



October 15, 2014

Water Docket
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: Docket ID No. EPA–HQ–OW–2011–0880 – Definition of “Waters of the United States” Under the Clean Water Act

These comments are submitted for the record to the U.S. Army Corps of Engineers and the Environmental Protection Agency (the Agencies) on behalf of the National Federation of Independent Business (NFIB) and the NFIB Small Business Legal Center in response to the notice of proposed rulemaking regarding Definition of “Waters of the United States” Under the Clean Water Act (proposed rule) published in the April 21, 2014 edition of the *Federal Register*.

NFIB is the nation’s leading small business advocacy association, representing members in Washington, DC, and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB’s mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States, in varying industries that cover virtually all of the small businesses potentially affected by this proposed rule.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation’s courts through representation on issues of public interest affecting small businesses.

The proposed rule will expand federal jurisdiction under the CWA. This expanded jurisdiction will lead to an increased need for small businesses to apply for permits. Consequently, small businesses will feel a direct economic impact. NFIB believes EPA has incorrectly certified the proposed rule as having no significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (RFA) and its amending laws.

These comments explicitly address the Agencies’ RFA certification. NFIB has concurrently filed separate comments outlining our objections to the Agencies’ decision to interpret the CWA’s jurisdictional provisions broadly, beyond those limits established by Congress and recognized by the U.S. Supreme Court.

An Overview of the Regulatory Flexibility Act

The RFA was passed by Congress and signed into law in 1980 as an acknowledgement that “uniform Federal regulatory and reporting requirements have in numerous instances imposed

unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources.”¹

The law required that all agencies, when issuing proposed and final rules subject to the Administrative Procedure Act, consider the economic impact of their rules on small entities. In addition, agencies must consider alternative regulatory approaches that minimize burden and make their analyses available for public comment.

Under the RFA, agencies are required to perform a screening analysis to determine if there is likely to be a significant economic impact on a substantial number of small entities. If an agency finds that there will not be, then it certifies the rule as having no impact and must explain why. If a proposed rule will have an impact, then the agency must conduct an Initial Regulatory Flexibility Analysis (IRFA). An IRFA consists of six components, per the U.S. Small Business Administration’s Office of Advocacy²:

1. A description of the reasons why the action by the agency is being considered.
2. A succinct statement of the objectives of, and legal basis for, the proposed rule.
3. A description – and, where feasible, an estimate of the number – of small entities to which the proposed rule will apply.
4. A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for preparation of the report or record.
5. An identification, to the extent practicable, of all relevant federal rules that may duplicate, overlap, or conflict with the proposed rule.
6. A description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.

The Small Business Regulatory Enforcement Fairness Act (SBREFA) was passed by Congress in 1996 to give the RFA more effect. Most importantly for the present case, the EPA is required to convene Small Business Advocacy Review (SBAR) panels of small entity representatives when an IRFA is necessary.

Unfortunately, the Agencies have certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. This decision prevented the Agencies from getting quality input on the proposed rule from small businesses before it was published. Given the controversial nature of the rule, NFIB believes the Agencies would have benefitted from the IRFA and SBAR process.

The agencies did a minimal amount of outreach to small businesses before publishing the proposed rule, but this outreach in no way meets the requirements of the RFA. Further, the Agencies’ dismissive response to small business concerns is troubling. If anything, the Agencies should have taken small business concerns more seriously after noting that: “[t]he national industry associations in attendance feel strongly that the EPA should complete a regulatory

flexibility analysis, and complete a formal Small Business Advocacy Review (SBAR) Panel...³ But instead the Agencies swept those concerns aside and concluded that the proposed rule will not impose substantial adverse economic impacts.

NFIB believes that this certification is improper. The following section will examine the Agencies' reasons for the certification and will demonstrate that they lack a factual basis. Accordingly, NFIB believes the Agencies should (1) acknowledge that the proposed rule will have a significant adverse impact on a substantial number of small businesses; (2) withdraw the proposed rule; and (3) wait to propose a new rule until the Agencies have considered less burdensome alternative interpretations of the pertinent CWA jurisdictional provisions.

The Agencies' Certification Lacks a Factual Basis

NFIB believes that the Agencies' certification lacks a factual basis as required by the RFA. The Agencies have pinned their justification for the certification on three arguments: (1) the proposed rule is merely a definitional change having no direct impact on any entity; (2) the proposed rule adds clarity for small businesses and other entities that will make determinations easier—therein reducing burdens on the regulated community; and (3) the proposed rule narrows CWA jurisdiction—therein reducing burdens on small entities.

However, these cited justifications are plainly strained efforts to avoid a full RFA analysis; they represent either a poorly conceived effort to contort reality or a severe disconnection with the real world implications of the proposed rule. The proposed rule will dramatically expand CWA jurisdiction beyond the limits recognized in *Rapanos v. United States* and this will necessarily have a significant adverse economic impact on a substantial number of small entities.

(1) A Definitional Change Can Have Severe Adverse Impacts on Small Businesses

The Agencies' first argument is that the proposed rule only changes the definition of "waters of the United States" and therefore has no direct impact. However, this argument ignores the clearly foreseeable direct impacts of the change. The definitional change has serious real world implications for landowners—including many small businesses and other small entities—owning properties that may now be considered jurisdictional wetlands under the CWA.

As an example, a small business may not currently need a section 404 dredge or fill permit to begin construction on a portion its property, or to make other uses of its land. But, with the new rule interpreting "waters of the United States" more broadly, the Agencies may very well assert jurisdiction over this property *for the first time*. As such, the business would therein be immediately subject to CWA's burdensome permitting process if it should wish to make economically beneficial use of this portion of land. As discussed in more detail below, this immediately devalues the affected property and stands to impose major costs on owners seeking to make use of the affected portions of their property.

(2) The Agencies are Imposing Significant Adverse Economic Impacts on Small Business by Clarifying that they are Interpreting the CWA's Jurisdictional Provisions Broadly

The Agencies' second argument is that the proposed rule would bring clarity to jurisdictional questions. It may well be that the new rule brings some degree of clarity *to the Agencies*, but the Agencies cannot assert that it is giving a benefit to the regulated community by resolving a murky question of statutory construction *categorically against private property owners*. Moreover, the proposed rule is still terribly complicated—meaning that ordinary landowners, including small business landowners, will have to hire costly environmental experts, or legal counsel to determine if it is safe to use questionable portions of their property.

Indeed, several small business owners, with whom we have talked, have indicated they have no idea how the proposed rule would impact them. They have expressed concerns that it vaguely worded and difficult to understand. To be sure, the 88-page proposed rule fails to offer much clarity to ordinary landowners struggling to figure out whether they have been swept-up in the new CWA regime.

Of course, given the severe financial penalties that apply when a landowner makes a mistake, many will still feel compelled to seek formal jurisdictional assessments from the Agencies before making constructive uses of their lands. As a practical matter, the proposed rule still requires a case-by-case determination that can only be done by the Agencies in many cases. As such, NFIB submits that the proposed rule does little to bring clarity here; if anything it gives small business new reasons to question whether their properties may be swept into the CWA jurisdictional regime for the first time. And to the extent the newly proposed rule “clarifies” that a property is jurisdictional, the rule necessarily *burdens* the landowner.

(3) The Proposed Rule Expands Jurisdiction—It Does Not Narrow Anything

The Agencies argue that, compared to the 1986 rule, the proposed rule actually decreases the Agencies' jurisdiction. But it is simply inappropriate to rely on the 1986 rule as a baseline because the U.S. Supreme Court has twice held that the 1986 rule interpreted waters of the United States more broadly than Congress could have intended, or than the Constitution would allow. In the most recent case, *Rapanos v. United States*, the Supreme Court set forth two tests for determining whether a property contains jurisdictional wetlands. In doing so, the Supreme Court set the law on how “waters of the United States” should be defined in 2006. Thus the *Rapanos* tests represent the baseline against which the Agencies must judge the effect of the newly proposed rule.

Rapanos set the outer-limits of what the Agencies can reach under the CWA's jurisdictional provisions. Accordingly, the Agencies can only seriously maintain that the newly proposed rule “narrows jurisdiction” if it may be said that the Agencies are actually disavowing jurisdictional assertions from those outer-limits. But the Agencies have insisted that the new rule is consistent with the *Rapanos* tests. Of course, NFIB disagrees emphatically.

In any event, it is inappropriate for the Agencies to certify that the proposed rule narrows CWA jurisdiction by reference to the 1986 rule because that rule was rendered invalid in the *Rapanos* decision. Thus the ultimate question is whether the newly proposed rule is consistent with or inconsistent with the *Rapanos* tests. NFIB maintains that the new rule extends the CWA's

jurisdictional reach beyond what the *Rapanos* tests allows. If that's the case then the Agencies are expanding—not narrowing—CWA jurisdiction.

In light of the Agencies' erroneous certification, the EPA and Army Corps should withdraw the proposed rule, perform an IRFA and convene an SBAR panel before publishing a new proposed rule.

The Proposed Rule Will Have Direct Adverse Impacts on Many Small Businesses

The Agencies are pursuing a significant expansion of federal CWA jurisdiction, which will necessarily exert more government control over private properties—including many owned by small businesses. As a result, the proposed rule will have severe practical and financial implications for many. This is because a business owner cannot make economically beneficial uses of his or her land once it is considered jurisdictional. And if an owner proceeds with a project on a portion of land that might be considered a water of the U.S., the owner faces the prospect of devastating fines—up to \$37,500 per day.

Consequently, most landowners—especially small businesses—will be forced into keeping their properties undeveloped. If the purported jurisdictional water covers the entire property, the owner may well be denied the opportunity to make any productive or economically beneficial use of the property. In some cases, it may be possible for the owner to obtain a permit to allow for development; however, there is no guarantee a permit will be issued. Moreover, for small business owners and individuals of modest means, such a permit is usually cost prohibitive. Indeed, the Supreme Court noted in *Rapanos* that the average CWA permit costs more than \$270,000.

While multinational corporations with tremendous capital resources might be able to afford such costs, most small businesses are without recourse. Usually, their only option is to swallow their losses and forgo any development plans. Unfortunately, these small businesses suffer greatly because they have usually tied up much of their assets into their real estate investments and can neither afford necessary permits, nor legal representation to challenge improper jurisdictional assertions. And lawsuits challenging these assertions are fact intensive and extremely costly to litigate.

The Proposed Rule Will Also Have Indirect Adverse Impacts on Many Small Businesses

Even in the absence of an affirmative assertion of CWA jurisdiction, landowners will be more hesitant to engage in development projects or to make other economically beneficial uses of their properties if the proposed rule is approved. Landowners are already aware that federal agencies have taken an aggressive posture in making jurisdictional assertions in recent years. And now that the Agencies have proposed this rule, it is apparent that they are taking an even more aggressive approach to jurisdictional issues—a signal that landowners can expect greater enforcement actions in the future.

NFIB already receives questions and concerns from small business owners who are worried about whether the Agencies have jurisdiction over their properties. And we expect to hear from

many more concerned individuals if the proposed rule is finalized. Indeed, under the proposed rule a landowner may have legitimate cause for concern if—at any point during the year—any amount of water rests or flows over a property.

And contrary to the Agencies' assertions, the proposed rule will do little or nothing to make CWA jurisdiction clearer for most properties. The reality is that landowners will have to seek out experts and legal counsel—which gets costly quickly—before developing on any segment of land that occasionally has water overflow. And, the only way to have definitive clarity is to seek a formal jurisdictional determination from the Agencies, which costs more money and further delays development plans.

Of course, in the absence of a formal jurisdictional assessment, property owners proceed at their own risk if they wish to use portions of their property that might be viewed as jurisdictional. Indeed, they face ruinous fines of up to \$37,500 per day if they errantly begin filling in—or dredging—land that the Agencies believe is a jurisdictional water. And for this reason any property that might be viewed as containing a jurisdictional water will be greatly devalued. In addition, even if the property owner is found to be in the right, he or she may use all their assets fighting to prove that their land is not jurisdictional.

Conclusion

NFIB believes that the Agencies have clearly failed to comply with the requirements of the RFA. The Agencies have incorrectly certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. As such, the Agencies should withdraw the proposed rule, perform an IRFA and convene an SBAR panel before considering issuing a new proposal.

We appreciate the opportunity to comment on the proposed rule. Should the Agencies require additional information, please contact the NFIB's manager of regulatory policy, Dan Bosch, at 202-314-2052.

Sincerely,



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NFIB

¹ Regulatory Flexibility Act, Pub. L. No. 96-354

² The RFA in a Nutshell: A Condensed Guide to the Regulatory Flexibility Act. 2010.
http://www.sba.gov/sites/default/files/advocacy/RFA_in_a_Nutshell2010.pdf

³ EPA Summary of the Discretionary Small Entity Outreach for Planned Proposed Revised Definition of “Waters of the United States”. pp. 10. Docket ID: EPA-HQ-OW-2011-0880-1927.