July 27, 2017

The Honorable Scott Pruitt
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

The Honorable Robert M. Speer
Acting Secretary of the Army
Department of the Army
The Pentagon
Washington, DC 20310

Dear Mr. Administrator and Mr. Secretary:


This letter presents comments of the National Federation of Independent Business (NFIB) on the rule proposed by the Environmental Protection Agency (EPA or agency) and the Department of the Army (DA or department) in the notice titled “Definition of ‘Waters of the United States’ -- Recodification of Pre-existing Rules,” 82 Fed. Reg. 34889 (July 27, 2017) (“Notice”). The rule proposed by the Notice revokes the EPA/DA rule issued in June 2015, which construed too broadly the term “waters of the United States” (WOTUS) as used in the Clean Water Act (33 U.S.C. 1362(7)), and replaces that rule with the EPA/DA rule construing WOTUS that immediately preceded the June 2015 rule. The Notice’s Summary stated that agency and the department were “publishing this proposed rule to initiate the first step in a comprehensive, two-step process intended to review and revise the definition of ‘waters of the United States’ consistent with Executive Order 13778 of February 28, 2017.

NFIB concurs with the rule proposed by the Notice (first step), as long as EPA and the Department of the Army proceed promptly with issuance of a notice of proposed rulemaking that construes the term “waters of the United States” for purposes of the Clean Water Act clearly, narrowly, and with maximum respect for the rights of property owners (second step).
NFIB is an incorporated nonprofit association with more than 300,000 members across America, including substantial numbers of landowners affected by the WOTUS rule. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and, in particular, ensures that the governments of the United States and the fifty states hear the voice of small business as they formulate public policies. Modification of the WOTUS rule to reduce the scope of the “waters” over which the federal government claims authority and to respect property rights will free small and independent businesses from the excessively burdensome regulations and requirements for permits that accompany designations of waters of the U.S. and will respect the freedom of those businesses to put their property to productive use.

The Clean Water Act provides generally that, without a government permit issued under the Act, “the discharge of any pollutant by any person shall be unlawful.” (33 U.S.C. 1311(a)). The term “pollutant” means “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water” (33 U.S.C. 1362(6)). The phrase “discharge of a pollutant” includes “any addition of any pollutant to navigable waters from any point source” (33 U.S.C. 1362(12)). And finally, the term “navigable waters” means “the waters of the United States, including the territorial seas” (33 U.S.C. 1362(7)). The Act generally reaches any building, grading, landscaping, dredging, draining, or adding of fill of any sort to “the waters of the United States.” Thus, the central issue in deciding the reach of these Clean Water Act provisions is the meaning of “waters of the United States.”

In *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court had addressed whether four Michigan wetlands, which lay near ditches or man-made drains that eventually emptied into traditional navigable waters, constituted “waters of the United States.” No opinion commanded a majority of the Justices, but five Justices (Scalia, Roberts, Thomas, Alito, and Kennedy) voted to vacate the lower court judgments holding that the wetlands were “waters of the United States” and remanded the case for further proceedings.

Justice Scalia authored the plurality opinion, joined by Chief Justice Roberts, Justice Thomas, and Justice Alito. The Scalia opinion concluded that “waters of the United States” as used in the Clean Water Act “includes only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as “streams[,] . . . oceans, rivers, [and] lakes” and excludes “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.” 547 U.S. at 739 (citation to dictionary omitted). Although the plurality opinion noted that the government’s regulations under the Clean Water Act can extend to waters adjacent to traditionally navigable waters, the plurality’s approach recognized such authority only to the extent that the government can demonstrate a continuous surface connection between the traditionally navigable waters and the adjacent waters for most of the year.
Justice Stevens authored the dissenting opinion, joined by Justices Souter, Ginsburg, and Breyer, concluding that the government's decision to treat the wetlands as "waters of the United States" was "a quintessential example of the Executive's reasonable interpretation of a statutory provision." 547 U.S. at 788.

Justice Kennedy concurred in the Supreme Court's judgment in the case, but declined to join the Scalia opinion, and instead wrote his own. He concluded that the applicable standard should be whether a water or wetland possesses "a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made" and noted that neither the plurality opinion nor the dissenting opinion applied that standard. 547 U.S. at 759 (citation omitted).

The three-way split among the Justices in Rapanos, with no opinion commanding a majority, left federal agencies and the lower courts without clear guidance from the Supreme Court regarding the outer limits of the statutory term "waters of the United States." The EPA and the Department of the Army took advantage of that vacuum in issuing the new Clean Water Rule in June 2015 that gave the phrase an expansive meaning and claimed authority reaching ditches, canals, and even land that is dry most of the year, as long as water runs over that land sometime on its way to interstate waters.

In October 2015, in the case of In re Environmental Protection Agency and Department of Defense Final Rule: Clean Water Rule, 803 F. 3d 804, 809 (6th Cir. October 9, 2015), the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay of the June 2015 Rule. Subsequently, in response to State, industry, and other challenges that jurisdiction over the case lay with a district court rather than with the Sixth Circuit, the Sixth Circuit held that it had jurisdiction, 817 F. 3d 261 (6th Cir. February 22, 2016). The U.S. Supreme Court agreed to review that jurisdictional decision, cert. granted sub nomine National Association of Manufacturers v. Department of Defense, No. 16-299, 137 S. Ct. 811, 2017 WL 126567 (January 13, 2017) and denied a Government request to hold briefing in the case in abeyance (137 S. Ct. 1452, No. 16-299, Order List of April 3, 2017). The Supreme Court will address in the case only the question of which court has jurisdiction and not the question of what "waters of the United States" actually means.

On February 28, 2017, the President issued the Executive Order 13778 on “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule.” Section 1 of the Order established a policy to govern the discretion of federal agencies: "It is in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.” The Order directed the agency and the department to review the June 2015 WOTUS Rule for consistency with that policy and to "publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law.” The Order also directed the
agency and department to consider revising their regulations to define "navigable waters" in a manner consistent with the Scalia opinion in *Rapanos*.

The EPA/DA rule proposed by the Notice is a first step toward implementing Executive Order 13778. While it is a useful first step, restoring temporarily the pre-existing rules does not provide the clear and narrow construction of "waters of the United States" that landowners need for the long run. Landowners need that clear and narrow construction so they can safely put their properties to economically productive uses without fear of unexpected and financially ruinous enforcement actions brought by the government or lawsuits brought by private parties who oppose productive uses.

To execute the Clean Water Act faithfully, carry out the President’s direction, and protect the rights of American landowners, EPA and the Department of the Army must complete properly the second step of the process. Proper completion requires issuance of a new rule that establishes the meaning of "waters of the United States" with full respect for property rights and with Scalia-like common sense that construes the statute with a clear, bright-line test to reach only relatively permanent bodies of water such as streams, oceans, rivers, and lakes. In that second step, it is also important that the agency and the department fully adhere to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601-612) to help ensure proper consideration of small businesses.

NFIB appreciates the opportunity to comment on the proposal of the EPA and the Department of the Army to revoke the Obama Administration’s WOTUS rule, replace it temporarily with the WOTUS rule that immediately preceded it, and issue promptly a further notice of proposed rulemaking to construe the term "waters of the United States" for purposes of the Clean Water Act. NFIB urges the EPA and the Department of the Army to ensure that the ultimate rule construes the term "waters of the United States" for purposes of the Clean Water Act clearly, narrowly, and with maximum respect for the rights of property owners.

Sincerely,

David S. Addington
Senior Vice President and General Counsel