

114TH CONGRESS
1ST SESSION

S. _____

To require the Secretary of the Army and the Administrator of the Environmental Protection Agency to propose a regulation revising the definition of the term “waters of the United States”, and for other purposes.

IN THE SENATE OF THE UNITED STATES

Mr. BARRASSO (for himself, Mr. DONNELLY, Mr. INHOFE, Ms. HEITKAMP, Mr. ROBERTS, Mr. MANCHIN, Mr. SULLIVAN, Mr. ROUNDS, Mr. BLUNT, Mr. MCCONNELL, Mrs. CAPITO, and Mrs. FISCHER) introduced the following bill; which was read twice and referred to the Committee on

A BILL

To require the Secretary of the Army and the Administrator of the Environmental Protection Agency to propose a regulation revising the definition of the term “waters of the United States”, 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 “Federal Water Quality
5 Protection Act”.

6 **SEC. 2. FINDINGS.**

7 Congress finds that—

1 (1) in section 101(b) of the Federal Water Pol-
2 lution Control Act (33 U.S.C. 1251(b)), Congress
3 adopted the principle of cooperative federalism, rec-
4 ognizing that “[i]t is the policy of the Congress to
5 recognize, preserve, and protect the primary respon-
6 sibilities and rights of States to prevent, reduce, and
7 eliminate pollution, to plan the development and use
8 (including restoration, preservation, and enhance-
9 ment) of land and water resources, and to consult
10 with the Administrator in the exercise of his author-
11 ity under this Act”;

12 (2) adequate consultation with States and local
13 governments and affected entities is necessary—

14 (A) to ensure that Federal departments
15 and agencies understand the scope and impacts
16 of regulatory proposals;

17 (B) to maintain the cooperative federalism
18 foundation of the Federal Water Pollution Con-
19 trol Act (33 U.S.C. 1251 et seq.); and

20 (C) to respect the limits on Federal au-
21 thority;

22 (3)(A) States have robust water quality protec-
23 tion programs capable of greater regulatory controls
24 on waters not covered by Federal jurisdiction; and

1 (B) an exclusion of waters from Federal juris-
2 diction does not mean that excluded waters will be
3 exempt from regulation and protection, but rather,
4 it recognizes the limits of Federal jurisdiction under
5 the Federal Water Pollution Control Act (33 U.S.C.
6 1251 et seq.) and the primary role of States in pro-
7 tecting State waters; and

8 (4) subchapter II of chapter 5, and chapter 7,
9 of title 5, United States Code (commonly known as
10 the “Administrative Procedure Act”), requires each
11 agency to provide notice and an opportunity to com-
12 ment regarding—

13 (A) information, including scientific and
14 technical findings, on which the agency relies in
15 taking a regulatory action; and

16 (B) definitions, exclusions, and standards
17 that determine the limits of Federal regulation.

18 **SEC. 3. DEFINITIONS.**

19 In this Act:

20 (1) ADMINISTRATOR.—The term “Adminis-
21 trator” means the Administrator of the Environ-
22 mental Protection Agency.

23 (2) BODY OF WATER.—The term “body of
24 water” means a traditional navigable water, terri-
25 torial sea, river, stream, lake, pond, or wetlands.

1 (3) INTERSTATE WATERS.—The term “inter-
2 state waters” means the water described in section
3 328.3(a)(2) of title 33, Code of Federal Regulations
4 (as in effect on the day before the date of enactment
5 of this Act).

6 (4) ISOLATED.—The term “isolated”, with re-
7 spect to a body of water, means the absence of a
8 surface hydrologic connection to a traditional navi-
9 gable water.

10 (5) MUNICIPALITY.—The term “municipality”
11 means a city, town, borough, county, parish, district,
12 association, or other public entity that—

13 (A) was established by, or pursuant to,
14 State law; and

15 (B) has authority over the distribution of
16 water or the disposal of sewage, industrial
17 waste, or any other waste.

18 (6) NORMAL YEAR.—The term “normal year”
19 means—

20 (A) the 30-year hydrologic normal, as that
21 term is used by the Natural Resources Con-
22 servaion Service of the Department of Agri-
23 culture, based on data from a specific geo-
24 graphic area; or

1 (B) if less than 30 years of data described
2 in subparagraph (A) are available, the average
3 of the observed monthly data from a specific ge-
4 ographic area over the period of record.

5 (7) POINT SOURCE.—The term “point source”
6 has the meaning given the term in section 502 of the
7 Federal Water Pollution Control Act (33 U.S.C.
8 1362).

9 (8) PUBLIC NOTICE AND AN OPPORTUNITY FOR
10 COMMENT.—

11 (A) IN GENERAL.—The term “public no-
12 tice and an opportunity for comment” means
13 notice and opportunity for comment that meets
14 the requirements of subchapter II of chapter 5,
15 and chapter 7, of title 5, United States Code
16 (commonly known as the “Administrative Pro-
17 cedure Act”).

18 (B) INCLUSION.—The term “public notice
19 and an opportunity for comment” includes the
20 opportunity for public hearings in different geo-
21 graphic regions with different hydrology, includ-
22 ing separate meetings in the arid West.

23 (9) SECRETARY.—The term “Secretary” means
24 the Secretary of the Army.

1 (10) STREAM.—The term “stream” means a
2 natural channel formed by the flow of water that has
3 a bed, bank, and ordinary high water mark (as de-
4 fined in section 328.3(e) of title 33, Code of Federal
5 Regulations (as in effect on the date of enactment
6 of this Act)).

7 (11) SURFACE HYDROLOGIC CONNECTION.—

8 (A) IN GENERAL.—The term “surface hy-
9 drologic connection” means a continuous sur-
10 face connection through which water moves
11 within a body of water or from 1 body of water
12 to another.

13 (B) EXCLUSION.—The term “surface hy-
14 drologic connection” does not include—

15 (i) overland flow of water outside a
16 body of water (including sheetflow); or

17 (ii) the movement of water through
18 soil, subsurface tiles, or a groundwater aq-
19 uifer.

20 (C) DETERMINATION OF CONTINUOUS-
21 NESS.—For purposes of this paragraph, a sur-
22 face hydrologic connection shall be considered
23 to be continuous if the connection is continuous,
24 regardless of whether—

25 (i) water is not always present; and

1 (ii) there is a break in the ordinary
2 high water mark of a stream that is unre-
3 lated to the flow regime of the stream, in-
4 cluding a break caused by a culvert, pipe,
5 dam, or by the flow of the stream under-
6 ground for a short distance, such as
7 through a cave.

8 (12) **TRADITIONAL NAVIGABLE WATER.**—The
9 term “traditional navigable water” means the water
10 described in section 328.3(a)(1) of title 33, Code of
11 Federal Regulations (as in effect on the date of en-
12 actment of this Act).

13 (13) **WETLANDS.**—The term “wetlands” has
14 the meaning given the term in section 328.3(b) of
15 title 33, Code of Federal Regulations (as in effect on
16 the date of enactment of this Act).

17 **SEC. 4. REVISED DEFINITION; PRINCIPLES AND PROCESS.**

18 (a) **REVISED DEFINITION.**—A revision to or guidance
19 on a regulatory definition of the term “navigable waters”
20 or “waters of the United States” promulgated or issued
21 pursuant to the Federal Water Pollution Control Act (33
22 U.S.C. 1251 et seq.) after February 4, 2015, shall have
23 no force or effect—

24 (1) unless the revision adheres to the principles
25 under subsection (b); and

1 conjunction with information on drinking
2 water source protection areas, to identify
3 potential sources of water for public drink-
4 ing water systems; or

5 (ii) for any State for which a map at
6 the scale described in clause (i) is not
7 available, identified on a map using the
8 United States Geological Survey National
9 Hydrology Dataset Plus at the available
10 scale that is closest to the scale described
11 in clause (i);

12 (C) the reach of a stream that, through a
13 surface hydrologic connection, contributes flow
14 in a normal year to a traditional navigable
15 water of sufficient volume, duration, and fre-
16 quency that pollutants in that reach would de-
17 grade the water quality of the traditional navi-
18 gable water, based on a quantifiable and statis-
19 tically valid measure of flow for that geographic
20 area; and

21 (D) wetlands situated next to a water of
22 the United States that, in a normal year, pro-
23 tect the water quality of a navigable water by
24 preventing the movement of pollutants to a nav-
25 igable water.

1 (3) The term “waters of the United States”
2 under the Federal Water Pollution Control Act (33
3 U.S.C. 1251 et seq.) should not include—

4 (A) water that is located below the surface
5 of the land, including soil water and ground-
6 water;

7 (B) water that is not located within a body
8 of water;

9 (C) an isolated pond, whether natural or
10 manmade, including a farm pond, fish pond,
11 quarry, mine pit, ornamental pond, swimming
12 pool, construction pit, fire control pond, sedi-
13 ment pond, and any other isolated facility or
14 system that holds water;

15 (D) a system constructed or used for the
16 purpose of collecting, conveying, holding, or
17 treating—

18 (i) stormwater or floodwater within
19 the boundaries of a State, tribal, munic-
20 ipal, industrial, agricultural, silvicultural,
21 residential, or Federal facility or operation,
22 including ditches along agricultural fields,
23 roads, runways, parking lots, and other in-
24 frastructure;

1 (ii) wastewater within the boundaries
2 of a State, tribal, municipal, industrial,
3 commercial, agricultural, silvicultural, resi-
4 dential, or Federal facility or operation;

5 (iii) municipal and industrial water
6 supplies within the boundaries of a State,
7 tribal, municipal, industrial, commercial,
8 agricultural, silvicultural, residential, or
9 Federal facility or operation—

10 (I) including spreading basins for
11 aquifer storage and recovery or aqui-
12 fer recharge and recovery; but

13 (II) not including instream res-
14 ervoirs or other instream facilities; or

15 (iv) water for agricultural or silvicult-
16 tural purposes by a municipality or at an
17 agricultural or silvicultural facility or oper-
18 ation, including irrigation water, a fish
19 production pond, livestock watering pond,
20 irrigated field, cranberry growing field, rice
21 production field, manure lagoon, and farm
22 pond;

23 (E) the reach of a stream that, through a
24 surface hydrologic connection, does not con-
25 tribute flow in a normal year to a traditional

1 navigable water of sufficient volume, duration,
2 and frequency that pollutants in that reach
3 would degrade the water quality of the tradi-
4 tional navigable water, based on a quantifiable
5 and statistically valid measure of flow for that
6 geographic area;

7 (F) prior-converted cropland (as defined in
8 section 12.2(a) of title 7, Code of Federal Reg-
9 ulations (as in effect on the date of enactment
10 of this Act)); and

11 (G) any water that is no longer a water of
12 the United States pursuant to a permit issued
13 under—

14 (i) section 10 of the Act of March 3,
15 1899 (commonly known as the “Rivers and
16 Harbors Appropriation Act of 1899”) (33
17 U.S.C. 403); or

18 (ii) section 404 of the Federal Water
19 Pollution Control Act (33 U.S.C. 1344).

20 (4) Unless a subparagraph of paragraph (3)
21 other than subparagraph (D) applies, for purposes
22 of the Federal Water Pollution Control Act (33
23 U.S.C. 1251 et seq.), the term “waters of the United
24 States” should include a system described in para-
25 graph (3)(D), or a component of such a system, if

1 the Secretary or the Administrator demonstrates
2 that—

3 (A) the system was a water of the United
4 States that was converted for use for the pur-
5 pose described in paragraph (3)(D) after Octo-
6 ber 18, 1972, without a permit under section
7 404 of that Act (33 U.S.C. 1344), unless the
8 construction or use of the system—

9 (i) is described in subparagraph (A)
10 or (C) of section 404(f)(1) of that Act (33
11 U.S.C. 1344(f)(1)); or

12 (ii) was otherwise exempt from per-
13 mitting under that Act; or

14 (B) the system was a traditional navigable
15 water that was converted for use for the pur-
16 pose described in paragraph (3)(D), unless—

17 (i) the system is identified as a point
18 source in a permit issued under section
19 402 of the Federal Water Pollution Con-
20 trol Act (33 U.S.C. 1342);

21 (ii) the water managed in the system
22 is—

23 (I) irrigation return flow exempt
24 from permitting under section

1 402(l)(1) of that Act (33 U.S.C.
2 1342(l)(1)); or

3 (II) agricultural stormwater or
4 return flows from irrigated agriculture
5 exempt from permitting under section
6 502(14) of that Act (33 U.S.C.
7 1362(14));

8 (iii) the construction or use of the sys-
9 tem is described in subparagraph (A) or
10 (C) of section 404(f)(1) of that Act (33
11 U.S.C. 1344(f)(1)); or

12 (iv) the system is a waste treatment
13 system.

14 (5) In promulgating a revised definition of
15 waters of the United States, the Secretary or the
16 Administrator shall take into consideration that—

17 (A) the use of a body of water by an orga-
18 nism, including a migratory bird, does not pro-
19 vide a basis for establishing Federal jurisdiction
20 under the Federal Water Pollution Control Act
21 (33 U.S.C. 1251 et seq.);

22 (B) the supply of water to a groundwater
23 aquifer and the storage of water in an isolated
24 body of water are issues that—

1 (i) pertain to the use of water re-
2 sources that shall not be superseded, abro-
3 gated, or otherwise impaired by the Fed-
4 eral Water Pollution Control Act (33
5 U.S.C. 1251 et seq.) pursuant to sections
6 101(g) and 510(2) of that Act (33 U.S.C.
7 1251(g), 1370(2)); and

8 (ii) do not provide a basis for estab-
9 lishing Federal jurisdiction under that Act
10 (33 U.S.C. 1251 et seq.); and

11 (C) evaporation, transpiration, condensa-
12 tion, precipitation, the overland flow of water,
13 and the movement of water in an aquifer are all
14 part of the water cycle and may connect all
15 water over sufficiently long periods of time and
16 distances, but do not provide a basis for estab-
17 lishing Federal jurisdiction under the Federal
18 Water Pollution Control Act (33 U.S.C. 1251 et
19 seq.).

20 (6) Waters that are waters of the United States
21 should be identified on maps provided by the Sec-
22 retary and the Administrator to promote certainty
23 and transparency in jurisdictional determinations.

24 (c) CONSIDERATION, CONSULTATION, AND RE-
25 PORT.—

1 (1) CONSIDERATION OF PUBLIC COMMENTS.—
2 Before issuing a proposed regulation pursuant to
3 subsection (a), the Secretary and the Administrator
4 shall make available to the public, review, and pub-
5 lish a response to comments filed regarding the pro-
6 posed rule entitled “Definition of ‘Waters of the
7 United States’ Under the Clean Water Act” of the
8 Corps of Engineers and the Environmental Protec-
9 tion Agency (79 Fed. Reg. 22188 (April 21, 2014)).

10 (2) FEDERALISM.—

11 (A) IN GENERAL.—In proposing and pro-
12 mulgating a regulation pursuant to subsection
13 (a), the Secretary and the Administrator shall
14 ensure compliance with the federalism policy-
15 making criteria and consultation in accordance
16 with Executive Order 13132 (64 Fed. Reg.
17 43255 (August 4, 1999)), regardless of whether
18 the Secretary and the Administrator determine
19 that the regulation would have any substantial
20 and direct effect on—

21 (i) States;

22 (ii) the relationship between the Fed-
23 eral Government and the States; or

1 (iii) the distribution of power and re-
2 sponsibilities among the various levels of
3 government.

4 (B) CONSULTATION.—

5 (i) IN GENERAL.—To be considered
6 meaningful consultation described in sec-
7 tion 101(b) of the Federal Water Pollution
8 Control Act (33 U.S.C. 1251(b)), before
9 publication of a proposed rule under this
10 section, consultation shall include a discus-
11 sion of alternative approaches with and a
12 request for input and advice on the ap-
13 proaches from States, including—

14 (I) Governors;

15 (II) State departments with au-
16 thority over water supply and water
17 quality;

18 (III) State departments of agri-
19 culture; and

20 (IV) local governments, including
21 elected officials, local governmental
22 entities with authority over water sup-
23 ply, stormwater, waste water, and
24 flood control, irrigation districts, and
25 conservation districts.

1 (ii) TOPICS.—The topics to be ad-
2 dressed in the consultation under this
3 paragraph should include—

4 (I) categories of waters, in addi-
5 tion to those discussed in paragraphs
6 (2) and (3) of subsection (b), that
7 should be subject to Federal jurisdic-
8 tion or should be subject solely to
9 State regulation;

10 (II) what is the role of States in
11 the identification of waters subject to
12 Federal jurisdiction; and

13 (III) whether channels in which
14 water is present only during or for a
15 short time after a precipitation event
16 are correctly categorized as
17 geomorphological features rather than
18 hydrologic features.

19 (3) REGULATORY FLEXIBILITY.—In proposing
20 and promulgating a regulation pursuant to sub-
21 section (a), and regardless of whether the Secretary
22 and the Administrator determine that the regulation
23 would have a significant impact on a substantial
24 number of small entities, the Secretary and the Ad-
25 ministrator shall—

1 (A) carry out the actions described in sec-
2 tions 603, 604, and 609 of title 5, United
3 States Code; and

4 (B) in carrying out those actions, take into
5 consideration the costs of all programs under
6 the Federal Water Pollution Control Act (33
7 U.S.C. 1251 et seq.), regardless of whether the
8 Secretary and the Administrator consider the
9 costs of the proposed regulation to be direct or
10 indirect.

11 (4) UNFUNDED MANDATES.—In proposing and
12 promulgating a regulation pursuant to subsection
13 (a), the Secretary and the Administrator shall evalu-
14 ate the intergovernmental and private sector impacts
15 of the regulation, in accordance with title II of the
16 Unfunded Mandates Reform Act of 1995 (2 U.S.C.
17 1531 et seq.), regardless of whether the Secretary
18 and the Administrator—

19 (A) consider the impacts of the proposed
20 regulation to be direct or indirect; or

21 (B) determine that expenditures resulting
22 from the proposed regulation would meet the
23 monetary thresholds established in that Act (2
24 U.S.C. 1501 et seq.).

1 (5) IMPROVING REGULATION AND REGULATORY
2 REVIEW.—In proposing and promulgating a regula-
3 tion pursuant to subsection (a), regardless of wheth-
4 er the Secretary and the Administrator consider the
5 regulation to be a significant regulatory action or
6 significantly affect State, local, and tribal govern-
7 ments, the Secretary and the Administrator shall en-
8 sure that the regulation meets the requirements of—

9 (A) Executive Order 12866 (5 U.S.C. 601
10 note; relating to regulatory planning and re-
11 view); and

12 (B) Executive Order 13563 (76 Fed. Reg.
13 3821 (January 18, 2011)).

14 (6) IMPROVING PERFORMANCE OF FEDERAL
15 PERMITTING AND REVIEW OF INFRASTRUCTURE
16 PROJECTS.—In proposing and promulgating a regu-
17 lation pursuant to subsection (a), the Secretary and
18 the Administrator shall consider—

19 (A) Executive Order 13604 (5 U.S.C. 601
20 note; relating to improving performance of Fed-
21 eral permitting and review of infrastructure
22 projects); and

23 (B) the goal of reducing the time to make
24 decisions in the permitting and review of infra-
25 structure projects by the Federal Government.

1 available alternatives to direct regula-
2 tion;

3 (ii) section 2(i) of Executive Order
4 13132 (64 Fed. Reg. 43256 (August 4,
5 1999)), which requires agencies to “act
6 only with the greatest caution where State
7 or local governments have identified uncer-
8 tainties regarding the constitutional or
9 statutory authority of the national govern-
10 ment”;

11 (iii) section 3 of that Executive order
12 (64 Fed. Reg. 43256 (August 4, 1999)),
13 which requires agencies—

14 (I) to strictly adhere to constitu-
15 tional principles and statutory author-
16 ity;

17 (II) to take action limiting the
18 policymaking discretion of the States
19 only in cases in which there exists
20 constitutional and statutory authority
21 for the action;

22 (III) to provide States with max-
23 imum administrative discretion prac-
24 ticable, without intrusive Federal
25 oversight; and

1 (IV) to rely on State policies to
2 the maximum extent practicable; and
3 (iv) Executive Order 13563 (76 Fed.
4 Reg. 3821 (January 18, 2011)), including
5 the public participation requirements of
6 section 2 of that Executive order, which re-
7 quire an opportunity for public comment
8 regarding all pertinent parts of the rule-
9 making docket, including relevant scientific
10 and technical findings and seeking the
11 views of those who are likely to be affected
12 before issuing a notice of proposed rule-
13 making;

14 (B) includes the Federalism summary im-
15 pact statement required by section 3 of Execu-
16 tive Order 13132 (64 Fed. Reg. 43256 (August
17 4, 1999));

18 (C) includes the regulatory flexibility anal-
19 yses required under section 603 of title 5,
20 United States Code, and the report of the re-
21 view panel required under section 609 of that
22 title;

23 (D) describes the small government agency
24 plan, and the State, local, and tribal input
25 under sections 203 and 204 of the Unfunded

1 Mandates Reform Act of 1995 (2 U.S.C. 1533,
2 1534);

3 (E) describes the means by which the pro-
4 posed regulation is the least costly, most cost-
5 effective, or least burdensome alternative, in ac-
6 cordance with section 205 of the Unfunded
7 Mandates Reform Act of 1995 (2 U.S.C. 1535);

8 (F) describes whether the Secretary and
9 the Administrator will provide funding to State,
10 local, and tribal governments to meet the inter-
11 governmental mandates imposed by the pro-
12 posed regulation; and

13 (G) describes how the proposed rule will
14 achieve the goal stated in section 1 of Executive
15 Order 13604 (5 U.S.C. 601 note; relating to
16 improving performance of Federal permitting
17 and review of infrastructure projects) that the
18 time to make decisions in the permitting and
19 review of infrastructure projects by the Federal
20 Government be reduced.

21 (8) TIMING.—In carrying out this section, the
22 Secretary and the Administrator shall use best ef-
23 forts—

24 (A) to provide not less than 180 days for
25 the consultation described in paragraph (2);

1 (B) to provide a comment period on the re-
2 vised proposed rule of not less than 120 days;
3 and

4 (C) to publish a final rule not later than
5 December 31, 2016.

6 **SEC. 5. MEASURE OF FLOW.**

7 After providing public notice and an opportunity for
8 comment, the Secretary shall establish quantifiable and
9 statistically valid measures of the volume, duration, and
10 frequency of flow in streams in different geographic areas
11 that would, in a normal year, allow pollutants in reaches
12 of streams in those geographic areas to flow to and de-
13 grade the water quality of a traditional navigable water.

14 **SEC. 6. REPORT TO CONGRESS.**

15 Not later than the date that is 3 years after the date
16 of promulgation of a regulation pursuant to section 4, and
17 not less frequently than once every 3 years thereafter, the
18 Comptroller General of the United States, after consulta-
19 tion with State, local, and tribal governments and other
20 affected entities, shall—

21 (1) review the jurisdictional determinations
22 made during the applicable period by the Secretary
23 and the Administrator; and

24 (2) submit to Congress a report that de-
25 scribes—

1 (A) the interpretations of the regulation
2 by—

3 (i) districts of the Corps of Engineers;

4 and

5 (ii) regional offices of the Environ-
6 mental Protection Agency;

7 (B) whether those interpretations are con-
8 sistent;

9 (C) if any inconsistency exists, the meas-
10 ures carried out by the Secretary and the Ad-
11 ministrator to reduce the inconsistency or an
12 explanation of the geographic differences that
13 make the inconsistency appropriate; and

14 (D) the impacts of those interpretations on
15 Federal permitting and review of infrastructure
16 projects, and the goal stated in section 1 of Ex-
17 ecutive Order 13604 (5 U.S.C. 601 note; relat-
18 ing to improving performance of Federal per-
19 mitting and review of infrastructure projects)
20 that the time to make decisions in the permit-
21 ting and review of infrastructure projects by the
22 Federal Government be reduced.

1 **SEC. 7. EFFECT OF ACT.**

2 (a) PERMITTING AUTHORITY.—Nothing in this Act
3 limits the authority of the Secretary or the Adminis-
4 trator—

5 (1) to require a permit for any discharge of pol-
6 lutants to a navigable water under the Federal
7 Water Pollution Control Act (33 U.S.C. 1251 et
8 seq.); or

9 (2) to take any enforcement action with respect
10 to an unpermitted discharge under that Act.

11 (b) WATER TRANSFERS.—Nothing in this Act affects
12 a determination regarding whether the transfer of water
13 from 1 body of water to another requires a permit under
14 section 402 of the Federal Water Pollution Control Act
15 (33 U.S.C. 1342).

16 (c) RETENTION OF STATE AUTHORITY.—Nothing in
17 this Act places any limitation on the scope of water subject
18 to State jurisdiction under State law.