

112TH CONGRESS
2D SESSION

S. 2122

To clarify the definition of navigable waters, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 16, 2012

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

A BILL

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 2012”.

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—

13 “(i) waters that—

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

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

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

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

23 “(II) that periodically provide
24 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) APPEALS.—A jurisdictional deter-
20 mination by the Administrator that would affect
21 the ability of a State to plan the development
22 and use (including restoration, preservation,
23 and enhancement) of land and water resources
24 may be appealed by the State during the 30-day

1 period beginning on the date of the determina-
2 tion.

3 “(F) TREATMENT OF GROUND WATER.—
4 Ground water shall—

5 “(i) be considered to be State water;
6 and

7 “(ii) not be considered in determining
8 or asserting Federal jurisdiction over iso-
9 lated or other waters, including intermit-
10 tent or ephemeral water bodies.

11 “(G) PROHIBITION ON USE OF NEXUS
12 TEST.—Notwithstanding any other provision of
13 law, the Administrator may not use a signifi-
14 cant nexus test (as used by EPA in the pro-
15 posed document listed in section 3(a)(1)) to de-
16 termine Federal jurisdiction over navigable
17 waters and waters of the United States (as
18 those terms are defined and used, respectively,
19 in section 502 of the Federal Water Pollution
20 Control Act (33 U.S.C. 1362)).”.

21 (b) APPLICABILITY.—Nothing in this section or the
22 amendments made by this section affects or alters any ex-
23 emption under—

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

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

3 **SEC. 3. APPLICABILITY OF AGENCY REGULATIONS AND**
4 **GUIDANCE.**

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

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

11 (2) The proposed rule of the Environmental
12 Protection Agency entitled “Advance Notice of Pro-
13 posed Rulemaking on the Clean Water Act Regu-
14 latory Definition of ‘Waters of the United States’ ”
15 (68 Fed. Reg. 1991 (January 15, 2003)).

16 (3) The guidance document entitled “Clean
17 Water Act Jurisdiction Following the U.S. Supreme
18 Court’s Decision in ‘Rapanos v. United States’ &
19 ‘Carabell v. United States’ ” (December 2, 2008)
20 (relating to the definition of waters under the juris-
21 diction of the Federal Water Pollution Control Act
22 (33 U.S.C. 1251 et seq.)).

23 (4) Any subsequent regulation of or guidance
24 issued by any Federal agency that defines or inter-
25 prets the term “navigable waters”.

1 (b) PROHIBITION.—The Secretary of the Army, act-
2 ing through the Chief of Engineers, and the Administrator
3 of the Environmental Protection Agency shall not promul-
4 gate any rules or issue any guidance that expands or inter-
5 prets the definition of navigable waters unless expressly
6 authorized by Congress.

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

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

9 (1) the right of a State to regulate waters in
10 the State; or

11 (2) the duty of a landowner to adhere to any
12 State nuisance laws (including regulations) relating
13 to waters in the State.

14 **SEC. 5. CONSENT FOR ENTRY BY FEDERAL REPRESENTA-**
15 **TIVES.**

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

19 “(a) IN GENERAL.—

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

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

1 “(B) is notified regarding the date of the
2 entry; and

3 “(C) is given access to any data collected
4 from the entry.

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

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

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

17 (b) ADMINISTRATION.—Any payment provided under
18 subsection (a) shall be made from the amounts made avail-
19 able to the relevant agency head for general operations
20 of the agency.

21 (c) APPLICABILITY.—A Federal regulation described
22 in subsection (a) shall have no force or effect until the
23 date on which each landowner with a claim under this sec-

- 1 tion relating to that regulation has been compensated in
- 2 accordance with this section.

○