

113TH CONGRESS
1ST SESSION

S. 861

To amend the Federal Water Pollution Control Act to provide guidance and clarification regarding issuing new and renewal permits, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 6, 2013

Mr. MCCONNELL (for himself and Mr. PAUL) 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 provide guidance and clarification regarding issuing new and renewal permits, 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. NATIONAL POLLUTANT DISCHARGE ELIMI-**
4 **NATION SYSTEM.**

5 (a) **APPLICABILITY OF GUIDANCE.**—Section 402 of
6 the Federal Water Pollution Control Act (33 U.S.C. 1342)
7 is amended by adding at the end the following:

8 “(s) **APPLICABILITY OF GUIDANCE.**—

9 “(1) **DEFINITIONS.**—In this subsection:

1 “(A) GUIDANCE.—

2 “(i) IN GENERAL.—The term ‘guid-
3 ance’ means draft, interim, or final guid-
4 ance issued by the Administrator.

5 “(ii) INCLUSIONS.—The term ‘guid-
6 ance’ includes—

7 “(I) the comprehensive guidance
8 issued by the Administrator and dated
9 April 1, 2010;

10 “(II) the proposed guidance enti-
11 tled ‘Draft Guidance on Identifying
12 Waters Protected by the Clean Water
13 Act’ and dated April 28, 2011;

14 “(III) the final guidance pro-
15 posed by the Administrator and dated
16 July 21, 2011; and

17 “(IV) any other document or
18 paper issued by the Administrator
19 through any process other than the
20 notice and comment rulemaking proc-
21 ess.

22 “(B) NEW PERMIT.—The term ‘new per-
23 mit’ means a permit covering discharges from a
24 structure—

1 “(i) that is issued under this section
2 by a permitting authority; and

3 “(ii) for which an application is—

4 “(I) pending as of the date of en-
5 actment of this subsection; or

6 “(II) filed on or after the date of
7 enactment of this subsection.

8 “(C) PERMITTING AUTHORITY.—The term
9 ‘permitting authority’ means—

10 “(i) the Administrator; or

11 “(ii) a State, acting pursuant to a
12 State program that is equivalent to the
13 program under this section and approved
14 by the Administrator.

15 “(2) PERMITS.—

16 “(A) IN GENERAL.—Notwithstanding any
17 other provision of law, in making a determina-
18 tion whether to approve a new permit or a re-
19 newed permit, the permitting authority—

20 “(i) shall base the determination only
21 on compliance with regulations issued by
22 the Administrator or the permitting au-
23 thority; and

24 “(ii) shall not base the determination
25 on the extent of adherence of the applicant

1 for the new permit or renewed permit to
2 guidance.

3 “(B) NEW PERMITS.—If the permitting
4 authority does not approve or deny an applica-
5 tion for a new permit by the date that is 270
6 days after the date of receipt of the application
7 for the new permit, the applicant may operate
8 as if the application were approved in accord-
9 ance with Federal law for the period of time for
10 which a permit from the same industry would
11 be approved.

12 “(C) SUBSTANTIAL COMPLETENESS.—In
13 determining whether an application for a new
14 permit or a renewed permit received under this
15 paragraph is substantially complete, the permit-
16 ting authority shall use standards for deter-
17 mining substantial completeness of similar per-
18 mits for similar facilities submitted in fiscal
19 year 2007.”.

20 (b) STATE PERMIT PROGRAMS.—

21 (1) IN GENERAL.—Section 402 of the Federal
22 Water Pollution Control Act (33 U.S.C. 1342) is
23 amended by striking subsection (b) and inserting the
24 following:

25 “(b) STATE PERMIT PROGRAMS.—

1 “(1) IN GENERAL.—At any time after the pro-
2 mulgation of the guidelines required by section
3 304(I)(2), the Governor of each State desiring to ad-
4 minister a permit program for discharges into navi-
5 gable waters within the jurisdiction of the State may
6 submit to the Administrator—

7 “(A) a full and complete description of the
8 program the State proposes to establish and ad-
9 minister under State law or under an interstate
10 compact; and

11 “(B) a statement from the attorney gen-
12 eral (or the attorney for those State water pol-
13 lution control agencies that have independent
14 legal counsel), or from the chief legal officer in
15 the case of an interstate agency, that the laws
16 of the State, or the interstate compact, as ap-
17 plicable, provide adequate authority to carry out
18 the described program.

19 “(2) APPROVAL.—The Administrator shall ap-
20 prove each program for which a description is sub-
21 mitted under paragraph (1) unless the Adminis-
22 trator determines that adequate authority does not
23 exist—

24 “(A) to issue permits that—

1 “(i) apply, and ensure compliance
2 with, any applicable requirements of sec-
3 tions 301, 302, 306, 307, and 403;

4 “(ii) are for fixed terms not exceeding
5 5 years;

6 “(iii) can be terminated or modified
7 for cause including—

8 “(I) a violation of any condition
9 of the permit;

10 “(II) obtaining a permit by mis-
11 representation or failure to disclose
12 fully all relevant facts; and

13 “(III) a change in any condition
14 that requires either a temporary or
15 permanent reduction or elimination of
16 the permitted discharge; and

17 “(iv) control the disposal of pollutants
18 into wells;

19 “(B)(i) to issue permits that apply, and
20 ensure compliance with, all applicable require-
21 ments of section 308; or

22 “(ii) to inspect, monitor, enter, and require
23 reports to at least the same extent as required
24 in section 308;

1 “(C) to ensure that the public, and any
2 other State the waters of which may be af-
3 fected, receives notice of each application for a
4 permit and an opportunity for a public hearing
5 before a ruling on each application;

6 “(D) to ensure that the Administrator re-
7 ceives notice and a copy of each application for
8 a permit;

9 “(E) to ensure that any State (other than
10 the permitting State), whose waters may be af-
11 fected by the issuance of a permit may submit
12 written recommendations to the permitting
13 State and the Administrator with respect to any
14 permit application and, if any part of the writ-
15 ten recommendations are not accepted by the
16 permitting State, that the permitting State will
17 notify the affected State and the Administrator
18 in writing of the failure of the State to accept
19 the recommendations, including the reasons for
20 not accepting the recommendations;

21 “(F) to ensure that no permit will be
22 issued if, in the judgment of the Secretary of
23 the Army acting through the Chief of Engi-
24 neers, after consultation with the Secretary of
25 the department in which the Coast Guard is op-

1 erating, anchorage and navigation of any of the
2 navigable waters would be substantially im-
3 paired by the issuance of the permit;

4 “(G) to abate violations of the permit or
5 the permit program, including civil and criminal
6 penalties and other means of enforcement;

7 “(H) to ensure that any permit for a dis-
8 charge from a publicly owned treatment works
9 includes conditions to require the identification
10 in terms of character and volume of pollutants
11 of any significant source introducing pollutants
12 subject to pretreatment standards under section
13 307(b) into the treatment works and a program
14 to ensure compliance with those pretreatment
15 standards by each source, in addition to ade-
16 quate notice, which shall include information on
17 the quality and quantity of effluent to be intro-
18 duced into the treatment works and any antici-
19 pated impact of the change in the quantity or
20 quality of effluent to be discharged from the
21 publicly owned treatment works, to the permit-
22 ting agency of—

23 “(i) new introductions into the treat-
24 ment works of pollutants from any source
25 that would be a new source as defined in

1 section 306 if the source were discharging
2 pollutants;

3 “(ii) new introductions of pollutants
4 into the treatment works from a source
5 that would be subject to section 301 if the
6 source were discharging those pollutants;
7 or

8 “(iii) a substantial change in volume
9 or character of pollutants being introduced
10 into the treatment works by a source intro-
11 ducing pollutants into the treatment works
12 at the time of issuance of the permit; and

13 “(I) to ensure that any industrial user of
14 any publicly owned treatment works will comply
15 with sections 204(b), 307, and 308.

16 “(3) ADMINISTRATION.—Notwithstanding para-
17 graph (2), the Administrator may not disapprove or
18 withdraw approval of a program under this sub-
19 section on the basis of the following:

20 “(A) The failure of the program to incor-
21 porate or comply with guidance (as defined in
22 subsection (s)(1)).

23 “(B) The implementation of a water qual-
24 ity standard that has been adopted by the State

1 and approved by the Administrator under sec-
2 tion 303(e).”.

3 (2) CONFORMING AMENDMENTS.—

4 (A) Section 309 of the Federal Water Pol-
5 lution Control Act (33 U.S.C. 1319) is amend-
6 ed—

7 (i) in subsection (c)—

8 (I) in paragraph (1)(A), by strik-
9 ing “402(b)(8)” and inserting
10 “402(b)(2)(H)”; and

11 (II) in paragraph (2)(A), by
12 striking “402(b)(8)” and inserting
13 “402(b)(2)(H)”; and

14 (ii) in subsection (d), in the first sen-
15 tence, by striking “402(b)(8)” and insert-
16 ing “402(b)(2)(H)”.

17 (B) Section 402(m) of the Federal Water
18 Pollution Control Act (33 U.S.C. 1342(m)) is
19 amended in the first sentence by striking “sub-
20 section (b)(8) of this section” and inserting
21 “subsection (b)(2)(H)”.

22 (c) SUSPENSION OF FEDERAL PROGRAM.—Section
23 402(e) of the Federal Water Pollution Control Act (33
24 U.S.C. 1342(e)) is amended—

1 (1) by redesignating paragraph (4) as para-
2 graph (5); and

3 (2) by inserting after paragraph (3) the fol-
4 lowing:

5 “(4) LIMITATION ON DISAPPROVAL.—Notwith-
6 standing paragraphs (1) through (3), the Adminis-
7 trator may not disapprove or withdraw approval of
8 a State program under subsection (b) on the basis
9 of the failure of the following:

10 “(A) The failure of the program to incor-
11 porate or comply with guidance (as defined in
12 subsection (s)(1)).

13 “(B) The implementation of a water qual-
14 ity standard that has been adopted by the State
15 and approved by the Administrator under sec-
16 tion 303(e).”.

17 (d) NOTIFICATION OF ADMINISTRATOR.—Section
18 402(d)(2) of the Federal Water Pollution Control Act (33
19 U.S.C. 1342(d)(2)) is amended—

20 (1) by striking “(2) NO” and inserting the fol-
21 lowing:

22 “(2) OBJECTION BY ADMINISTRATOR.—

23 “(A) IN GENERAL.—Subject to subpara-
24 graph (C), no permit shall issue if—

1 “(i) not later than 90 days after the
2 date on which the Administrator receives
3 notification under subsection (b)(2)(E), the
4 Administrator objects in writing to the
5 issuance of the permit; or

6 “(ii) not later than 90 days after the
7 date on which the proposed permit of the
8 State is transmitted to the Administrator,
9 the Administrator objects in writing to the
10 issuance of the permit as being outside the
11 guidelines and requirements of this Act.”;

12 (2) in the second sentence, by striking “When-
13 ever the Administrator” and inserting the following:

14 “(B) REQUIREMENTS.—If the Adminis-
15 trator”; and

16 (3) by adding at the end the following:

17 “(C) EXCEPTION.—The Administrator
18 shall not object to or deny the issuance of a
19 permit by a State under subsection (b) or (s)
20 based on the following:

21 “(i) Guidance, as that term is defined
22 in subsection (s)(1).

23 “(ii) The Administrator’s interpreta-
24 tion of a water quality standard that has

1 been adopted by the State and approved by
2 the Administrator under section 303(c).”.

3 **SEC. 2. PERMITS FOR DREDGED OR FILL MATERIAL.**

4 (a) IN GENERAL.—Section 404(a) of the Federal
5 Water Pollution Control Act (33 U.S.C. 1344(a)) is
6 amended—

7 (1) by striking the section heading and all that
8 follows through “SEC. 404. (a) The Secretary may
9 issue” and inserting the following:

10 **“SEC. 404. PERMITS FOR DREDGED OR FILL MATERIAL.**

11 “(a) PERMITS.—

12 “(1) IN GENERAL.—The Secretary may issue”;

13 and

14 (2) by adding at the end the following:

15 “(2) DEADLINE FOR APPROVAL.—

16 “(A) PERMIT APPLICATIONS.—

17 “(i) IN GENERAL.—Except as pro-
18 vided in clause (ii), if an environmental as-
19 sessment or environmental impact state-
20 ment, as appropriate, is required under the
21 National Environmental Policy Act of
22 1969 (42 U.S.C. 4321 et seq.), the Sec-
23 retary shall—

24 “(I) begin the process not later
25 than 90 days after the date on which

1 the Secretary receives a permit appli-
2 cation; and

3 “(II) approve or deny an applica-
4 tion for a permit under this sub-
5 section not later than the latter of—

6 “(aa) if an agency carries
7 out an environmental assessment
8 that leads to a finding of no sig-
9 nificant impact, the date on
10 which the finding of no signifi-
11 cant impact is issued; or

12 “(bb) if an agency carries
13 out an environmental assessment
14 that leads to a record of decision,
15 15 days after the date on which
16 the record of decision on an envi-
17 ronmental impact statement is
18 issued.

19 “(ii) PROCESSES.—Notwithstanding
20 clause (i), regardless of whether the Sec-
21 retary has commenced an environmental
22 assessment or environmental impact state-
23 ment by the date described in clause (i)(I),
24 the following deadlines shall apply:

1 “(I) An environmental assess-
2 ment carried out under the National
3 Environmental Policy Act of 1969 (42
4 U.S.C. 4321 et seq.) shall be com-
5 pleted not later than 1 year after the
6 deadline for commencing the permit
7 process under clause (i)(I).

8 “(II) An environmental impact
9 statement carried out under the Na-
10 tional Environmental Policy Act of
11 1969 (42 U.S.C. 4321 et seq.) shall
12 be completed not later than 2 years
13 after the deadline for commencing the
14 permit process under clause (i)(I).

15 “(B) FAILURE TO ACT.—If the Secretary
16 fails to act by the deadline specified in clause
17 (i) or (ii) of subparagraph (A)—

18 “(i) the application, and the permit
19 requested in the application, shall be con-
20 sidered to be approved;

21 “(ii) the Secretary shall issue a permit
22 to the applicant; and

23 “(iii) the permit shall not be subject
24 to judicial review.”.

25 (b) STATE PERMITTING PROGRAMS.—

1 (1) AUTHORITY OF EPA ADMINISTRATOR.—Sec-
2 tion 404(c) of the Federal Water Pollution Control
3 Act (33 U.S.C. 1344(c)) is amended by striking
4 “(c)” and inserting the following:

5 “(c) AUTHORITY OF EPA ADMINISTRATOR.—

6 “(1) POSSIBLE PROHIBITION OF SPECIFICA-
7 TION.—Until such time as the Secretary has issued
8 a permit under this section, the Administrator is au-
9 thorized to prohibit the specification (including the
10 withdrawal of specification) of any defined area as
11 a disposal site, and he is authorized to deny or re-
12 strict the use of any defined area for specification
13 (including the withdrawal of specification) as a dis-
14 posal site, whenever he determines, after notice and
15 opportunity for public hearings, that the discharge
16 of such materials into such area will have an unac-
17 ceptable adverse effect on municipal water supplies,
18 shellfish beds and fishery areas (including spawning
19 and breeding areas), wildlife, or recreational areas.
20 Before making such determination, the Adminis-
21 trator shall consult with the Secretary. The Admin-
22 istrator shall set forth in writing and make public
23 his findings and his reasons for making any deter-
24 mination under this subsection.

1 (B) ANNUAL GAO REPORT.—Not later
2 than December 31st of each year, the Comp-
3 troller General of the United States shall sub-
4 mit to Congress a report on the economic mod-
5 els used by the Administrator to carry out this
6 subsection.

7 (3) AVAILABILITY OF INFORMATION.—With re-
8 spect to any covered action, the Administrator
9 shall—

10 (A) post the analysis under paragraph (1)
11 as a link on the main page of the public Inter-
12 net Web site of the Environmental Protection
13 Agency; and

14 (B) request that the Governor of any State
15 experiencing more than a de minimis negative
16 impact post such analysis in the Capitol of such
17 State.

18 (b) PUBLIC HEARINGS.—

19 (1) IN GENERAL.—If the Administrator con-
20 cludes under subsection (a)(1) that a covered action
21 will have more than a de minimis negative impact on
22 employment levels or economic activity in a State,
23 the Administrator shall hold a public hearing in each
24 such State at least 30 days prior to the effective
25 date of the covered action.

1 (2) TIME, LOCATION, AND SELECTION.—A pub-
2 lic hearing required under paragraph (1) shall be
3 held at a convenient time and location for impacted
4 residents. In selecting a location for such a public
5 hearing, the Administrator shall give priority to loca-
6 tions in the State that will experience the greatest
7 number of job losses.

8 (c) NOTIFICATION.—If the Administrator concludes
9 under subsection (a)(1) that a covered action will have
10 more than a de minimis negative impact on employment
11 levels or economic activity in any State, the Administrator
12 shall give notice of such impact to the State’s Congres-
13 sional delegation, Governor, and Legislature at least 45
14 days before the effective date of the covered action.

15 (d) DEFINITIONS.—In this section, the following defi-
16 nitions apply:

17 (1) ADMINISTRATOR.—The term “Adminis-
18 trator” means the Administrator of the Environ-
19 mental Protection Agency.

20 (2) COVERED ACTION.—The term “covered ac-
21 tion” means any of the following actions taken by
22 the Administrator under the Federal Water Pollu-
23 tion Control Act (33 U.S.C. 1201 et seq.):

1 (A) Issuing a regulation, policy statement,
2 guidance, response to a petition, or other re-
3 quirement.

4 (B) Implementing a new or substantially
5 altered program.

6 (3) MORE THAN A DE MINIMIS NEGATIVE IM-
7 PACT.—The term “more than a de minimis negative
8 impact” means the following:

9 (A) With respect to employment levels, a
10 loss of more than 100 jobs. Any offsetting job
11 gains that result from the hypothetical creation
12 of new jobs through new technologies or govern-
13 ment employment may not be used in the job
14 loss calculation.

15 (B) With respect to economic activity, a
16 decrease in economic activity of more than
17 \$1,000,000 over any calendar year. Any offset-
18 ting economic activity that results from the hy-
19 pothetical creation of new economic activity
20 through new technologies or government em-
21 ployment may not be used in the economic ac-
22 tivity calculation.

1 **SEC. 4. IDENTIFICATION OF WATERS PROTECTED BY THE**
2 **CLEAN WATER ACT.**

3 (a) IN GENERAL.—The Secretary of the Army and
4 the Administrator of the Environmental Protection Agen-
5 cy may not—

6 (1) finalize, adopt, implement, administer, or
7 enforce the proposed guidance described in the no-
8 tice of availability and request for comments entitled
9 “EPA and Army Corps of Engineers Guidance Re-
10 garding Identification of Waters Protected by the
11 Clean Water Act” (EPA–HQ–OW–2011–0409) (76
12 Fed. Reg. 24479 (May 2, 2011)); and

13 (2) use the guidance described in paragraph
14 (1), any successor document, or any substantially
15 similar guidance made publicly available on or after
16 December 3, 2008, as the basis for any decision re-
17 garding the scope of the Federal Water Pollution
18 Control Act (33 U.S.C. 1251 et seq.) or any rule-
19 making.

20 (b) RULES.—The use of the guidance described in
21 subsection (a)(1), or any successor document or substan-
22 tially similar guidance made publicly available on or after
23 December 3, 2008, as the basis for any rule shall be
24 grounds for vacating the rule.

1 **SEC. 5. LIMITATIONS ON AUTHORITY TO MODIFY STATE**
2 **WATER QUALITY STANDARDS.**

3 (a) STATE WATER QUALITY STANDARDS.—Section
4 303(c)(4) of the Federal Water Pollution Control Act (33
5 U.S.C. 1313(c)(4)) is amended—

6 (1) by redesignating subparagraphs (A) and
7 (B) as clauses (i) and (ii), respectively;

8 (2) by striking “(4)” and inserting “(4)(A)”;

9 (3) by striking “The Administrator shall pro-
10 mulgate” and inserting the following:

11 “(B) The Administrator shall promulgate;”

12 and

13 (4) by adding at the end the following:

14 “(C) Notwithstanding subparagraph
15 (A)(ii), the Administrator may not promulgate
16 a revised or new standard for a pollutant in any
17 case in which the State has submitted to the
18 Administrator and the Administrator has ap-
19 proved a water quality standard for that pollut-
20 ant, unless the State concurs with the Adminis-
21 trator’s determination that the revised or new
22 standard is necessary to meet the requirements
23 of this Act.”.

24 (b) FEDERAL LICENSES AND PERMITS.—Section
25 401(a) of such Act (33 U.S.C. 1341(a)) is amended by
26 adding at the end the following:

1 “(7) With respect to any discharge, if a State
2 or interstate agency having jurisdiction over the nav-
3 igable waters at the point where the discharge origi-
4 nates or will originate determines under paragraph
5 (1) that the discharge will comply with the applica-
6 ble provisions of sections 301, 302, 303, 306, and
7 307, the Administrator may not take any action to
8 supersede the determination.”.

9 **SEC. 6. STATE AUTHORITY TO IDENTIFY WATERS WITHIN**
10 **ITS BOUNDARIES.**

11 Section 303 of the Federal Water Pollution Control
12 Act (33 U.S.C. 1313) is amended by striking subsection
13 (d)(2) and inserting the following:

14 “(2)(A) Each State shall submit to the Admin-
15 istrator from time to time, with the first such sub-
16 mission not later than 180 days after the date of
17 publication of the first identification of pollutants
18 under section 304(a)(2)(D), the waters identified
19 and the loads established under paragraphs (1)(A),
20 (1)(B), (1)(C), and (1)(D) of this subsection. The
21 Administrator shall approve the State identification
22 and load or announce his disagreement with the
23 State identification and load not later than 30 days
24 after the date of submission and if—

1 “(i) the Administrator approves the identi-
2 fication and load submitted by the State in ac-
3 cordance with this subsection, such State shall
4 incorporate them into its current plan under
5 subsection (e); and

6 “(ii) the Administrator announces his dis-
7 agreement with the identification and load sub-
8 mitted by the State in accordance with this sub-
9 section he shall submit, not later than 30 days
10 after the date that the Administrator announces
11 his disagreement with the State’s submission, to
12 such State his written recommendation of those
13 additional waters that he identifies and such
14 loads for such waters as he believes are nec-
15 essary to implement the water quality standards
16 applicable to such waters.

17 “(B) Upon receipt of the Administrator’s rec-
18 ommendation the State shall within 30 days either—

19 “(i) disregard the Administrator’s rec-
20 ommendation in full and incorporate its own
21 identification and load into its current plan
22 under subsection (e);

23 “(ii) accept the Administrator’s rec-
24 ommendation in full and incorporate its identi-
25 fication and load as amended by the Adminis-

1 trator’s recommendation into its current plan
2 under subsection (e); or

3 “(iii) accept the Administrator’s rec-
4 ommendation in part, identifying certain addi-
5 tional waters and certain additional loads pro-
6 posed by the Administrator to be added to such
7 State’s identification and load and incorporate
8 the such State’s identification and load as
9 amended into its current plan under subsection
10 (e).

11 “(C)(i) If the Administrator fails to either ap-
12 prove the State identification and load or announce
13 his disagreement with the State identification and
14 load within the time specified in this subsection then
15 such State’s identification and load is deemed ap-
16 proved and such State shall incorporate the identi-
17 fication and load that it submitted into its current
18 plan under subsection (e).

19 “(ii) If the Administrator announces his dis-
20 agreement with the State identification and load but
21 fails to submit his written recommendation to the
22 State within 30 days as required by subparagraph
23 (A)(ii) then such State’s identification and load is
24 deemed approved and such State shall incorporate

1 the identification and load that it submitted into its
2 current plan under subsection (e).

3 “(D) This section shall apply to any decision
4 made by the Administrator under this subsection
5 issued on or after March 1, 2013.”.

○