

114TH CONGRESS
1ST SESSION

S. 1178

To prohibit implementation of a proposed rule relating to the definition of the term “waters of the United States” under the Clean Water Act, or any substantially similar rule, until a Supplemental Scientific Review Panel and Ephemeral and Intermittent Streams Advisory Committee produce certain reports, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 30, 2015

Mr. FLAKE (for himself, Mr. MCCAIN, and Mrs. FISCHER) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To prohibit implementation of a proposed rule relating to the definition of the term “waters of the United States” under the Clean Water Act, or any substantially similar rule, until a Supplemental Scientific Review Panel and Ephemeral and Intermittent Streams Advisory Committee produce certain reports, 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 “Defending Rivers from
5 Overreaching Policies Act of 2015”.

1 **SEC. 2. WATERS OF THE UNITED STATES.**

2 (a) FINDINGS.—Congress finds that—

3 (1) according to the testimony of Assistant Sec-
4 retary of the Army for Civil Works Jo-Ellen Darcy
5 at the House of Representatives and Senate Joint
6 Hearing on State and Local Impacts of the Adminis-
7 tration’s Proposed Expansion of Waters Regulation
8 on February 4, 2015, that proposed expansion of
9 waters regulation “is based on science including a
10 peer-reviewed report on connectivity and the rec-
11 ommendations of EPA’s Science Advisory Board”;

12 (2) the proposed rule entitled “Definition of
13 ‘Waters of the United States’ Under the Clean
14 Water Act” (79 Fed. Reg. 22188 (April 21, 2014)),
15 was drafted before the science on which the pro-
16 posed rule was based had been reviewed by the Sci-
17 entific Advisory Board of the Environmental Protec-
18 tion Agency;

19 (3) the final review and synthesis of the sci-
20 entific evidence was released in January 2015, 2
21 months after the close of the public comment period
22 for the proposed rule;

23 (4) the review and synthesis of the scientific
24 evidence found that “the degree and downstream ef-
25 fects of those connections [between parts of a water-
26 shed] vary spatially and temporally” and the

1 “connectivity of streams and wetlands to down-
2 stream waters occurs along a continuum”;

3 (5) the authors of the review and synthesis were
4 unable to place the water bodies in the case studies
5 “along a gradient of connectivity” and reported that
6 “the research community has not reached a con-
7 sensus regarding the best methods or metrics to
8 quantify or predict hydrologic or chemical
9 connectivity”;

10 (6) without a scientific basis for evaluating the
11 degree of connectivity between a particular stream
12 and a traditionally navigable water, it is premature
13 to use the scientific literature to define which con-
14 nections are “significant”;

15 (7) because the analysis of the relevant science
16 was completed after the proposed rule described in
17 paragraph (2) was drafted, and because the sci-
18 entific review failed to produce a method to assess
19 the location of a particular water body on a “gra-
20 dient of connectivity”, the resulting proposed rule is
21 not effectively based on science; and

22 (8) because the likely cost of implementation of
23 that proposed rule will be greater than the
24 \$162,000,000 to \$278,000,000 cited in the testi-
25 mony of Administrator of the Environmental Protec-

tion Agency Gina McCarthy at the House of Representatives and Senate joint hearing described in paragraph (1), the proposal will have significant impacts on many sectors of the United States economy.

(b) DEFINITIONS.—In this section:

(1) ADMINISTRATOR.—The term “Administrator” means the Administrator of the Environmental Protection Agency.

(2) COMMISSION.—The term “Commission” means the Commission established under subsection (d)(1).

(3) PANEL.—The term “Panel” means the Panel established under subsection (c)(1).

(4) PROPOSED RULE.—The term “proposed rule” means the proposed rule entitled “Definition of ‘Waters of the United States’ Under the Clean Water Act” (79 Fed. Reg. 22188 (April 21, 2014)).

(5) SECRETARY.—The term “Secretary” means the Secretary of the Army, acting through the Chief of Engineers.

(c) SUPPLEMENTAL SCIENTIFIC REVIEW PANEL.—

(1) ESTABLISHMENT.—The Secretary and the Administrator shall establish a panel, to be known as the “Supplemental Scientific Review Panel”, to submit to the Secretary and the Administrator rec-

ommendations regarding metrics, based on the best available scientific information, to quantify the degree of connectivity between any body of water or wetland and a traditionally navigable water.

(2) MEMBERSHIP.—

(A) IN GENERAL.—The Panel shall be composed of 9 members, of whom—

(i) 2 shall be appointed by the Majority Leader of the Senate;

(ii) 2 shall be appointed by the Minority Leader of the Senate;

(iii) 2 shall be appointed by the Speaker of the House of Representatives;

(iv) 2 shall be appointed by the Minority Leader of the House of Representatives; and

(v) 1 shall be appointed by the President of the National Academy of Engineering.

(B) DATE OF APPOINTMENTS.—The appointment of a member of the Panel shall be made not later than 45 days after the date of enactment of this Act.

(C) QUALIFICATIONS.—Each member of the Panel shall be appointed from among individuals who possess—

(i) expertise in a field of the biogeosciences, such as hydrology, ecology, or geomorphology;

(ii)(I) academic excellence, as determined in accordance with criteria including peer-reviewed journal publications and invited academic conference presentations; or

(II) practical expertise demonstrated by a record of employment as a professional with equivalent experience as an academic scientist; and

(iii) experience regarding collecting and interpreting field measurements of streams and wetlands.

(D) REQUIREMENT.—In appointing members of the Panel, each appointing officer referred to in subparagraph (A) shall ensure that the Panel includes balanced representation of research expertise across all Level I ecoregions (as defined in section III of the 1997 publication of the Commission for Environmental Cooperation publication entitled “Ecological Re-

1 gions of North America Toward a Common
2 Perspective”).

3 (E) CHAIRPERSON.—At the first meeting
4 of the Panel, a majority of the members of the
5 Panel present and voting shall elect the Chair-
6 person of the Panel from among the members
7 of the Panel.

8 (F) VACANCIES.—A vacancy on the
9 Panel—

10 (i) shall not affect the powers of the
11 Panel; and

12 (ii) shall be filled in the same manner
13 as the original appointment was made.

14 (G) COMPENSATION.—

15 (i) IN GENERAL.—A member of the
16 Panel—

17 (I) shall not be considered to be
18 a Federal employee for any purpose
19 by reason of service on the Panel; and

20 (II) shall serve without pay.

21 (ii) TRAVEL EXPENSES.—A member
22 of the Panel shall be allowed travel ex-
23 penses, including per diem in lieu of sub-
24 sistence, at rates authorized for an em-
25 ployee of an agency under subchapter I of

chapter 57 of title 5, United States Code, while away from the home or regular place of business of the member in the performance of the duties of the Panel.

(H) INITIAL MEETING.—The Panel shall hold the initial meeting of the Panel by not later than 90 days after the date of enactment of this Act.

(I) MEETINGS.—The Panel shall meet at the call of a majority of the members of the Panel.

(J) QUORUM.—Of the members of the Panel, 5 shall constitute a quorum.

(K) RULES OF PROCEDURE.—The Panel may establish rules for the conduct of business of the Panel, subject to the condition that those rules shall not be inconsistent with this Act or any other applicable law.

(3) DUTIES.—The Panel shall—

(A) recommend metrics, based on the best available scientific information and considering the duration, magnitude, and frequency of flows, to quantify the degree of connectivity between any body of water or wetland and a traditionally navigable water;

1 (B) ensure the recommended metrics ac-
2 count for regional variability in all types of
3 waterbodies and across all States, the District
4 of Columbia, Puerto Rico, and other territories
5 and possessions of the United States; and

6 (C) not later than 1 year after the date on
7 which the Panel first convenes, submit to the
8 Secretary and Administrator a report describing
9 each recommendation of the Panel to which not
10 fewer than 6 members have agreed.

11 (4) ADMINISTRATIVE SUPPORT.—

12 (A) IN GENERAL.—The Secretary and the
13 Administrator shall provide to the Panel such
14 staff and administrative services as may be nec-
15 essary and appropriate for the Panel to perform
16 the duties under paragraph (3).

17 (B) DETAIL OF FEDERAL GOVERNMENT
18 EMPLOYEES.—

19 (i) IN GENERAL.—An employee of the
20 Federal Government may be detailed to the
21 Panel without reimbursement.

22 (ii) CIVIL SERVICE STATUS.—The de-
23 tail of the employee shall be without inter-
24 ruption or loss of civil service status or
25 privilege.

1 (5) FUNDING.—The Secretary and the Admin-
2 istrator shall provide to the Panel such funds as the
3 Secretary and the Administrator determine to be ap-
4 propriate from amounts made available to the Sec-
5 retary and the Administrator in appropriations Acts.

6 (6) TERMINATION.—The Panel shall terminate
7 on the earlier of—

8 (A) the date that is 180 days after the
9 date on which the report is submitted under
10 paragraph (3)(C); and

11 (B) the date that is 2 years after the date
12 of enactment of this Act.

13 (7) APPLICABILITY OF FEDERAL ADVISORY
14 COMMITTEE ACT.—

15 (A) IN GENERAL.—The Federal Advisory
16 Committee Act (5 U.S.C. App.) shall apply to
17 the Panel.

18 (B) PUBLIC MEETINGS AND RELEASE OF
19 PUBLIC VERSIONS OF REPORTS.—The Panel
20 shall—

21 (i) hold public hearings and meetings
22 to the extent appropriate; and

23 (ii) release public versions of the re-
24 port required under paragraph (3)(C).

1 (C) PUBLIC HEARINGS.—Any public hear-
 2 ings of the Panel shall be conducted in a man-
 3 ner consistent with the protection of informa-
 4 tion provided to or developed for or by the
 5 Panel as required by any applicable law, regula-
 6 tion, or Executive order.

7 (d) EPHEMERAL AND INTERMITTENT STREAMS AD-
 8 VISORY COMMISSION.—

9 (1) ESTABLISHMENT.—The Secretary and the
 10 Administrator shall establish a commission, to be
 11 known as the “Ephemeral and Intermittent Streams
 12 Advisory Commission”, to develop criteria to define
 13 whether a waterbody or wetland has a significant
 14 nexus to a traditional navigable water using the
 15 metrics developed by the Panel.

16 (2) MEMBERSHIP.—

17 (A) IN GENERAL.—The Commission shall
 18 be composed of 15 members, of whom—

19 (i) 2 shall be appointed by the Major-
 20 ity Leader of the Senate;

21 (ii) 2 shall be appointed by the Minor-
 22 ity Leader of the Senate;

23 (iii) 2 shall be appointed by the
 24 Speaker of the House of Representatives;

1 (iv) 2 shall be appointed by the Mi-
 2 nority Leader of the House of Representa-
 3 tives; and

4 (v) 7 shall be appointed jointly by the
 5 Administrator and the Secretary.

6 (B) DATE OF APPOINTMENTS.—The ap-
 7 pointment of a member of the Commission shall
 8 be made not later than the date that is 45 days
 9 after the date on which the report of the Panel
 10 is submitted under subsection (c)(3)(C).

11 (C) QUALIFICATIONS.—Each member of
 12 the Commission shall be appointed from among
 13 individuals who possess—

14 (i) experience regarding the permit-
 15 ting process under the Federal Water Pol-
 16 lution Control Act (33 U.S.C. 1251 et
 17 seq.);

18 (ii) experience serving on the Panel;
 19 or

20 (iii)(I) expertise in a field of the bio-
 21 geosciences, such as hydrology, ecology, or
 22 geomorphology; and

23 (II) academic excellence, as deter-
 24 mined in accordance with criteria including

1 peer-reviewed journal publications and in-
2 vited academic conference presentations.

3 (D) REQUIREMENTS.—In appointing mem-
4 bers of the Commission, each appointing officer
5 referred to in subparagraph (A) shall ensure
6 that the Commission includes—

7 (i) balanced representation of research
8 expertise across all Level I ecoregions (as
9 defined in section III of the 1997 publica-
10 tion of the Commission for Environmental
11 Cooperation publication entitled “Ecologi-
12 cal Regions of North America Toward a
13 Common Perspective”); and

14 (ii) equal representation of the fol-
15 lowing groups:

16 (I) Individuals who represent—

17 (aa) the interests of builders
18 and developers;

19 (bb) agricultural interests;

20 (cc) energy and mineral de-
21 velopment; or

22 (dd) the commercial timber
23 industry.

24 (II) Individuals who represent—

1 (aa) nationally or regionally
 2 recognized environmental organi-
 3 zations;

4 (bb) sport, recreational, and
 5 commercial fishing interests;

6 (cc) sportsman's organiza-
 7 tions; or

8 (dd) municipal water supply
 9 interests.

10 (III) Individuals who—

11 (aa) hold a State, county, or
 12 local elected office;

13 (bb) are employed by a
 14 State agency responsible for the
 15 management of the environment
 16 or natural interests; or

17 (cc) represent the affected
 18 public at-large.

19 (E) CHAIRPERSON.—At the first meeting
 20 of the Commission, a majority of the members
 21 of the Commission present and voting shall
 22 elect the Chairperson of the Commission from
 23 among the members of the Commission.

24 (F) VACANCIES.—A vacancy on the Com-
 25 mission—

1 (i) shall not affect the powers of the
2 Commission; and

3 (ii) shall be filled in the same manner
4 as the original appointment was made.

5 (G) COMPENSATION.—

6 (i) IN GENERAL.—A member of the
7 Commission—

8 (I) shall not be considered to be
9 a Federal employee for any purpose
10 by reason of service on the Commis-
11 sion; and

12 (II) shall serve without pay.

13 (ii) TRAVEL EXPENSES.—A member
14 of the Commission shall be allowed travel
15 expenses, including per diem in lieu of sub-
16 sistence, at rates authorized for an em-
17 ployee of an agency under subchapter I of
18 chapter 57 of title 5, United States Code,
19 while away from the home or regular place
20 of business of the member in the perform-
21 ance of the duties of the Commission.

22 (H) INITIAL MEETING.—The Commission
23 shall hold the initial meeting of the Commission
24 not earlier than the date on which the report of

1 the Panel is submitted under subsection
2 (c)(3)(C).

3 (I) MEETINGS.—The Commission shall
4 meet at the call of a majority of the members
5 of the Commission.

6 (J) QUORUM.—Of the members of the
7 Commission, 9 shall constitute a quorum.

8 (K) RULES OF PROCEDURE.—The Com-
9 mission may establish rules for the conduct of
10 business of the Commission, subject to the con-
11 dition that those rules shall not be inconsistent
12 with this Act or any other applicable law.

13 (3) DUTIES.—The Commission shall—

14 (A) develop criteria to define whether a
15 waterbody or wetland has a significant nexus to
16 traditional navigable water using the metrics
17 developed by the Panel;

18 (B) ensure those criteria account for re-
19 gional variability in all types of waterbodies and
20 wetlands and across all States, the District of
21 Columbia, Puerto Rico, and other territories
22 and possessions of the United States;

23 (C) not later than 180 days after the date
24 on which the Commission holds the initial meet-
25 ing under paragraph (2)(H), submit to the Sec-

retary and the Administrator a draft report
that—

(i) describes the criteria developed by
the Commission; and

(ii) is subject to a 60-day period for
public comment; and

(D) after addressing the comments received during the 60-day comment period under subparagraph (C)(ii), submit to the Secretary and the Administrator a final report.

(4) ADMINISTRATIVE SUPPORT.—

(A) IN GENERAL.—The Secretary and the Administrator shall provide to the Commission such staff and administrative services as may be necessary and appropriate for the Commission to perform the duties under paragraph (3).

(B) DETAIL OF FEDERAL GOVERNMENT EMPLOYEES.—

(i) IN GENERAL.—An employee of the Federal Government may be detailed to the Commission without reimbursement.

(ii) CIVIL SERVICE STATUS.—The detail of the employee shall be without interruption or loss of civil service status or privilege.

1 (5) FUNDING.—The Secretary and the Admin-
2 istrator shall provide to the Commission such funds
3 as the Secretary and the Administrator determine to
4 be appropriate from amounts made available to the
5 Secretary and the Administrator in appropriations
6 Acts.

7 (6) TERMINATION.—The Commission shall ter-
8 minate on the earlier of—

9 (A) the date that is 180 days after the
10 date on which the final report is submitted
11 under paragraph (3)(D); and

12 (B) the date that is 3 years after the date
13 of enactment of this Act.

14 (7) APPLICABILITY OF FEDERAL ADVISORY
15 COMMITTEE ACT.—

16 (A) IN GENERAL.—The Federal Advisory
17 Committee Act (5 U.S.C. App.) shall apply to
18 the Commission.

19 (B) PUBLIC MEETINGS AND RELEASE OF
20 PUBLIC VERSIONS OF REPORTS.—The Commis-
21 sion shall—

22 (i) hold public hearings and meetings
23 to the extent appropriate; and

1 (ii) release public versions of the re-
2 ports required under subparagraphs (C)
3 and (D) of paragraph (3).

4 (C) PUBLIC HEARINGS.—Any public hear-
5 ings of the Commission shall be conducted in a
6 manner consistent with the protection of infor-
7 mation provided to or developed for or by the
8 Commission as required by any applicable law,
9 regulation, or Executive order.

10 (e) PROHIBITION.—The Secretary and the Adminis-
11 trator are prohibited from developing, finalizing, adopting,
12 implementing, applying, administering, or enforcing the
13 proposed rule or beginning the drafting of any substan-
14 tially similar rule until the date on which the Secretary
15 and the Administrator receive a final report from the
16 Commission under subsection (d)(3)(D).

○