STEVE CHABOT, OHIO
CHAIRMAN

NYDIA M. VELAZQUEZ, NEW YORK
RANKING MEMBER

Congress of the United States
U.S. House of Representatives
Committee on Small Business

2361 Rayburn House Office Building
Washington, DC 20515–6315

May 13, 2015

The Honorable Howard Shelanski
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Administrator Shelanski:

For the reasons set forth in the attached comment letter, I am writing to urge the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) to return the rule[1] to revise the definition of "waters of the United States" under the Clean Water Act (CWA or Act)[2] to the Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) (collectively, the "agencies") for reconsideration. The agencies submitted the draft final rule to OIRA after taking a mere five months to review over one million public comments, many describing the concerns of small businesses, which were submitted to the agencies on the proposed rule.[3] While the agencies have stated that changes were made to the draft final rule in response to concerns raised during the comment period, the definition and the process by which it was developed are so flawed that the defects cannot be cured without reissuing a new proposed rule after fully complying with the requirements of the Regulatory Flexibility Act (RFA).[4]

As the comment letter from the Committee on Small Business (Committee) describes, the agencies failed to conduct the formal outreach to small businesses and analysis of small business impacts required by the RFA. The agencies, pursuant to the RFA, certified that the proposed rule will not have a significant economic impact on a substantial number of small entities.[5] Based on testimony gathered at two hearings[6] and analysis of the proposed rule by the Committee staff, the

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[1] http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201410&RIN=2040-AF30 [hereinafter "draft final rule"].
[2] 33 U.S.C. §§ 1251-1387.
[3] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (Apr. 21, 2014) [hereinafter "proposed rule"].
[4] 5 U.S.C. §§ 601-12.
[5] 79 Fed. Reg. at 22,220. Under the RFA, "small entities" are defined to include small businesses, small not-for-profits and small governmental jurisdictions. 5 U.S.C. § 601(6). The term "small businesses" will be used when referring to "small entities" in this letter.
[6] *Regulatory Overreach: Is EPA Meeting Its Small Business Obligations: Hearing Before the H. Comm. on Small* Business, 113th Cong. (2014); *Will EPA's "Waters of the United States" Rule Drown Small Businesses?: Hearing Before the H.Comm. on Small Business*, 113th Cong. (2014).

agencies' certification is incorrect and suffers from several significant flaws. The proposed rule will increase the geographic scope of CWA jurisdiction and a substantial number of small businesses, including farmers, home builders, and others, will be affected directly.

Had the agencies complied with the RFA, it would have become obvious that the proposed rule does not achieve the stated objective of providing "increased clarity regarding the CWA regulatory definition of 'waters of the United States' and associated definitions and concepts."[7] Furthermore, it would have become abundantly clear that small businesses will be directly affected because the permitting requirements of the CWA are triggered when a water body is determined to be a "water of the United States." However, the EPA did not conduct a Small Business Advocacy Review panel to get input from small businesses, and the agencies did not perform an initial regulatory flexibility analysis assessing the impacts of the proposed rule on small businesses as required by the RFA. Instead, the agencies engaged in arbitrary and capricious rulemaking, and the result is a flawed rule that cannot be saved without the agencies fully complying with the RFA and reproposing a new proposed rule for public comment.

The agencies are under no judicial order to complete this rulemaking by a specific deadline so there is no need to rush to finalize this flawed rule. If the agencies proceed, the result will not be clarification of what is a "water of the United States," but rather significant litigation over the definition as well as the process used to create the rule. Thus, I respectfully request that OIRA return the draft final rule to the agencies for reconsideration.

Sincerely,

Steve Chabot
Chairman

cc: The Hon. Gina McCarthy, Administrator, Environmental Protection Agency
The Hon. Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works), Department of the Army
Claudia Rayford Rodgers, Acting Chief Counsel for Advocacy, Small Business Administration

[7] 79 Fed. Reg. at 22,190.

SAM GRAVES, MISSOURI
CHAIRMAN

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Congress of the United States
U.S. House of Representatives
Committee on Small Business

2361 Rayburn House Office Building
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November 14, 2014

The Hon. Gina McCarthy
Administrator
Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, DC 20460

The Hon. Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
Department of the Army
108 Army Pentagon
Washington, DC 20310-0108

RE: Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (Apr. 21, 2014); Docket ID No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy:

On April 21, 2014, the Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) (collectively, the "agencies") published a proposed rule[1] to revise the definition of "waters of the United States" under the Clean Water Act (CWA or Act).[2] The Proposed Rule will revise the definition of "waters of the United States" for all sections of the CWA. The agencies, pursuant to the Regulatory Flexibility Act (RFA),[3] have certified that the Proposed Rule will not have a significant economic impact on a substantial number of small entities.[4]

In response to the publication of the Proposed Rule, the Committee on Small Business (Committee) has held two hearings to examine concerns with the EPA and Corps' analysis of small business impacts of the Proposed Rule. On May 29, 2014, three small business representatives testified before the Committee and discussed their concerns with the Proposed Rule.[5] On July 30, 2014, then EPA Deputy Administrator Bob Perciasepe testified before the Committee on the EPA's compliance with the RFA.[6]

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[1] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (Apr. 21, 2014) [hereinafter "Proposed Rule"].
[2] 33 U.S.C. §§ 1251-1387.
[3] 5 U.S.C. §§ 601-12.
[4] 79 Fed. Reg. at 22,220. Under the RFA, "small entities" are defined to include small businesses, small not-for-profits and small governmental jurisdictions. 5 U.S.C. § 601(6). These comments will, when referring to all groups covered, use this statutory appellation.
[5] *Will EPA's "Waters of the United States" Rule Drown Small Businesses?: Hearing Before the H. Comm. on Small Business*, 113th Cong. (2014) [hereinafter "WOTUS Hearing"].
[6] *Regulatory Overreach: Is EPA Meeting Its Small Business Obligations?: Hearing Before the H. Comm. on Small Business*, 113th Cong. (2014).

Based on the testimony from the hearings and the Committee staff's analysis, the Committee disagrees with the agencies' certification of the Proposed Rule. Contrary to the agencies' assertions, the Proposed Rule will increase the geographic scope of CWA jurisdiction and small entities will be directly affected. The EPA should have conducted a Small Business Advocacy Review (SBAR) panel to get input from small entities and performed an initial regulatory flexibility analysis (IRFA) assessing the impacts of the Proposed Rule on small entities as required by the RFA. Unfortunately, the agencies did not do so and instead engaged in arbitrary and capricious rulemaking.

Not surprisingly, the flawed rulemaking process has produced a flawed Proposed Rule. Instead of achieving the stated objective of providing "increased clarity regarding the CWA regulatory definition of 'waters of the United States' and associated definitions and concepts,"[7] the Proposed Rule only will increase confusion if finalized as drafted. The proposed regulatory demarcation includes a number of imprecise and vaguely defined terms that do not clearly delineate which waters are subject to the CWA's permitting and other requirements. Had the agencies complied with the RFA, they would have uncovered the flaws in the definition, developed alternatives that would have achieved the agencies' objectives, and ensured greater compliance by the regulated community. Instead, the Proposed Rule, if finalized in its current form, will lead to litigation over the definition as well as the procedures used to craft the rule. To avoid these consequences, the most sensible action would be for the agencies to withdraw the Proposed Rule and only repropose it after fully complying with the requirements of the RFA.

I. The Clean Water Act (CWA or Act)

The objective of the CWA is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters"[8] and is accomplished by eliminating "the discharge of pollutants into the navigable waters."[9] The term "navigable waters" is used throughout the Act. Thus, the definition of navigable waters is the fulcrum upon which the regulatory structure of the CWA pivots.

"Navigable waters" are defined under the Act as "the waters of the United States, including the territorial seas."[10] Once a body of water has been determined to be a water of the United States, the permitting requirements of the CWA are triggered; pollutants[11] and dredged and fill materials[12] cannot be discharged without a permit. While the CWA is generally administered by the EPA,[13] the EPA and Corps jointly administer and enforce the Section 404 Program.[14] The definition of navigable waters, a

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[7] 79 Fed. Reg. at 22,190.
[8] 33 U.S.C. § 1251(a).
[9] *Id.* at § 1251(a)(1).
[10] *Id.* at § 1362(7).
[11] *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 to mean "any discernible, confined and discrete conveyance" and includes pipes and ditches. *Id.* at § 1362(14).
[12] *Id.* at §§ 1311(a), 1344. The permit program for dredged or fill activities is referred to as the "Section 404 Program." "Dredged material" is material that is dredged or excavated; "fill material" is material that is placed in a "water of the United States" including dirt, rock, soil and clay. 33 C.F.R. § 323.2(c), (e).
[13] *Id.* at § 1251(d).
[14] *Id.* at § 1344. States may operate their own Section 402 and 404 permit programs. *Id.* at §§ 1342(b), 1344(g).

statutory tautology, was mostly unhelpful in determining what constituted a water of the United States. Since the Act's enactment in 1972, regulatory actions and litigation have placed additional glosses on the scope of waters subject to the CWA.

II. Regulations, Supreme Court Decisions and the Agencies' Responses

Since the CWA's enactment in 1972, the Corps and EPA have defined "waters of the United States" in their regulations. The Corps' existing regulation[15] (and EPA's virtually identical regulation[16]), which were last codified in 1986, define "waters of the United States" as:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
> (2) All interstate waters including interstate wetlands;
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> > (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
> > (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
> > (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
>
> (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
> (5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;
> (6) The territorial seas;
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.[17]

In addition, the Corps' regulation exempts "prior converted cropland" and "waste treatment systems" and defines the terms "wetlands," "adjacent," "high tide line," "ordinary high water mark," and "tidal waters."[18] These regulations did not dispose of the question of what is a water of the United States.

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[15] 33 C.F.R. § 328.3(a).
[16] 40 C.F.R. § 230.3(s). For ease of reference, these comments will cite the definition used by the Corps, including when referencing the Proposed Rule.
[17] 33 C.F.R. § 328.3(a).
[18] *Id.* at § 328.3(a)(8)-(f). When Corps published the updated the regulation in 1986, the preamble to the rule further stated that § 328.3(a)(3) also included waters:

> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
> b. Which are or would be used as habitat by other migratory birds which cross state lines; or
> c. Which are or would be used as habitat for endangered species; or
> d. Used to irrigate crops sold in interstate commerce.

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" and the Corps' authority to assert CWA jurisdiction on this basis was to be challenged in court, ultimately landing at the Supreme Court.

Given the impact of a determination that a body of water falls within the CWA's jurisdiction, it is not surprising that the issue made it to the Supreme Court.

In 2001, the Supreme Court was asked whether CWA jurisdiction extended to isolated "nonnavigable" intrastate ponds by virtue of migratory birds using them as habitat. The Court, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*[19] ("*SWANCC*"), concluded that Corps' assertion of jurisdiction on these grounds exceeded the authority granted by the CWA.[20] The Court determined that the term "navigable" in the CWA must be given some effect and the term would be rendered meaningless if it concluded that isolated, intrastate ponds that served as habitat for migratory birds were "navigable waters."[21]

Five years later, in *Rapanos v. United States*[22] ("*Rapanos*"), the Supreme Court placed a further gloss on the definition and regulations. *Rapanos* concerned whether wetlands near ditches or man-made drains that eventually connected to traditional navigable waters were "waters of the United States."[23] *Rapanos* did not result in a majority opinion in which five justices agreed to an interpretation of the CWA. Justice Scalia, writing for the plurality, concluded that "*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."[24] Justice Kennedy, while concurring in the judgment, developed a different basis for determining what constitutes a water of the United States by concluding that the Corps must establish that a "significant nexus" exists when it asserts jurisdiction over wetlands adjacent to non-navigable tributaries.[25]

Following both *SWANCC* and *Rapanos*, the agencies issued joint memoranda to provide their field staff and the public with guidance on the scope of CWA jurisdiction in light of the Supreme Court's decisions.[26] The agencies currently operate under the 1986 rules as further interpreted by the guidance contained in joint memoranda published in 2003 and 2008.

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[19] 531 U.S. 159 (2001). At issue was whether jurisdiction extended to an abandoned sand and gravel pit with old trenches that evolved into permanent and seasonal ponds under the Migratory Bird Rule. *Id.* at 162-63.
[20] *Id.* at 173-74.
[21] *Id.* at 171-72.
[22] 547 U.S. 715 (2006).
[23] *Id.* at 729.
[24] *Id.* at 742. The plurality opinion also concluded that "waters of the United States" only includes "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features'" such as streams, rivers, lakes and oceans and does not include channels that flow intermittently, ephemerally or periodically after rain. *Id.*
[25] *Id.* at 779. 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.
[26] In 2003, the agencies issued a joint memorandum that provides guidance on CWA jurisdiction over isolated waters in light of *SWANCC*. *See* Appendix A of the Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991, 1995-98 (Jan. 15, 2003) [hereinafter "2003 Guidance"]. In 2007, the agencies issued a joint memorandum that provided guidance on the scope of CWA jurisdiction following the *Rapanos* decision. EPA AND CORPS, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES (2007). The 2007 guidance was superseded by a joint memorandum issued by the EPA and the Corps in December 2008, that was revised based upon public comments received on the 2007 guidance. EPA AND CORPS, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES (2008) [hereinafter "2008 Guidance"].

The 2003 Guidance states that the agencies will not assert jurisdiction over isolated, intrastate waters that are non-navigable where the sole basis for doing so is a factor in the Migratory Bird Rule.[27] It notes that other factors in 33 C.F.R. § 328.3(a)(3) for asserting jurisdiction over isolated waters that are both intrastate and non-navigable were called into question by the *SWANCC* decision, and field staff should seek headquarters' approval prior to asserting jurisdiction over those waters.[28]

The 2008 Guidance states that the agencies will assert CWA jurisdiction over: 1) traditional navigable waters (TNWs)[29] and their adjacent wetlands, including those that do not have a continuous surface connection to TNWs;[30] 2) relatively permanent non-navigable tributaries of TNWs;[31] and 3) adjacent wetlands with a continuous surface connection to relatively permanent non-navigable tributaries of TNWs.[32] In addition, the guidance states that "[t]he agencies will assert jurisdiction over non-navigable, not relatively permanent tributaries and their adjacent wetlands where such tributaries and wetlands have a significant nexus to a [TNW]" and describes the significant nexus analysis.[33] Finally, the guidance states that the agencies generally will not assert jurisdiction over swales or erosional features and "ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water[.]"[34] Absent this guidance, any or all of the waters excluded in the guidance could (except for those specifically addressed in *SWANCC* and *Rapanos*) fall within the current regulatory definition.

As evidenced by the decisions in *SWANCC* and *Rapanos*, the current regulatory definitions did not resolve the question of what is a water of the United States. The decisions of the Court have not provided definitive demarcations either. Finally, the agency guidance issued subsequent to the Court's decision failed to resolve the issue. In an attempt to increase clarity as to which waters are subject to CWA jurisdiction, the agencies have issued a Proposed Rule that would revise the regulatory definition of "waters of the United States" for all sections of the CWA.[35]

III. The Proposed Rule

The Proposed Rule will revise the definition of "waters of the United States" in both the Corps and EPA regulations in 11 separate parts of the Code of Federal Regulations.[36] The Proposed Rule defines a "water of the United States" as:

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[27] 2003 Guidance, *supra* note 26, at 1996.
[28] *Id.*
[29] TNWs include "'[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide[.]'" 2008 Guidance, *supra* note 26, at 4-5 (citing 33 C.F.R. § 328.3(a)(1); 40 C.F.R. § 230.3(s)(1)).
[30] *Id.* at 4.
[31] *Id.* at 6. Relatively permanent tributaries are those with flow year-round or continuous flow at least seasonally (e.g. typically three months). *Id.* It does not include ephemeral tributaries which only flow after rain or intermittent streams that do not flow year-round or continuously at least seasonally. *Id.* at 7.
[32] *Id.* at 6. A continuous surface connection is one where there is not a separation by uplands, a berm, dike or a similar feature. *Id.* at 6. It exists where a wetland directly abuts a relatively permanent, non-navigable tributary. *Id.* at 7.
[33] *Id.* at 8. "A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters." *Id.*
[34] *Id.*
[35] 79 Fed. Reg. at 22,188.
[36] *Id.* at 22,262-74.

(a) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 et. seq. and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term "waters of the United States" means:
(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
(2) All interstate waters, including interstate wetlands;
(3) The territorial seas;
(4) All impoundments of waters identified in paragraphs (a)(1) through (3) and (5) of this section;
(5) All tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
(6) All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this section; and
(7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section.[37]

The Proposed Rule excludes waste treatment systems, prior converted croplands, two types of ditches, and certain geographic features from the definition of "waters of the United States."[38] The Proposed Rule then goes on to define the terms: "adjacent;" "neighboring;" "riparian area;" "floodplain;" "tributary;" "wetlands;" and "significant nexus."[39] As will be made clear later in these comments, those additional definitions are crucial elements in determining the scope of the term "waters of the United States." While the Proposed Rule retains some of the existing regulation's structure, it differs in critical ways from the existing rule and guidance.

First, under the Proposed Rule, ***all waters and wetlands*** that are adjacent to TNWs, interstate waters and wetlands, the territorial seas, impoundments, and tributaries are "waters of the United States."[40] In comparison, under the extant rule and 2008 Guidance, ***only certain adjacent wetlands*** were categorically deemed "waters of the United States."[41] Second, the definition of the term "adjacent" is different in the Proposed Rule than the existing regulation. The proposed definition of "adjacent" departs from the existing one by substituting "[w]aters, including wetlands" for

[37] Proposed 33 C.F.R. § 328.3(a), 79 Fed. Reg. at 22,262-63.
[38] *Id.* at § 328.3(b), 79 Fed Reg. at 22,263. Ditches "that are excavated wholly in uplands, drain only uplands, and have less than perennial flow" and those "that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4)[,]" are not "waters of the United States." *Id.* at § 328.3(b)(3)-(4), 79 Fed. Reg. at 22,263. The geographic features that are not "waters of the United States" include: artificial irrigated areas that would revert to upland if irrigation ceased; artificial lakes or ponds created on dry land and used exclusively for stock watering, irrigation, settling basins or rice growing; artificial reflecting or swimming pools created on dry land; small ornamental waters created on dry land; water-filled depressions created incidental to construction activity; groundwater; and gullies, rills and non-wetlands swales. *Id.* at § 328.3(b)(5), 79 Fed. Reg. at 22,263.
[39] *Id.* at § 328.3(c), 79 Fed. Reg. at 22,263.
[40] *Id.* at § 328.3(a)(1)(6), 79 Fed. Reg. at 22,263.
[41] 2008 Guidance, *supra* note 26, at 5-7 interpreting 33 C.F.R. § 328.3(a)(7), (c). The guidance states that the agencies only will assert categorical jurisdiction over wetlands adjacent to TNWs or adjacent wetlands that have a continuous surface connection with a relatively permanent non-navigable tributary. *Id.* at 5-7.

"wetlands."[42] Third, the terms "neighboring," "riparian area," "floodplain," "tributary," and "significant nexus" are defined for the first time under the Proposed Rule.[43] These terms are not defined in the existing rule or guidance documents. Finally, the Proposed Rule changes the list of geographic features that are expressly excluded from the definition of "waters of the United States."[44] Unfortunately, the proposed alterations to the existing regulation do not resolve the question of which water bodies are subject to the jurisdiction of the CWA.

IV. The Rule Is Confusing and Expands the Jurisdictional Scope of the CWA

While the agencies claim that the Proposed Rule will clarify the scope of "waters of the United States" in comparison to the current rule and 2003 and 2008 Guidance, the Proposed Rule falls well short of achieving this objective. Many of the definitions in the Proposed Rule lack precision and are so vague that it is unclear which waters would or would not be covered. More importantly, the Proposed Rule will expand the jurisdictional scope of the CWA which will affect entities other than the agencies by forcing them to obtain permits that they would not have needed under the current rule and guidance.

A. The Rule Does Not Clarify What Is a Water of the United States and the Absence of Clarity Will Impose Significant Burdens on Small Entities

According to the EPA and the Corps, a primary purpose of the Proposed Rule is to clarify the definition of what constitutes a water of the United States.[45] Yet an examination of the Proposed Rule shows anything but clarity. The Proposed Rule requires significant cross-referencing of terms. In and of itself, such cross-references are not problematic although clearly not a simplification. Where the agencies do not meet their objective is that many of the cross-references are either vague or tautological. Thus, the Proposed Rule perpetuates and exacerbates rather than eliminates the problems with the current rules.

For example, in order to determine whether a water or wetland is adjacent, one must refer to five separate definitions; those terms are "adjacent," "neighboring," "riparian area," "floodplain," and "tributary." The Proposed Rule states that "[a]ll waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this section" are waters of the United States.[46] Waters listed in (a)(1) through (5) include: 1) TNWs; 2) interstate waters and wetlands; 3) the territorial seas; 4) impoundments of TNWs, interstate waters and wetlands, the territorial seas and tributaries; and 5) all tributaries.[47] "Adjacent" is defined as "bordering, contiguous or neighboring."[48] The term "neighboring" is defined to include "waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface connection to such a jurisdictional water."[49] "Riparian area"

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[42] *Compare* Proposed § 328.3(c)(1) ("Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent waters.'") *with* 33 C.F.R. § 328.3(c) ("Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'").
[43] Proposed 33 C.F.R. § 328.3(c), 79 Fed. Reg. at 22,263.
[44] *Id.* at § 328.3(b), 79 Fed. Reg. at 22,263.
[45] 79 Fed. Reg. at 22,190.
[46] Proposed 33 C.F.R. § 328.3(a)(6), 79 Fed. Reg. at 22,263.
[47] *Id.* at § 328.3(a)(1)-(5), 79 Fed. Reg. at 22,262.
[48] *Id.* at § 328.3(c)(1), 79 Fed. Reg. at 22,263.
[49] *Id.* at § 328.3(c)(2), 79 Fed. Reg. at 22,263. Note that this definition also introduces its own new terminology – "jurisdictional water."

is defined as "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area."[50] "Floodplain" is defined as "an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climactic conditions and is inundated during periods of moderate to high flows."[51] The term tributary is defined as:

> [A] water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (b)(3) or (4) of this section.[52]

Cross-referencing these five separate definitions ("adjacent," "neighboring," "riparian area," "floodplain," and "tributary") that are either vague or tautological does not clarify which adjacent waters are waters of the United States. Instead, it makes the determination more complex.

For instance, the definition of "neighboring" includes the ambiguous phrase "waters with a shallow subsurface hydrologic connection." It is unclear if "waters with a shallow subsurface hydrologic connection" are the same thing as groundwater or something different. No quantum of measure is provided to determine what depth(s) would be considered shallow or how shallowness is to be measured.[53] The definitions of "riparian area" and "floodplain" are tautological. Both definitions include vague descriptions of "areas" and provide no metrics that could be used to determine how far an area extends geographically.

The Proposed Rule also does not clarify which "other waters" would be determined to be "waters of the United States" following a fact-specific significant nexus analysis. A "significant nexus" is one that "significantly affects the chemical, physical or biological integrity of a water."[54] The definition goes on to unhelpfully describe "significant" as "more than speculative or insubstantial."[55] Because the definition of significant is totally imprecise, it is completely unclear how the agencies will

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[50] *Id.* at § 328.3(c)(3), 79 Fed. Reg. at 22,263. The definition further states that "[r]iparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems." *Id.*
[51] *Id.* at § 328.3(c)(4), 79 Fed. Reg. at 22,263.
[52] *Id.* at § 328.3(c)(5), 79 Fed. Reg. at 22,263.
[53] The shallow end of a pool may be two-feet deep. The agencies are probably thinking something less than this but there is no way of knowing.
[54] *Id.* at § 328.3(c)(7), 79 Fed. Reg. at 22,263.
[55] *Id.*

determine if a nexus is significant. Ostensibly, an effect that is slightly more than speculative or insubstantial could be deemed "significant" under this vague definition.

The imprecision of the definitions in the Proposed Rule do not clarify whether a particular water body is a "water of the United States." For a large business with access to lawyers and civil engineers deciphering these terms would be very problematic. For small entities such as a rural town government, a farmer or a home builder, the determination of whether a water body is an adjacent water under the Proposed Rule will be well nigh impossible due to the inherent vagueness. This inherent vagueness portends significant civil liability if the small entity is incapable of ascertaining whether it needs a permit under §§ 402 or 404 of the CWA.[56]

Since agencies are drafting rules designed to force people to change their behavior, it is a basic premise that the law (in this case, a regulation) should be sufficiently clear so that those subject to the regulation can modify their behavior to comply.[57] If an agency is writing a rule, the outcome of which is so unclear that people cannot determine how to comply, then the rulemaking process must have been arbitrary and capricious because the end result will be something the agency would not have intended – non-compliance.[58]

B. The Rule Expands the Jurisdictional Scope of the CWA

While the agencies assert that the scope of CWA jurisdiction under the Proposed Rule is narrower, an examination of the Proposed Rule's regulatory text shows that jurisdiction potentially will expand. The expansion of jurisdiction is important because, in contrast to the agencies' assertions, such expansion will have an effect, probably significant, on small entities.

Take the definition of the term "tributary;" it is all encompassing. Nearly every kind of water body, wetland, lake, pond, river, stream, impoundment, canal, or ditch, could be a "tributary" under the

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[56] The EPA is authorized to issue administrative orders, seek injunctive relief or impose civil penalties. 33 U.S.C. § 1319(a),(b),(d). Small entities may face civil penalties of up to $37,500 per day for each CWA violation. 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4. Criminal penalties can also be imposed if the government can prove that the defendant acted negligently or knowingly. *Id.* at § 1319(c). The Act authorizes enforcement of its provisions through citizen suits. 33 U.S.C. § 1365.

[57] *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."); *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . . ."); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.").

[58] *See FCC*, 132 S. Ct. at 2317-20 (FCC indecency policy held void for vagueness because it failed to provide television broadcasters fair notice that a fleeting expletive or a brief nudity shot could be actionably indecent); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-69 (2012) (Department of Labor's interpretation of its ambiguous overtime regulations was not owed deference because new interpretation did not provide regulated parties fair warning of prohibited conduct); *see also Talk Am., Inc. v. Mich. Bell. Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) ("[D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.); *Elgin Nursing and Rehabilitation Center v. HHS*, 718 F.3d 488, 494 (5th Cir. 2013).

proposed definition.[59] This broad definition will expand jurisdiction of the CWA to a plethora of water bodies not currently subject to the CWA.[60]

That expansion is compounded by the waters that will be covered under the definition of "significant nexus."[61] The 2008 Guidance states that, "[a] significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the ***chemical, physical and biological integrity*** of downstream traditional navigable waters."[62] In contrast, the Proposed Rule states that a significant nexus is found if "a water, including wetlands, either alone or in combination with other similarly situated waters in the region . . . , significantly affects the ***chemical, physical, or biological integrity***" of a traditional navigable water, interstate water or wetland, or territorial sea.[63] Changing the conjunction from "and" to "or" is a potentially substantial expansion of CWA jurisdiction because the Proposed Rule's "significant nexus" test may be satisfied if only one significant effect exists.

The aforementioned analysis only represents two examples of the agencies increased expansion of the potential applicability of the CWA to waters not currently subject to its requirements. By the operations of the Act, this will necessitate small entities to obtain permits that they would not have otherwise needed to get. Most of those entities are likely to be small and thus would have benefited from the agencies' compliance with the RFA that would have uncovered significant economic impacts and flaws with the Proposed Rule's imprecise definitions.

V. The Agencies Failed to Comply with the RFA

The RFA, by focusing an agency's attention on the vast majority of entities subject to a rule, is designed to help the agency craft a better rule. By incorrectly certifying the Proposed Rule, the agencies prevented themselves from obtaining input needed to craft a more rational rule better suited to achieving cleaner water – their ultimate objective under responsibilities delegated to them by Congress.

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[59] Proposed 33 C.F.R. § 328.3(c)(5), 79 Fed. Reg. at 22,263. For example, the definition of "tributary" includes ditches. *Id.* Ditches traverse urban, suburban and rural areas across the country; therefore, the inclusion of ditches in the definition of "tributary" will significantly expand the definition of "waters of the United States." Although the Proposed Rule excludes two types of ditches ("[d]itches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow" and "ditches that do not contribute flow, either directly or through another water, to a [TNW, interstate water or wetland, territorial sea, or impoundment]"), both exclusions likely would not exempt the majority of ditches from the CWA's requirements. *Id.* at § 328.3(b)(3)-(4), 79 Fed. Reg. at 22,263. It's unclear what kind of ditches would qualify for the uplands ditch exemption – perhaps a moat at the top of a hill – or the other ditch exemption since many ditches may contribute indirect or direct flow to a TNW, interstate water or wetland, territorial sea or impoundment.

[60] The proposed definition states that a "tributary" is a "water physically characterized by the presence of a bed and banks and ordinary high water mark . . . which contributes flow either directly or through another water, [TNW, interstate water, territorial sea, or impoundment]." *Id.* at § 328.3(c)(5), 79 Fed. Reg. at 22,263. In contrast, the 2008 Guidance only describes tributaries as waters that "carry flow directly or indirectly into a [TNW]." 2008 Guidance, *supra* note 26, at 6 n.24. Defining "tributary" to include any water that contributes, rather than carries, flow to interstate waters and wetlands, territorial seas, and impoundments will significantly increase the number of waters that are deemed "waters of the United States" because contributes connotes a lesser connection than carries when referring to water.

[61] Proposed 33 C.F.R. § 328(c)(7), 79 Fed. Reg. at 22,263.

[62] 2008 Guidance, *supra* note 26, at 8 (emphasis added).

[63] Proposed 33 C.F.R. § 328(c)(7), 79 Fed. Reg. at 22,263 (emphasis added).

A. The RFA's Requirements

The RFA requires agencies to assess the impacts of rules on small entities. 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 "screening analysis" in its own RFA compliance guide.[64] The threshold analysis informs an agency whether or not it has enough information to be able to certify that a rule does not require it to prepare an IRFA.

If the agency determines that the proposed rule will have a "significant economic impact on a substantial number of small entities," it must prepare an IRFA.[65] 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.[66] If the agency determines the proposed rule will not have a "significant economic impact on a substantial number of small entities," the agency head may certify to such a conclusion and need not prepare an IRFA.[67] The certification statement must include a "factual basis for the certification."[68]

The RFA also requires agencies to conduct outreach to small entities when a rule will have a "significant economic impact on a substantial number of small entities."[69] EPA has an additional outreach requirement for any proposed rule that requires preparation of an IRFA. Pursuant to § 609(b) of the RFA, covered agencies, including EPA,[70] must convene a SBAR panel[71] before the rule is proposed to receive input from small entities.[72]

B. The Agencies Incorrectly Certified the Proposed Rule

Pursuant to § 605 of the RFA, the EPA and Corps certified that the Proposed Rule would not have a "significant economic impact on a substantial number of small entities."[73] However, the certification is incorrect and suffers from several fatal flaws, including: lack of a factual basis as required by § 605; reliance on judicial interpretations of the RFA for the agencies' conclusory certification that are inapt for the Proposed Rule; and an irrelevant conclusion, at least with respect to RFA applicability, that the Proposed Rule is size neutral and the factors cannot be scaled to a specific entity.

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[64] EPA, FINAL GUIDANCE FOR EPA RULEWRITERS: REGULATORY FLEXIBILITY ACT 9-30 (2006) [hereinafter "EPA RFA Guidance"], *available at* http://www.epa.gov/sbrefa/documents/Guidance-RegFlexAct.pdf.
[65] 5 U.S.C. §§ 603, 605(b).
[66] *Id.* at § 603(a)-(c).
[67] *Id.* at § 605(b).
[68] *Id.*
[69] *Id.* at § 609(a).
[70] *Id.* at § 609(d).
[71] The panel is comprised of a representative of the EPA, a representative of the Small Business Administration's Office of the Chief Counsel for Advocacy and a representative from the Office of Management and Budget's Office of Information and Regulatory Affairs. *Id.* at § 609(b).
[72] *Id.* The panel provides small entity representatives (SERs) with a draft of the proposed rule as well as any analysis of small entity impacts and regulatory alternatives, and collects advice and recommendations from the SERs. The panel then must report on the SERs' comments and its findings. The report is made part of the rulemaking record. *Id.*
[73] 79 Fed. Reg. at 22,220.

1. The Agencies Failed to Provide a Factual Basis for the Certification

To certify that a proposed rule will not have a significant economic impact on a substantial number of small entities, there must be an adequate factual basis for such a conclusion. In *North Carolina Fisheries Association, Inc. v. Daley* (*"North Carolina Fisheries"*), the court found that the National Marine Fisheries Service's statement that the rule in question was no different than the previous year's rule did not provide a factual basis to support the certification as required by the RFA.[74]

In the Proposed Rule, the agencies' statements in the certification similarly fail to meet the statutory requirement. The agencies merely state that the Proposed Rule is narrower than existing regulation.[75] It is quite possible, that the original rule had a significant impact and the Proposed Rule while having lesser impact – still may be significant. Thus, the statement about the rule being narrower completely misses the point and fundamentally is irrelevant to the determination of whether to do an IRFA just as the assertion that a rule in 1997 was identical to a 1996 rule was irrelevant in the RFA calculus in *North Carolina Fisheries*.

The agencies, to bolster their certification, claim that the economic effects of the Proposed Rule are not significant in comparison to the 1986 codified rule. This rationale also is problematic because it uses a baseline that is not currently in effect since the scope of the 1986 rule has been modified by the 2003 and 2008 Guidance. The inappropriateness of using the 1986 rule is belied by the agencies failure to use that as a basis for preparing a Regulatory Impact Analysis (RIA) required by Executive Order 12,866.[76] In the RIA, the agencies state that using the agencies' field practice following the 2008 guidance as the baseline is "the most useful for purposes of comparing the potential outcome of the rule."[77] In other words, to measure costs and benefits of the rule the agencies do not use the regulatory language currently extant but rather the gloss placed on the regulation by the 2003 and 2008 Guidance. This appears to give a different estimate of costs than if the 1986 regulation was used.[78] Yet, in determining costs imposed by the new rule on small entities, the agencies used the existing regulation as the baseline without any explanation of why there should be a difference in the procedure used to estimate costs[79] under the RIA and the RFA.

Presumably, the only reason the agencies adopted a different standard in their threshold RFA analysis (if it can be called that) is that the impacts of the Proposed Rule in comparison to that of the extant regulation are lower than that of the Proposed Rule compared to the 2008 Guidance. Without adequate explanation for why the agencies took this approach, the use of the existing rule to measure impacts on small entities does not meet the factual basis for certification as elucidated by *North*

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[74] 16 F. Supp. 2d 647, 652 (E.D. Va. 1997). "A simple conclusory statement that, because the quota was the same in 1997 as it was in 1996, there would be no significant impact, is not an analysis." *Id.* at 653.

[75] 79 Fed. Reg. at 22,220. Of course, the Committee does not concur with the conclusion as these comments have already demonstrated.

[76] 58 Fed. Reg. 51,735 (Oct. 4, 1993). The Executive Order requires all executive branch agencies (which includes EPA and the Corps) to prepare a RIA for major rules. The RIA requires an assessment of costs and benefits of a rule which necessitates adopting a baseline for measuring the change. It is important to note that denomination as a major rule has no consequence on compliance with the RFA.

[77] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND UNITED STATES ARMY CORPS OF ENGINEERS, ECONOMIC ANALYSIS OF PROPOSED REVISED DEFINITION OF WATERS OF THE UNITED STATES 2 n.1 (2014) [hereinafter "Regulatory Impact Analysis" or "RIA"].

[78] Using field practices following issuance of the 2008 Guidance, the agencies found that CWA jurisdiction will increase by approximately three percent. *Id.* at 2.

[79] Of course, the agencies may be under the misimpression that a cost is not a cost (with apologies to Gertrude Stein).

Carolina Fisheries.[80] Therefore, the certification is inadequate and, as will be shown later, constitutes arbitrary and capricious rulemaking.

2. Judicial Interpretations of the RFA Do Not Support the Conclusion that the Rule Only Indirectly Affects Small Entities

The agencies also appear to have concluded that small entities are affected only indirectly by the Proposed Rule because they cite a series of cases where the United States Court of Appeals for the District of Columbia ("D.C. Circuit") has concluded, for the purposes of RFA compliance, that an agency need not assess the effects of a regulation on small entities or on a particular group of small entities if they are not subject to the regulation.[81] However, the agencies are incorrect and the regulations that were challenged in those cases can be distinguished from the Proposed Rule.

In *Mid-Tex Elec. Coop., Inc. v. FERC*, the D.C. Circuit determined that the Federal Energy Regulatory Commission (FERC), which had promulgated a rule that regulated the wholesale rates of electric utilities, was not required to assess the rule's effects on retail customers of the utilities since FERC was only regulating wholesale sales.[82] Similarly, in *Cement Kiln Recycling Coalition v. EPA*, the D.C. Circuit concluded that the EPA was not required to assess the effects of a rule that regulated the emissions of hazardous waste combustors on hazardous waste generators because only hazardous waste combustion was being regulated.[83] This precept, that the RFA applies only to situations in which an agency directly imposes regulatory burdens on entities, was followed in a number of cases concluding that the development of national ambient air quality standards (NAAQS) under the Clean Air Act did not impose any regulatory burdens on small entities since activities of those entities were not circumscribed by EPA's development of NAAQs but rather in rules imposed by states to achieve the NAAQS.[84] The situation of the Proposed Rule is quite distinguishable from the inapplicability of the RFA to retail electric customers, hazardous waste generators or the adoption of NAAQS by EPA.

The Proposed Rule will change the scope of waters subject to the jurisdiction of the CWA. That means small entities will have to obtain permits under §§ 402 and 404 of the CWA in situations in which they previously would not have needed to seek permits for their activities. Thus, the scope of a small entity's activities is circumscribed by the rule which is quite distinct from the indirect effects cases cited by the agencies in which the rules imposed no potential limitations on the actions of small entities.

Nor is the agencies' argument that the Proposed Rule only indirectly regulates small entities any more availing because small entities would have to subsequently obtain a permit in a later proceeding. In *National Ass'n of Home Builders v. Army Corps of Eng'rs*[85] ("*Home Builders*"), the Corps' issuance

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[80] Although not provable, it appears that the use of a different baseline for RFA compliance was undertaken to avoid EPA's need to comply with the prepublication requirement to seek small entity input as required by § 609(b) of the RFA. Use of such analysis to avoid a statutory requirement appears to be the epitome of arbitrary and capricious decisionmaking.

[81] 79 Fed. Reg. at 22,220.

[82] 773 F.2d 327, 340-43 (D.C. Cir. 1985).

[83] 255 F.3d 855, 868-69 (D.C. Cir. 2001).

[84] *Michigan v. EPA*, 213 F.3d 663, 688-89 (D.C. Cir. 2000); *American Trucking Ass'n v. EPA*, 175 F.3d 1027, 1043-45 (D.C. Cir. 1999), *aff'd in part and rev'd in part on other grounds sub nom.*, *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001).

[85] 417 F.3d 1272 (D.C. Cir. 2005).

of certain nationwide permits (NWPs) under § 404 of the CWA were challenged.[86] The Corps reduced the number of acres for which it would issue a NWP without providing public notice and an opportunity to comment.[87] The Corps argued that modification in scope of the NWP did not require compliance with the RFA because the modification was not a rule since the only time an entity would be affected was when it had to apply for an individual permit.[88] The D.C. Circuit roundly rejected that argument. The court first held that the modification of the standards for obtaining the NWP was a rule since entities would have to modify their behavior (which permit to seek) based on the change.[89] The court then determined that small entities were directly affected because they would need to modify their projects to meet the new NWP or obtain an individual permit.[90]

The logic of the court in *Home Builders* could not be more clear in the Proposed Rule. By changing the fulcrum on which the CWA rests, the agencies are either permitting or delimiting activity that prior to the change would not have fallen within the scope of the CWA. As a result, small entities may be required to obtain permits, that prior to the change, they would not have. And the *Home Builders* court forecloses the argument that obtaining permits saves the agencies from the rule-like nature of imposing obligations directly on small entities.[91] As a result, the definitions changing the scope of the CWA by regulation requires compliance with the RFA – either preparation of an IRFA or the provision of an adequately based certification. The agencies have done neither.

3. The Agencies Have Engaged in Arbitrary and Capricious Decisionmaking

The agencies contend that they need not comply with the RFA because the Proposed Rule does not impose any disparate regulatory burdens on small entities due to the fact that the hydrologic factors utilized in demarcating waters of the United States are not related to the size of an enterprise.[92] This reasoning badly misconstrues the RFA and actually leads the agencies into the territory of arbitrary and capricious rulemaking because of the failure to consider all relevant factors mandated by Congress.[93] This conclusion derives from examining an analogous statute – the National Environmental Policy Act (NEPA).

NEPA mandates that a federal agency must prepare an environmental impact statement (EIS) for any major action significantly affecting the environment.[94] The EIS requires the agency to identify

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[86] *Id.* at 1277-78. The Corps may issue general (state, regional or nationwide) permits for similar activities that when performed separately will cause only minimal environmental effects. 33 U.S.C. § 1344(e). General permits may not be issued for a period of more than five years. *Id.* The Corps may also issue "individual permits" on a case-by-case basis. *Id.* at § 1344(a).

[87] 417 F.3d at 1276-77, 1284-86. This meant that entities would have to seek and comply with more detailed rules on individual permits rather than relying on their actions falling under the general categorical nature of a NWP.

[88] *Id.* at 1282, 1285.

[89] *Id.* at 1284. "[Entities] must either modify their projects to conform to the NWP thresholds and conditions (as the Corps contemplates they will do) or refrain from building until they can secure individual permits. The NWPs therefore affect the [entities'] activities in a 'direct and immediate' way." *Id.*

[90] *Id.* at 1284-85.

[91] The analysis of the agencies is particularly galling since the *Home Builders* involved one of the agencies that issued the Proposed Rule.

[92] Specifically, the agencies stated in the Proposed Rule that "the question of CWA jurisdiction will be informed by the tools of statutory construction and the geographical and hydrological factors identified in *Rapanos* . . . which are not factors readily informed by the RFA." 79 Fed. Reg. at 22,220.

[93] *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

[94] 42 U.S.C. § 4332(2)(C). If the major federal action will not significantly affect the environment, the agency may make a finding of no significant environmental impact backed by an environmental assessment. 40 C.F.R. § 1501.4(e).

the adverse environmental consequences of its actions and analyze mitigative steps to ameliorate such consequences.[95] Once the agency has prepared an adequate EIS, nothing in NEPA mandates that an agency select a particular outcome; NEPA is an analytical not action-forcing statute.[96] However, it is quite clear that if an agency fails to prepare an EIS (whether it simply ignores the mandate from Congress or determines incorrectly an environmental assessment suffices), the agency action is considered arbitrary and capricious.[97] This conclusion derives from the principle set out in *Citizens to Preserve Overton Park* – environmental impacts are a factor that Congress required the agencies to consider and the failure perforce requires a conclusion of arbitrary and capricious decisionmaking.[98]

The RFA is modeled after NEPA and the courts have recognized that parallel.[99] Just as it would be arbitrary and capricious decisionmaking for an agency to ignore its obligations under NEPA, the courts, recognizing the parallel, have held that the failure to prepare a regulatory flexibility analysis constitutes arbitrary and capricious decisionmaking. For example, in *United States Telecom Association*, the D.C. Circuit held that the failure of an agency to prepare a regulatory flexibility analysis as required by the RFA constitutes arbitrary and capricious rulemaking even if the end-result of that analysis would be a rule that imposes excessive burdens on small telecommunication companies.[100]

Given the above analysis, the agencies cannot be heard to rely on the logic that their decision would not change even if they did an analysis. That is not the point of NEPA or the RFA; the point of both statutes is to properly inform the decisionmakers of the consequences of their actions so that they can properly consider all relevant factors Congress wished them to consider. Since the agencies did not perform the analysis mandated by the RFA, it is impossible to ascertain how they weighed the various competing factors – protections of the waters of the United States with the potential adverse economic impacts on small businesses. Given this significant lacuna in the administrative record, it is beyond cavil that the agencies engaged in arbitrary and capricious decisionmaking by contending that their decision would be unaltered by any RFA analysis.

VI. The Significant and Direct Effects of the Proposed Rule on Small Entities

Having already demonstrated that the Proposed Rule should not have been certified for the reason proffered by the agencies, it is now appropriate to show the significant impacts on small entities of the proposed rule. Any change of the scope of waters subject to the CWA's jurisdiction will affect small businesses and other small entities, despite the agencies' certification to the contrary.[101]

The Proposed Rule will impose requirements on small businesses, as it will change the scope of the permits needed to carry out actions in or adjacent to waters of the United States, and concomitantly costs, on any business that is working in or near a body of water that is deemed to be a water of the United States pursuant to the Proposed Rule. In addition, the Proposed Rule will impose requirements

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The cited regulation was developed by the Council on Environmental Quality whose guidance is given substantial deference by the courts. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355-56 (1989).

[95] 42 U.S.C. § 4332(2)(C).

[96] *See Robertson*, 490 U.S. at 352; *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227-28 (1980).

[97] *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989).

[98] *Robertson*, 490 U.S. at 352.

[99] *Home Builders*, 417 F.3d at 1286; *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA*, 415 F.3d 1078, 1102 (9th Cir. 2005); *Associated Fisheries Maine v. Daley*, 127 F.3d 104, 114 (1st Cir. 1997).

[100] *United States Telecom Ass'n*, 400 F.3d 29, 42-43 (D.C. Cir. 2005).

[101] 79 Fed. Reg. at 22,220.

on small governmental jurisdictions.[102] According to the EPA, over 90 percent of United States governmental jurisdictions, or about 40,000, are small governmental jurisdictions.[103] The agencies should have assessed the proposed rule's impact on small governmental jurisdictions, such as counties, because they too work in or near bodies of water, such as ditches, that will be deemed "waters of the United States" under the Proposed Rule.

Small businesses such as construction firms, land developers, natural resource extraction operations, agricultural producers, and small governmental jurisdictions, such as counties, that conduct dredge and fill activities (even clearing vegetation and debris from ditches) will require Section 404 permits. Stormwater discharges from small municipal separate storm sewer systems, construction activities, and industrial activities (e.g., manufacturing, mining, oil and gas exploration and processing) will require Section 402 permits. In addition, farmers and ranchers may need Section 402 permits for discharges from animal feeding operations or pesticide applications.[104]

The permitting process can be lengthy and expensive. For example, at the WOTUS Hearing, Tom Woods, President of Woods Custom Homes, testified that one of his company's building projects was entangled in the permitting process for over two years and the permitting process cost $250,000.[105] According to a 2002 assessment, "[t]he average applicant for an individual [Section 404] permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915."[106] This does not include the time and expense of any design changes or mitigation.[107] At the WOTUS Hearing, Alan Parks, Vice President of Memphis Stone and Gravel Company, testified that under the Proposed Rule, one member of his industry calculated that mitigation of a stream would cost more than $100,000.[108] Section 402 permits, which include effluent limitations, monitoring and reporting requirements, and conditions, impose costs as well. For example, EPA estimated the per construction site compliance costs for its Phase II Section 402 storm water permitting program was between $2,143 and $9,646 for sites disturbing between one to five acres.[109]

While the agencies did not provide any discussion in the RFA certification of the small entities that would be affected nor the potential impacts on small entities, the agencies did discuss entities that would be affected and potential costs in the RIA.[110] Even though the RIA inaccurately refers to the costs as indirect and is flawed, it does show that the agencies are capable of providing an assessment of the effects of the Proposed Rule.[111] The agencies estimate that the Proposed Rule will annually cost

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[102] 5 U.S.C. § 601(5). The RFA defines small governmental jurisdictions as those with a population of less than 50,000.
[103] EPA RFA Guidance, *supra* note 64, at 46-47.
[104] Small businesses also may be affected by other provisions of the CWA such as § 311 (oil and hazardous substance liability) and § 505 (citizen suits). 33 U.S.C. §§ 1321, 1365.
[105] WOTUS Hearing, *supra* note 5, at 30.
[106] *Rapanos*, 547 U.S. at 721 (citation omitted).
[107] *Id.*
[108] WOTUS Hearing, *supra* note 5, at 7 (statement of Alan Parks).
[109] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ECONOMIC ANALYSIS OF THE FINAL PHASE II STORM WATER RULE ES-4 (1999). The compliance cost figures are the sum of the average best management practice costs and administrative costs. *Id.*
[110] Regulatory Impact Analysis, *supra* note 77, at 5-7, 32-33.
[111] Although the proposed rule will affect all CWA programs, the Regulatory Impact Analysis only used § 404 permitting data to project the increase in CWA jurisdiction. *Id.* at 11-12. The restriction to Section 404 makes no sense since obtaining a NPDES permit is quite expensive. Fees must be paid for such permits and such fees are not de minimis. *See* A. ROGER GREENWAY, HOW TO OBTAIN WATER QUALITY PERMITS 113-318 (2004) (setting out state fee

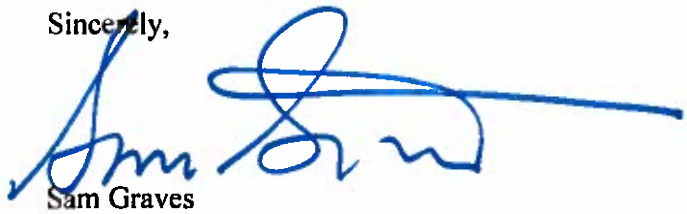
between $133 and $231 million.[112] Furthermore, the agencies identify entities, landowners, energy companies, agricultural operations, transportation firms, land developers, industrial operations and local governments, that will be affected.[113] If the agencies are able to estimate costs and identify entities affected, even under flawed conditions, then the agencies certainly could parse the data to prepare an IRFA. Given the testimony at congressional hearings, the flawed incomplete RIA data, and the costs of compliance with NPDES permits, expansion of the pivotal definition in the CWA clearly will have significant and direct effects on a substantial number of small entities.

VII. Conclusion

The Proposed Rule is fatally flawed arbitrary and capricious decisionmaking. The agencies failed to comply with the requirements of the RFA and their rationales appear to be nothing more than pretexts to avoid consideration of impacts on small businesses, small governmental jurisdictions and small not-for-profits as directed by Congress. Moreover, even if the agencies had complied with the RFA in its entirety and still adopted the current proposed rule, they would not achieve their objective of clarifying the scope of the CWA because the language remains vague, self-referential, and in some instances tautological. Had the agencies conducted a SBAR panel and developed an IRFA, they would have learned of the fatal flaws in the Proposed Rule. As it now stands, the Proposed Rule will clarify little, lead to significant litigation (including challenges that might prohibit enforcement against small entities[114]), and ultimately undermine the agencies' mission of protecting the waters of the United States from degradation. The only logical course for the agencies is to rescind the proposal and reissue it after fully complying with the RFA so the end result will be a logical, non-arbitrary rule that actually clarifies definitions and protects the waters of the United States.

Should you or your staff have any questions concerning these comments, please contact Viktoria Ziebarth or Barry Pineles with Committee at (202) 225-5821.

Sincerely,



Sam Graves
Chairman

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structures). And the fees do not include the capital needed to modify production activities to meet the terms of the NPDES and the effluent limitation imposed by EPA to ensure that the waters of the United States are not polluted.

In addition, the agencies used data from Fiscal Year 2009-2010, a time period of low construction activity following the Great Recession, which is not likely to reflect future economic activity and the need for CWA permits. Moreover, the agencies' analysis does not account for waters that have previously been assumed to be non-jurisdictional by landowners and businesses. Letter to EPA and Corps from Waters Advocacy Coalition 2 (May 13, 2014), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-0851.

[112] Regulatory Impact Analysis, *supra* note 77, at 32-33.

[113] *Id.* at 5-7, 32. Moreover, in the 2003 advanced notice of proposed rulemaking (ANPRM) for the definition of "waters of the United States," the agencies identified entities that "are likely to be regulated by a rulemaking based on this ANPRM." 2003 Guidance, *supra* note 26, at 1992. The entities identified included: local governments or instrumentalities; industrial, commercial, or agricultural entities; land developers; and landowners. *Id.* If the agencies were able to identify entities that were likely to be regulated by a definitional change in 2003, they could surely do so now.

[114] 5 U.S.C. § 611.