

Congress of the United States

U.S. House of Representatives

Committee on Small Business

2561 Rayburn House Office Building

Washington, DC 20515-6515

June 28, 2021

The Honorable Michael S. Regan
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Mr. Jaime Pinkham
Acting Assistant Secretary of the Army
for Civil Works
108 Army Pentagon
Room 3E446
Washington, DC 20310-0108

Re: Regulatory Flexibility Act and the Definition of “Waters of the United States” under the Clean Air Act

Dear Administrator Regan and Acting Assistant Secretary Pinkham:

On June 9, 2021, the Environmental Protection Agency (EPA) and the Department of the Army Corps of Engineers (Corps) announced their plans to initiate a new rulemaking process to revise the definition of “waters of the United States” (WOTUS) pursuant to an Executive Order titled “Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis”¹ signed by President Biden on January 20, 2021.

Over the past forty plus years, few federal regulations have generated the amount of concern from, and potential negative impacts on, small businesses as those defining the reach of the Clean Water Act (CWA)² and the definition of WOTUS. For many years, and now as Ranking Member of the Committee on Small Business, we have heard firsthand from countless farmers, ranchers, home builders, and other small business owners about the detrimental effect of a wide geographic scope of CWA jurisdiction and a broad definition of WOTUS. As a result, we respectfully urge you to carefully consider the requirements of the Regulatory Flexibility Act (RFA)³ and the post-pandemic situation of small businesses when reviewing the CWA and any potential revisions to its regulations.

¹ Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021), *available at* <https://www.federalregister.gov/documents/2021/01/25/2021-01765/protecting-public-health-and-the-environment-and-restoring-science-to-tackle-the-climate-crisis>.

² 33 U.S.C. §1251 et seq.

³ 5 U.S.C. § 601 et seq.

I. The Regulatory Flexibility Act

As you may know, the RFA requires federal agencies to assess the impacts of rules on small entities.⁴ Before an agency issues a proposed rule, it must conduct a threshold analysis of the economic impact of the proposed rule. The EPA refers to this threshold analysis as a “screening analysis” in its own RFA compliance guide.⁵ And, underscoring its importance, the EPA’s website even provides a summary of the RFA and its requirements.⁶ In addition, to help agencies comply with the RFA, the SBA’s Office of the Chief Counsel for Advocacy has prepared a compliance guide.⁷

The agency’s threshold analysis informs the agency whether it has sufficient information to certify that a rule does not require it to prepare an initial regulatory flexibility analysis (IRFA) assessing the impacts of the proposed rule on small entities as required by the RFA. If the agency determines that a proposed rule will have a “significant impact on a substantial number of small entities,” it must prepare an IRFA.⁸ An IRFA must describe the small entities that will be affected, the impact of the proposed rule on small entities, the compliance burdens imposed, and any significant alternatives that could minimize any significant economic impacts.⁹ If the agency determines that the proposed rule will not have a “significant impact on a substantial number of small entities,” the agency may certify to such a conclusion and need not prepare an IRFA.¹⁰ The certification statement must include a “factual basis for the certification.”¹¹

The RFA also requires agencies to conduct outreach to small entities when a rule will have a “significant impact on a substantial number of small entities.”¹² Pursuant to § 609(b) of the RFA, as amended by the Small Business Regulatory Enforcement Act (SBREFA),¹³ the agency must convene a Small Business Agency Review (SBAR) panel before the rule is proposed to receive input and recommendations from small entities and to ensure that the agency has carefully considered small entity concerns.¹⁴

⁴ Under the RFA, “small entities” are defined to include all businesses, small not-for-profits and governmental jurisdictions. 5 U.S.C. § 601 (6). This letter will, when referring to all groups, use this “small entities” statutory appellation.

⁵ EPA, GUIDANCE FOR EPA RULEWRITERS: REGULATORY FLEXIBILITY ACT (2006), *available at* <https://www.epa.gov/reg-flex/epas-action-development-process-final-guidance-epa-rulewriters-regulatory-flexibility-act>.

⁶ EPA, SUMMARY OF THE REGULATORY FLEXIBILITY ACT, AS AMENDED BY THE SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT, *available at* <https://www.epa.gov/laws-regulations/summary-regulatory-flexibility-act-amended-small-business-regulatory-enforcement>.

⁷ OFFICE OF ADVOCACY, SBA, A GUIDE FOR GOVERNMENT AGENCIES: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT, *available at* <https://cdn.advocacy.sba.gov/wp-content/uploads/2019/06/21110349/How-to-Comply-with-the-RFA.pdf>.

⁸ 5 U.S.C § 603, 605(b).

⁹ *Id.* at § 605(b).

¹⁰ *Id.* at § 603 (a)-(c).

¹¹ *Id.*

¹² The panel would be composed of a representative of the agency; a representative of the Small Business Administration’s Office of the Chief Counsel for Advocacy; and a representative of the Office of Management and Budget’s Office of Information and Regulatory Affairs. *Id.*

¹³ 42 U.S.C. § 601.

¹⁴ *Id.*

II. The Clean Water Act (CWA or Act)

The objective of the Clean Water Act is to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters”¹⁵ and is accomplished by eliminating “the discharge of pollutants into the navigable waters.”¹⁶ The term “navigable waters” is used throughout the Act. As a result, the definition of “navigable waters” is the term on which the regulatory structure of the CWA turns.

“Navigable waters” is defined in the Act as the “waters of the United States, including territorial seas.”¹⁷ Once a body of water has been determined to be a water of the United States, the permitting requirements of the CWA are triggered; pollutants¹⁸ and dredged and fill materials cannot be discharged without a permit. While the CWA is generally administered by the EPA,¹⁹ the EPA and the Corps jointly administer the Section 404 Program. The definition of navigable waters was generally unhelpful in determining what constituted a water of the United States. Since the Act’s enactment in 1972, regulations and litigation have placed additional and often contradictory notations on the scope of the waters subject to the CWA.²⁰ For example, since 1972, the EPA and the Corps have defined “waters of the United States” in their regulations, but often not identical definitions.²¹ The definitions remain paramount, as it has the ability to encompass wide swaths of the United States. For example, when the 2015 proposed rule was released, a report by the Missouri Farm Bureau estimated that approximately 99 percent of the entire state of Missouri could be impacted by the rule.²² There are similar reports from almost every state.

¹⁵ 33 U.S.C. § 1251(a).

¹⁶ *Id.* at 33 U.S.C. § 1251(a)(1).

¹⁷ *Id.* at 1362(7).

¹⁸ *Id.* at §§ 1311(a), 1342. Pollutants from point sources may not be discharged into a water of the United States unless the discharger has a permit issued pursuant to § 402 of the CWA (colloquially known as “the Section 402 Program” or the “National Pollutant Discharge Elimination System (NPDES) Program”). *Id.* at §§ 1342, 1362(12). “Pollutant” includes sewage, garbage, chemical wastes, biological materials, discarded equipment, sand, cellar dirt and rock. *Id.* at § 1362(6). “Point source” is defined as “any discernable, confined and discrete conveyance” and includes pipes and ditches. *Id.* at § 1362(14).

¹⁹ *Id.* at § 1251(d).

²⁰ Most recently, on April 21, 2020, the EPA and the Corps issued a final defining the scope of waters federally regulated under the Clean Water Act. The Navigable Waters Protection Rule is the second step in a comprehensive, twostep process intended to review and revise the definition of “waters of the United States” consistent with the Executive Order signed on February 28, 2017, “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.” Once effective, it replaces the rule published on October 22, 2019. It was effective on June 22, 2020. 88 Fed. Reg. 22,250, *available at* <https://www.federalregister.gov/documents/2020/04/21/2020-02500/the-navigable-waters-protection-rule-definition-of-waters-of-the-united-states>.

²¹ *Id.* at § 328.3(a)-(8)-(f). When the Corps updated regulation in 1986, the preamble to the rule stated that § 328.3(a)(3) also included waters which “are used as habitat by birds protected by the Migratory Bird Species Treaties...” Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). This became known as the “Migratory Bird Rule.”

²² MISSOURI FARM BUREAU, WOTUS IS PROOF THAT OVERREGULATION DOES EXIST (Jan. 26, 2018)

In 2001, in the case of *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*,²³ the Supreme Court ruled that the Corps' assertion of jurisdiction to isolated "non-navigable" intrastate ponds by virtue of migratory birds using them as a habitat exceeded the authority granted by the CWA.²⁴ In *Rapanos v. United States*,²⁵ the Supreme Court was asked whether ditches or man-made drains that connected to traditional navigable waters were "waters of the United States."²⁶ The plurality opinion said "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' ... are 'adjacent to' such waters and covered by the Act."²⁷ Justice Kennedy's concurring opinion stated that the Corps must establish that a significant nexus exists when it asserts jurisdiction over wetlands adjacent to non-navigable tributaries."²⁸ After the *Solid Waste* and *Rapanos* decisions, the EPA and the Corps issued joint memoranda to provide guidance on the scope of CWA jurisdiction.²⁹ Simply put, for over forty years, there has been disagreement about the intent of Congress in defining "waters of the United States." These disagreements have left small businesses, our nation's best job creators, entangled in bureaucratic delays and red tape.

III. The Small Business Post-Pandemic Landscape

Without question, America needs the strong economic boost that small firms can provide now. At this critical time in our nation's history, we must ensure that they have the environment that allows them to grow, flourish, and support their workers and communities. Studies have shown that small business have been disproportionately affected across all industries during the pandemic,³⁰ they need an environment that provides them with independence – and one that is free from burdensome regulations.

Small business owners are working hard simply to stay afloat and adjust to operating in the complex post-pandemic world. As you review the Clean Water Act and its definition of "navigable waters of the United States," we respectfully urge you to carefully consider the requirements of the Regulatory Flexibility Act and the needs of entrepreneurs and reject regulations that will impose additional burdens as they work to recover, create jobs, and keep our economy moving.

²³ 531 U.S. 159 (2001).

²⁴ *Id.* at 174.

²⁵ 547 U.S. 715 (2006).

²⁶ *Id.* at 729.

²⁷ *Id.* at 742.

²⁸ See Kennedy, J., concurring: A "significant nexus" exists "if the wetlands...significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as 'navigable'." *Id.* at 780.

²⁹ https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

³⁰ *Id.*

Sincerely,



Blaine Luetkemeyer (MO-3)
Ranking Member
Committee on Small Business



Roger Williams (TX-25)
Vice Ranking Member
Committee on Small Business



Jim Hagedorn (MN-1)
Member of Congress



Pete Stauber (MN-8)
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Dan Meuser (PA-9)
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Claudia Tenney (NY-22)
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