(6) NORMAL YEAR.—The term ''normal year'' means—

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

(B) if less than 30 years of data described in subparagraph (A) are available, the average of the observed monthly data from a specific geographic area over the period of record.

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

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

(A) IN GENERAL.—The term ''public notice and an opportunity for comment'' means notice and opportunity for comment that meets the requirements of subchapter II of chapter 5, and chapter 7, of title 5, United States Code (commonly known as the ''Administrative Procedure Act'').

(B) INCLUSION.—The term ''public notice and an opportunity for comment'' includes the opportunity for public hearings in different geographic regions with different hydrology, including separate meetings in the arid West.

(9) SECRETARY.—The term ''Secretary'' means the Secretary of the Army.

(10) STREAM.—The term ''stream'' means a natural channel formed by the flow of water that has a bed, bank, and ordinary high water mark (as defined in section 328.3(e) of title 33, Code of Federal Regulations (as in effect on the date of enactment of this Act)).

(11) SURFACE HYDROLOGIC CONNECTION.—

(A) IN GENERAL.—The term ''surface hydrologic connection'' means a continuous surface connection through which water moves within a body of water or from 1 body of water to another.

(B) EXCLUSION.—The term ''surface hydrologic connection'' does not include—

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

(ii) the movement of water through soil, subsurface tiles, or a groundwater aquifer.

(C) DETERMINATION OF CONTINUOUSNESS.—For purposes of this paragraph, a surface hydrologic connection shall be considered to be continuous if the connection is continuous, regardless of whether—

(i) water is not always present; and

(ii) there is a break in the ordinary high water mark of a stream that is unrelated to the flow regime of the stream, including a break caused by a culvert, pipe, dam, or by the flow of the stream underground for a short distance, such as through a cave.

(12) TRADITIONAL NAVIGABLE WATER.—The term ''traditional navigable water'' means the water described in section 328.3(a)(1) of title 33, Code of Federal Regulations (as in effect on the date of enactment of this Act).

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

SEC. 4. REVISED DEFINITION; PRINCIPLES AND PROCESS.

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

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

(2) until after the Secretary and the Administrator carry out each action described in subsection (c).

(b) PRINCIPLES.—In promulgating a revised regulatory definition pursuant to this subsection, the Secretary and the Administrator shall adhere to the following principles:

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

(2) The term ''waters of the United States'' under the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) should identify bodies of water subject to Federal jurisdiction, and, except as provided in paragraph (3), should include—

(A) traditional navigable waters and interstate 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 navigable water, based on a quantifiable and statistically valid measure of flow for that geographic area; and

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

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

(A) water that is located below the surface of the land, including soil water and groundwater;

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

(C) an isolated pond, whether natural or manmade, including a farm pond, fish pond, quarry, mine pit, ornamental pond, swimming pool, construction pit, fire control pond, sediment pond, and any other isolated facility or system that holds water;

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

(i) stormwater or floodwater within the boundaries of a State, tribal, municipal, industrial, agricultural, silvicultural, residential, or Federal facility or operation, including ditches along agricultural fields, roads, runways, parking lots, and other infrastructure;

(ii) wastewater within the boundaries of a State, tribal, municipal, industrial, commercial, agricultural, silvicultural, residential, or Federal facility or operation;

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

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

(II) not including instream reservoirs or other instream facilities; or

(iv) water for agricultural or silvicultural purposes by a municipality or at an agricultural or silvicultural facility or operation, 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 contribute 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 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 Regulations (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

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

(4) Unless a subparagraph of paragraph (3) other than subparagraph (D) applies, for purposes of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the term ''waters of the United States'' should include a system described in paragraph (3)(D), or a component of such a system, if

the Secretary or the Administrator demonstrates that—

(A) the system was a water of the United States that was converted for use for the purpose described in paragraph (3)(D) after October 18, 1972, without a permit under section 404 of that Act (33 U.S.C. 1344), unless the construction or use of the system—

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

(ii) was otherwise exempt from permitting under that Act; or

(B) the system was a traditional navigable water that was converted for use for the purpose described in paragraph (3)(D), unless—

(i) the system is identified as a point source in a permit issued under section 402 of the Federal Water Pollution Control Act (33 U.S.C. 1342);

(ii) the water managed in the system is—

(I) irrigation return flow exempt from permitting under section

402(*l*)(1) of that Act (33 U.S.C. 1342(*l*)(1)); or

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

(iii) the construction or use of the system is described in subparagraph (A) or (C) of section 404(f)(1) of that Act (33 U.S.C. 1344(f)(1)); or

(iv) the system is a waste treatment system.

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

(A) the use of a body of water by an organism, including a migratory bird, does not provide a basis for establishing Federal jurisdiction under the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.);

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

(i) pertain to the use of water resources that shall not be superseded, abrogated, or 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) CONSIDERATION OF PUBLIC COMMENTS.—Before issuing a proposed regulation pursuant to subsection (a), the Secretary and the Administrator shall make available to the public, review, and publish a response to comments filed regarding the proposed rule entitled ''Definition of 'Waters of the United States' Under the Clean Water Act'' of the Corps of Engineers and the Environmental Protection Agency (79 Fed. Reg. 22188 (April 21, 2014)).

(2) FEDERALISM.—

(A) IN GENERAL.—In proposing and promulgating a regulation pursuant to subsection (a), the Secretary and the Administrator shall ensure compliance with the federalism policymaking criteria and consultation in accordance with Executive Order 13132 (64 Fed. Reg. 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

(IV) local governments, including elected officials, local governmental entities with authority over water supply, stormwater, waste water, and flood control, irrigation districts, and conservation districts.

(ii) TOPICS.—The topics to be addressed in the consultation under this paragraph should include—

(I) categories of waters, in addition to those discussed in paragraphs (2) and (3) of subsection (b), that should be subject to Federal jurisdiction or should be subject solely to State regulation;

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

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

(3) REGULATORY FLEXIBILITY.—In proposing and promulgating a regulation pursuant to subsection (a), and regardless of whether the Secretary and the Administrator determine that the regulation would have a significant impact on a substantial number of small entities, the Secretary and the Administrator shall—

(A) carry out the actions described in sections 603, 604, and 609 of title 5, United States Code; and

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

(4) UNFUNDED MANDATES.—In proposing and promulgating a regulation pursuant to subsection (a), the Secretary and the Administrator shall evaluate the intergovernmental and private sector impacts of the regulation, in accordance with title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531 et seq.), regardless of whether the Secretary and the Administrator—

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

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

(5) IMPROVING REGULATION AND REGULATORY REVIEW.—In proposing and promulgating a regulation pursuant to subsection (a), regardless of whether the Secretary and the Administrator consider the regulation to be a significant regulatory action or significantly affect State, local, and tribal governments, the Secretary and the Administrator shall ensure that the regulation meets the requirements of—

(A) Executive Order 12866 (5 U.S.C. 601 note; relating to regulatory planning and review); and

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

(6) IMPROVING PERFORMANCE OF FEDERAL PERMITTING AND REVIEW OF INFRASTRUCTURE PROJECTS.—In proposing and promulgating a regulation pursuant to subsection (a), the Secretary and the Administrator shall consider—

(A) Executive Order 13604 (5 U.S.C. 601 note; relating to improving performance of Federal permitting and review of infrastructure projects); and

(B) the goal of reducing the time to make decisions in the permitting and review of infrastructure projects by the Federal Government.

(7) REPORT.—Not later than the date that is 30 days before the date of issuance of a proposed regulation pursuant to subsection (a), the Secretary and the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report that—

(A) describes the means by which the proposed regulation, if finalized, would achieve compliance with—

(i) Executive Order 12866 (5 U.S.C. 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;

(II) to take action limiting the policymaking discretion of the States only in cases in which there exists constitutional and statutory authority for the action;

(III) to provide States with maximum administrative discretion practicable, without intrusive Federal oversight; and

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

(iv) Executive Order 13563 (76 Fed. Reg. 3821 (January 18, 2011)), including the public participation requirements of section 2 of that Executive order, which require an opportunity for public comment regarding all pertinent parts of the rulemaking docket, including relevant scientific and technical findings and seeking the views of those who are likely to be affected before issuing a notice of proposed rulemaking;

(B) includes the Federalism summary impact statement required by section 3 of Executive Order 13132 (64 Fed. Reg. 43256 (August 4, 1999));

(C) includes the regulatory flexibility analyses required under section 603 of title 5, United States Code, and the report of the review panel required under section 609 of that title;

(D) describes the small government agency plan, and the State, local, and tribal input under sections 203 and 204 of the Unfunded

Mandates Reform Act of 1995 (2 U.S.C. 1533, 1534);

(E) describes the means by which the proposed regulation is the least costly, most cost-effective, or least burdensome alternative, in accordance with section 205 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1535);

(F) describes whether the Secretary and the Administrator will provide funding to State, local, and tribal governments to meet the intergovernmental mandates imposed by the proposed regulation; and

(G) describes how the proposed rule will achieve the goal stated in section 1 of Executive Order 13604 (5 U.S.C. 601 note; relating to improving performance of Federal permitting and review of infrastructure projects) that the time to make decisions in the permitting and review of infrastructure projects by the Federal Government be reduced.

(8) TIMING.—In carrying out this section, the Secretary and the Administrator shall use best efforts—

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

(B) to provide a comment period on the revised proposed rule of not less than 120 days; and

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

SEC. 5. MEASURE OF FLOW.

After providing public notice and an opportunity for comment, the Secretary shall establish quantifiable and statistically valid measures of the volume, duration, and frequency of flow in streams in different geographic areas that would, in a normal year, allow pollutants in reaches of streams in those geographic areas to flow to and degrade the water quality of a traditional navigable water.

SEC. 6. REPORT TO CONGRESS.

Not later than the date that is 3 years after the date of promulgation of a regulation pursuant to section 4, and not less frequently than once every 3 years thereafter, the Comptroller General of the United States, after consultation with State, local, and tribal governments and other affected entities, shall—

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

(2) submit to Congress a report that describes—

(A) the interpretations of the regulation by—

(i) districts of the Corps of Engineers; and

(ii) regional offices of the Environmental Protection Agency;

(B) whether those interpretations are consistent;

(C) if any inconsistency exists, the measures carried out by the Secretary and the Administrator to reduce the inconsistency or an explanation of the geographic differences that make the inconsistency appropriate; and

(D) the impacts of those interpretations on Federal permitting and review of infrastructure projects, and the goal stated in section 1 of Executive Order 13604 (5 U.S.C. 601 note; relating to improving performance of Federal permitting and review of infrastructure projects) that the time to make decisions in the permitting and review of infrastructure projects by the Federal Government be reduced.

SEC. 7. EFFECT OF ACT.

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

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

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

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

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