



July 30, 2014

The Honorable Sam Graves
Chairman
House Committee on Small Business
Washington, D.C. 20515

The Honorable Nydia Velázquez
Ranking Member
House Committee on Small Business
Washington, D.C. 20515

Dear Chairman Graves and Ranking Member Velázquez:

The Waters Advocacy Coalition (WAC) supports the House Small Business Committee's attention to the impact on small business of the proposed Clean Water Act (CWA) rule redefining "Waters of the United States" (WOTUS). WAC is a multi-industry coalition representing the nation's construction, real estate, mining, agriculture, forestry, manufacturing, and energy sectors, and wildlife conservation interests—many of which include a substantial number of small business entities.

The Environmental Protection Agency and the U.S. Army Corps of Engineers ("the agencies") proposed the rule to "clarify" which waters are federally regulated and which waters remain under the jurisdiction of their respective states. The agencies assert, "Because fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations."¹ We believe the agencies have dramatically underestimated the impact of the proposed rule on small business entities. In reality, the proposed rule establishes broader definitions of existing regulatory categories, such as tributaries, and regulates new areas that are not jurisdictional under current regulations. For example, the new definition of adjacent waters based on their location within riparian areas and floodplains or subsurface connections to jurisdictional waters is a significant change. Furthermore, the agencies' proposal to aggregate similarly situated waters to bootstrap jurisdiction is ill-conceived, potentially expanding jurisdiction beyond historical interpretations and negatively impacting all CWA programs.

Agencies Fail to Comply with Regulatory Flexibility Act

The agencies have bypassed the safeguards of the Regulatory Flexibility Act (RFA) by certifying the proposed rule. Under the RFA, Congress clearly intends for federal agencies to carefully consider the proportional impacts of federal regulations on small businesses. WAC members believe that the agencies should have conducted an initial regulatory review through a Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) panel. A more thorough, small business-focused, analysis of the proposed requirements would have revealed the disproportionate burdens that the rule would place on small businesses.

¹ 79 Fed. Reg. 22,188, 22,220 (Apr. 21, 2014).

In the docket for the proposed rule, the EPA has provided a “Summary of the Discretionary Small Entity Outreach for Planned Proposed Revised Definition of ‘Waters of the United States,’” which details an outreach meeting that the EPA held in 2011 to discuss the 2011 Draft Guidance. This meeting should in no way be seen as a substitute for a SBREFA panel on the proposed rule. The 2011 meeting was open to only a limited number of participants, the topic of the meeting was not the proposed rule but a previous draft guidance, and the EPA has wholly ignored all of the feedback from those who were able to participate. The agencies have not given the small business community a real, meaningful opportunity to discuss the burdens of the proposed rule as the RFA requires.

Agencies Rely on Flawed Economic Analysis

The economic analysis of the proposal prepared by the EPA is seriously flawed. It does not provide a reasonable assessment of the proposed rule’s costs and benefits as required by Executive Order 12866. Economist Dr. David Sunding, the Thomas J. Graff Professor at the University of California-Berkeley’s College of Natural Resources, has identified several of the most significant flaws with the analysis.

Dr. Sunding explains how the EPA excluded costs, underrepresented jurisdictional areas and used flawed methodologies to arrive at much lower economic impacts. He also examines how the lack of transparency in the report makes it difficult to understand or replicate the calculations, evaluate the underlying assumptions, or understand discrepancies in the results. Dr. Sunding concludes that EPA’s analysis results in an artificially small increase in jurisdictional waters because of how it selected and analyzed data from the Section 404 (dredge and fill) program and did not include new categories of waters that would be jurisdictional under the proposed rule. The distortion caused by an artificially low estimate is magnified when EPA examines costs and largely ignores the impacts for non-404 CWA programs.

According to Sunding, “the errors and omissions in the EPA’s study are so severe as to render it virtually meaningless.”² The use of the flawed methodology as a basis for claiming a *de minimis* impact on small businesses conveys an inaccurate picture of the impact of the proposed rule. A full copy of his report is available online.

Agencies Misjudge Unintended Consequences of Proposed Rule

Under the proposed rule, more waters would become a WOTUS. As a result, fewer projects will qualify for nationwide permits and, instead, applicants will need to obtain an individual permit from the Corps. The costs of obtaining Corps permits are significant: averaging 788 days and \$271,596 for an individual permit compared to 313 days and \$28,915 for a nationwide permit. Over \$1.7 billion is spent each year by the private and public sectors on administrative costs to

² Sunding, David, “Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States,” May 2014, available at <http://www.nssga.org/economist-reviews-epas-economic-analysis-proposed-waters-united-states-rule/>

obtain wetlands permits.³ Importantly, these ranges do not take into account the cost of required mitigation.

Additionally, with more WOTUS dotting the landscape, more section 404 permits will be needed. Section 404 permits are federal “actions” that trigger additional companion statutory reviews by agencies, other than the state permitting agency, including reviews under the Endangered Species Act, the National Historic Preservation Act, and the National Environmental Policy Act. Not only are these reviews costly, but project proponents do not have a seat at the table during these additional reviews, consulting agencies are not bound by a specific time limit, and there is potential for activist litigation. Longer permit preparation and review times combined with the higher costs associated with additional reviews place small businesses in a no win situation, as they lead to higher costs overall and greater risks that can ultimately jeopardize a project.

The potential effect of the proposed rule directly conflicts with the Administration’s stated commitment to expedite infrastructure projects.⁴ The agencies’ proposal can be expected to forestall energy company progress towards meeting state and federal-level environmental and other requirements. For example, small businesses associated with the natural gas pipeline and distribution industry, subject to state and federal pipeline mandates, are concerned about the potential impact on pipeline testing and replacement work (which usually require Clean Water Act permits when affecting a WOTUS) as more areas are treated by the agencies as WOTUS. Similarly, electric cooperatives, which are overwhelmingly small businesses, are concerned about how permitting delays and increased costs could affect the viability and timely development of new generation, including generation from renewables.

The negative impact on real estate transaction processes is another example of the negative practical effects of the proposed rule. Increased permitting requirements will cause delay for site modifications, and landlords, who often have specific time incentives built into lease agreements, may be unable to fulfill time obligations or predict certainty in those lease agreements. This would jeopardize their ability to retain and attract future tenants. In addition, tenant companies seeking to expand or relocate their operations will be impacted by project scheduling uncertainty and increased time and cost. This would change the calculation and potentially put at risk the capital investment necessary to support such projects. These consequences are not limited to the real estate sector; rather, these practical implications would affect everyday business transactions in the manufacturing, construction, transportation, energy and agriculture industries. For example, small businesses could now have to meet water quality standards for ditches, ephemeral streams, or other features on their property that were not previously considered WOTUS.

WAC respectfully requests that the members of the House Small Business Committee take steps to assure that the agencies do not advance a proposed rule that does not consider the needs of small businesses. The proposed rule will disproportionately disadvantage small businesses and increase their compliance costs at a time when they already face significant economic

³ David Sunding and David Zilberman, “The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process,” 2002

⁴ Executive Order 13604: Improving Performance of Federal Permitting and Review of Infrastructure.

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headwinds. WAC looks forward to working with the Committee and to find workable solutions that protect our nation's waters while minimizing unnecessary cost and uncertainty for America's small business community.

Sincerely,

Agricultural Retailers Association
American Coke & Coal Chemicals Institute
American Exploration & Mining Association
American Farm Bureau Federation
American Forest & Paper Association
American Gas Association
American Public Gas Association
American Public Power Association
American Road & Transportation Builders Association
Associated Builders and Contractors
The Associated General Contractors of America
CropLife America
Edison Electric Institute
The Fertilizer Institute
Foundation for Environmental and Economic Progress (FEEP)
Industrial Minerals Association – North America
International Council of Shopping Centers (ICSC)
Interstate Natural Gas Association of America (INGAA)
Irrigation Association
Leading Builders of America
NAIOP, the Commercial Real Estate Development Association
National Association of Home Builders
National Association of Manufacturers
National Association of REALTORS®
National Cattlemen's Beef Association
National Council of Farmer Cooperatives
National Industrial Sand Association
National Mining Association
National Multifamily Housing Council
National Pork Producers Council (NPPC)
National Rural Electric Cooperative Association
National Stone, Sand and Gravel Association (NSSGA)
Portland Cement Association
Public Lands Council
Responsible Industry for a Sound Environment (RISE)
Southern Crop Production Association
Texas Wildlife Association
Treated Wood Council
United Egg Producers

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cc: Members of House Small Business Committee