

S.2122: The Defense of Environment and Property Act of 2012

Section-by-Section

SECTION 1. Short Title

SECTION 2. Navigable Waters

Amends the Federal Water Pollution Control Act to redefine “navigable waters” in line with the Scalia majority opinion in *Rapanos v. United States*. Specifically, the term is defined to authorize federal regulation of (1) navigable-in-fact waters (e.g. waters that actually support a boat) and (2) relatively permanent water bodies commonly known as streams, oceans, rivers and lakes connected to navigable-in-fact waters. Excluded from regulation are waters that lack a continuous surface water connection to navigable waters, including intermittent or ephemeral streams. Clarifies that groundwater should be treated as state water and should not be used in determining federal jurisdiction over other waters. The use of the “significant nexus” test is prohibited. Clarifies that this new definition does not materially change any existing statutory exemptions from permit requirements (such as normal farming, maintenance of serviceable dikes and dams, and construction of irrigation ditches; NPDES exemptions for agricultural return flows and storm water runoff from oil, gas and mining operations also remain in place).

SECTION 3. Applicability of Agency Regulations and Guidance

Retracts the “Final Rule for Regulatory Program of the Corps of Engineers” (51 Fed. Reg. 41206); the proposed EPA rule entitled “Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of ‘Waters of the United States’” (68 Fed. Reg. 1991); the guidance document entitled “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* and *Carabell v. United States*.” Further prohibits the EPA or Army Corps from promulgating rules or issuing any guidance that expands or interprets the definition of navigable waters unless expressly authorized by Congress.

SECTION 4. State Regulation of Water

Clarifies that this bill does not impact the ability of States to assert regulatory authority over their waters.

SECTION 5. Consent for Entry by Federal Representatives

Amends the Federal Water Pollution Control Act to clarify that a federal official may only enter private property to collect information about navigable waters (as defined) if the owner of that property has a) consented to that entry in writing; b) is notified regarding the date of entry; c) given access to any data collected. The landowner must also have the option of being present at the time the data collection is carried out.

SECTION 6. Compensation for Regulatory Taking

States that, if federal regulation relating to navigable waters diminishes the fair market value or economic viability of the property (as determined by an independent appraiser), the Federal agency issuing the regulation then owns the property owner twice the value of the loss. The payment must come from the administrative budget of the agency, and the federal regulation shall have no force or effect upon the landowner until the landowner has been compensated.