S. 2517

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

JULY 28, 2021

Mr. PAUL (for himself, Mr. RUBIO, and Mr. CRUZ) 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.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the “Defense of Environment and Property Act of 2021”.

SEC. 2. NAVIGABLE WATERS.

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

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

“(i) navigable-in-fact; or

“(ii) permanent, standing, or continuously flowing bodies of water that form geographical features commonly known as streams, oceans, rivers, and lakes that are connected to waters that are navigable-in-fact.

“(B) EXCLUSIONS.—The term ‘navigable waters’ does not include (including by regulation)—

“(i) waters that—

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

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

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

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

“(II) that periodically provide drainage for rainfall; or
“(iii) wetlands without a continuous
surface connection to bodies of water that
are waters of the United States.”.

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

(1) by redesignating section 520 as section 521;

and

(2) by inserting after section 519 the following:

“SEC. 520. JURISDICTION OF THE ADMINISTRATOR AND
SECRETARY OF THE ARMY.

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

“(b) AGGREGATION; WETLANDS.—

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

“(2) WETLANDS.—Wetlands described in sec-
tion 502(7)(B)(iii) shall not be considered to be
under Federal jurisdiction.
“(c) JUDICIAL REVIEW.—If a jurisdictional determination by the Administrator or the Secretary of the Army would affect the ability of a State or individual property owner to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, the State or individual 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.

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

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

“(2) not be considered in determining or asserting Federal jurisdiction over isolated or other waters, including intermittent or ephemeral water bodies.

“(e) PROHIBITION ON USE OF SIGNIFICANT NEXUS TEST.—

“(1) DEFINITION OF SIGNIFICANT NEXUS TEST.—In this subsection, the term ‘significant nexus test’ means an analysis to determine whether a water has a significant nexus (as defined in subsection (c) of section 328.3 of title 33, Code of Fed-
eral Regulations (as in effect on August 29, 2015))
to a water described in paragraphs (1) through (3)
of subsection (a) of that section (as in effect on that
date), or any similar analysis.

“(2) PROHIBITION.—Notwithstanding any other
provision of law, the Administrator may not use a
significant nexus test to determine Federal jurisdic-
tion over navigable waters and waters of the United
States.”.

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

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

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

SEC. 3. APPLICABILITY OF AGENCY REGULATIONS AND
GUIDANCE.

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

(1) The final rule of the Corps of Engineers ent-
titled “Final Rule for Regulatory Programs of the
Corps of Engineers” (51 Fed. Reg. 41206 (Novem-
ber 13, 1986)).
(2) The guidance document entitled “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in ‘Rapanos v. United States’ & ‘Carabell v. United States’” and dated December 2, 2008 (relating to the definition of waters under the jurisdiction of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.)).

(3) Any subsequent regulation of or guidance issued by any Federal agency that defines or interprets the terms “navigable waters” or “waters of the United States”.

(b) Prohibition.—The Secretary of the Army, acting through the Chief of Engineers, and the Administrator of the Environmental Protection Agency shall not promulgate any rules or issue any guidance that expands or interprets the definition of navigable waters unless expressly authorized by Congress.

SEC. 4. STATE REGULATION OF WATER.

Nothing in this Act or the amendments made by this Act affects, amends, or supersedes—

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

(2) the duty of a landowner to adhere to any State nuisance laws (including regulations) relating to waters in the State.
SEC. 5. CONSENT FOR ENTRY BY FEDERAL REPRESENTATIVES.

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

“(a) IN GENERAL.—

“(1) ENTRY BY FEDERAL AGENCY.—A representative of a Federal agency shall only enter private property to collect information about navigable waters if the owner of that property—

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

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

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

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

SEC. 6. COMPENSATION FOR REGULATORY TAKING.

(a) IN GENERAL.—If a Federal regulation relating to the definition of “navigable waters” or “waters of the United States” diminishes the fair market value or economic viability of a property, as determined by an independent appraiser, the Federal agency issuing the regula-
tion shall pay the affected property owner an amount equal to twice the value of the loss.

(b) ADMINISTRATION.—Any payment provided under subsection (a) shall be made from the amounts made available to the relevant agency head for general operations of the Federal agency.

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