

117TH CONGRESS
1ST SESSION

S. 2168

To amend the Federal Water Pollution Control Act to modify the definition of navigable waters, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 22, 2021

Mr. BRAUN (for himself, Ms. ERNST, and Mr. GRASSLEY) 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 modify 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 “Define WOTUS Act
5 of 2021”.

6 **SEC. 2. NAVIGABLE WATERS.**

7 (a) NAVIGABLE WATERS DEFINITION.—Section 502
8 of the Federal Water Pollution Control Act (33 U.S.C.
9 1362) is amended by striking paragraph (7) and inserting
10 the following:

1 “(7) NAVIGABLE WATERS.—

2 “(A) IN GENERAL.—The term ‘navigable
3 waters’ means—

4 “(i) the territorial seas;

5 “(ii) interstate waters that are used,
6 or are susceptible to use in the natural and
7 ordinary condition of those waters, as a
8 means in transport of interstate or foreign
9 commerce;

10 “(iii) relatively permanent, standing,
11 or continuously flowing bodies of water
12 that form geographical features commonly
13 known as streams, rivers, or lakes, that
14 flow directly into waters described in
15 clause (ii); and

16 “(iv) wetlands that are adjacent to
17 and have a continuous surface water con-
18 nection to waters described in clause (ii) or
19 (iii).

20 “(B) EXCLUSIONS.—The term ‘navigable
21 waters’ does not include—

22 “(i) intermittent or ephemeral waters,
23 including features that flow only in re-
24 sponse to precipitation or melt from
25 snowpack;

1 “(ii) subsurface waters, such as
2 groundwater or underground streams, in-
3 cluding subsurface waters drained through
4 subsurface drainage systems, such as drain
5 tiling;

6 “(iii) intrastate waters, unless the
7 waters meet the requirements described in
8 subparagraph (A);

9 “(iv) a man-made channel or ditch,
10 including irrigation, distribution, and
11 drainage systems;

12 “(v) prior converted cropland;

13 “(vi) artificially irrigated areas;

14 “(vii) artificial lakes and ponds con-
15 structed in upland;

16 “(viii) water-filled depressions created
17 in upland, including water-filled depres-
18 sions incidental to mining or construction
19 activity;

20 “(ix) stormwater control features ex-
21 cavated or constructed in upland to convey,
22 treat, infiltrate, or store stormwater run-
23 off;

24 “(x) wastewater recycling structures
25 constructed in upland;

1 “(xi) waste treatment systems;

2 “(xii) waters that require the use of
3 means beyond visual inspection by the
4 naked eye, including aerial photographs,
5 satellite imaging, or hydrological testing, to
6 determine if the waters meets the require-
7 ments described in subparagraph (A); or

8 “(xiii) any other waters that do not
9 meet the requirements under subparagraph
10 (A), without regard to whether the water—

11 “(I) previously met or would have
12 met those requirements; or

13 “(II) may in the future meet
14 those requirements.

15 “(C) ASSOCIATED DEFINITIONS.—For the
16 purposes of this paragraph:

17 “(i) CONTINUOUS SURFACE WATER
18 CONNECTION.—The term ‘continuous sur-
19 face water connection’ means a connection
20 with respect to which an ordinary person
21 would not be able to visually determine by
22 the naked eye, by looking at the water sur-
23 face, where 1 body of water ends and the
24 other begins.

1 “(ii) RELATIVELY PERMANENT,
2 STANDING, OR CONTINUOUSLY FLOWING
3 BODIES OF WATER.—The term ‘relatively
4 permanent, standing, or continuously flow-
5 ing bodies of water’ means waters that, ex-
6 cept in cases of extreme events (such as a
7 drought)—

8 “(I) stand or have continuous
9 flow for not less than 185 days each
10 year; and

11 “(II) exhibit a bed and banks.”.

12 (b) JURISDICTIONAL DETERMINATION.—Title V of
13 the Federal Water Pollution Control Act is amended—

14 (1) by redesignating section 520 (33 U.S.C.
15 1251 note) as section 521; and

16 (2) by inserting after section 519 (33 U.S.C.
17 1377a) the following:

18 **“SEC. 520. JURISDICTIONAL DETERMINATIONS.**

19 “(a) DEFINITIONS.—In this section:

20 “(1) AFFECTED PERSON.—The term ‘affected
21 person’ means an applicant for a permit under sec-
22 tion 404, landowner, or other affected person with
23 an identifiable and substantial legal interest in a
24 property.

1 “(2) SECRETARY.—The term ‘Secretary’ means
2 the Secretary of the Army.

3 “(b) BINDING DETERMINATION.—On written request
4 of an affected person, the Secretary shall provide a bind-
5 ing determination of whether the waters on the property
6 of the affected person are navigable waters that meet the
7 requirements described in section 502(7)(A)(iv).

8 “(c) COSTS.—A determination of the Secretary under
9 subsection (b) shall be made at the cost of the Secretary.

10 “(d) TIMING.—

11 “(1) IN GENERAL.—The Secretary shall make a
12 determination under subsection (b) not later than 60
13 days after the date on which the Secretary receives
14 a written request from an affected person.

15 “(2) EFFECT OF NONRESPONSE.—If the Sec-
16 retary does not make a determination by the end of
17 the period described in paragraph (1), the waters on
18 the property of the affected person shall not be con-
19 sidered to be navigable waters.

20 “(e) TERM OF DETERMINATION.—

21 “(1) FINDING OF NAVIGABLE WATERS.—If the
22 Secretary determines under subsection (b) that the
23 waters on the property of the affected person are
24 navigable waters, the determination shall be binding
25 on the Secretary and the Administrator for a period

1 to be determined by the Secretary, but in any case
2 not longer than 5 years after the date of the deter-
3 mination.

4 “(2) FINDING OF NONNAVIGABLE WATERS.—If
5 the Secretary determines under subsection (b) that
6 the waters on the property of the affected person are
7 not navigable waters, the determination shall be
8 binding on the Secretary and the Administrator for
9 as long as the affected person has an identifiable
10 and substantial legal interest in the property.

11 “(f) JUDICIAL REVIEW.—

12 “(1) IN GENERAL.—An affected person may ob-
13 tain expedited judicial review of a determination of
14 the Secretary under subsection (b).

15 “(2) TIMING.—To obtain expedited judicial re-
16 view under paragraph (1), the affected person shall
17 submit a claim under that paragraph not later than
18 30 days after the date on which the Secretary makes
19 the determination under subsection (b).

20 “(3) JURISDICTION.—A district court of the
21 United States with appropriate venue for the State
22 in which the affected person resides or in which a
23 substantial part of the property of the affected per-

1 son is located shall have jurisdiction over an action
2 under this subsection.”.

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