



September 27, 2017

VIA ELECTRONIC SUBMISSION

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Lieutenant General Todd T. Semonite
Commanding General and Chief of Engineers
U.S. Army Corps of Engineers
441 G Street N.W.
Washington, D.C. 20314

**Re: Definition of “Waters of the United States”- Recodification of Pre-Existing Rules
(Docket No. EPA-HQ-OW-2017-0203)**

Dear Administrator Pruitt and Lieutenant General Semonite:

On July 27, 2017 the Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) published a proposed rule titled: *Definition of “Waters of the United States”- Recodification of Pre-Existing Rules*.¹ The proposed rule is the first in a two-step process to revise the definition of “waters of the United States.” This first step proposes to rescind the definition of “waters of the United States” as promulgated in the 2015 Clean Water Rule, and instead apply the definition of “waters of the United States” as it existed before the 2015 rule. The Office of Advocacy (Advocacy) applauds EPA and the Corps’ efforts to revise the definition of “waters of the United States” by first rescinding the 2015 rule thereby providing

¹ Definition of “Waters of the United States”- Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899 (proposed July 27, 2017).



certainty to small business as to the current definition, and to then revise the definition to ensure that it is clear and not overly broad. Advocacy urges EPA and the Corps in the second step of the rulemaking to consider the impacts to small business when revising the definition, and conduct a proper and thorough regulatory flexibility analysis when writing the rule.

The Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵

Background

Congress enacted the Clean Water Act (CWA) in 1972 to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."⁶ The CWA accomplishes this by eliminating the "discharge of pollutants into the navigable waters."⁷ The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas."⁸ Existing regulations currently define "waters of the United States" as traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands.⁹

The CWA requires a permit in order to discharge pollutants, dredge, or fill materials into any body of water deemed to be a "water of the United States."¹⁰ The EPA generally administers

² 5 U.S.C. § 601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

⁴ Small Business Jobs Act of 2010 (PL. 111-240) §1601.

⁵ Id.

⁶ 33 U.S.C. § 1251(a) (1972).

⁷ Id. at § 1251(a)(1).

⁸ Id. at § 1362(7).

⁹ 33 C.F.R. § 328.3(a); 40 C.F.R. § 230.3(s).

¹⁰ 33 U.S.C. §§ 1311(a), 1342, 1344.

these permits, but EPA and the Corps jointly administer and enforce certain permit programs under the Act.¹¹

The extent of the Act's jurisdiction has been the subject of much litigation and regulatory action, including three Supreme Court decisions. Actions of the Court have expanded and contracted the definition, especially regarding wetlands and smaller bodies of water.

In response to uncertainty from the Courts, and to industries' requests for clarity on the definition of what is considered a "water of the United States," EPA and the Corps on April 21, 2014, published a proposed rule, revising the definition and solicited public comments on the proposed rule. Advocacy submitted a public comment on the proposed rule on October 1, 2014, stating that the Agencies improperly certified the rule, and that the proposed rule would have a significant economic impact on a substantial number of small entities.¹²

EPA and the Corps then reviewed the public comments and on June 29, 2015, finalized a rule titled, "'Clean Water Rule: Definition of 'Waters of the United States.'"¹³ The rule was scheduled to take effect on August 28, 2015.

Following publication of the final rule, several parties and states sought judicial review in Federal district courts and Circuit Courts of Appeal. One district court granted a preliminary injunction staying the rule's effective date, finding that the challengers were likely to succeed on their claims.¹⁴ The rule was stayed by the U.S. Court of Appeals for the Sixth Circuit on October 9, 2015.¹⁵ Due to the stay, the 2015 rule was not implemented. On January 13, 2017, the U.S. Supreme Court granted certiorari on the issue of whether the court of appeals had jurisdiction to review the challenges to the 2015 rule.

On February 28, 2017, President Trump signed an Executive Order entitled, "Restoring the Rule of Law, Federalism, and Economic Growth by reviewing the 'Waters of the United States Rule.'"¹⁶ As part of their review, and consistent with the Executive Order, EPA and the Corps have proposed to rescind the 2015 final rule, and in a separate second step, plan to revise and replace the definition.

Small Businesses are in Favor of Rescinding the Rule

Advocacy has heard from a number of stakeholders that they are in favor of rescinding the 2015 final rule. Stakeholders have stated that the rule is too broad, and that its implementation would mean that 100 percent of streams and wetlands would meet the definition of waters of the United

¹¹ *Id.* at § 1344.

¹² *See* Comments of SBA Office of Advocacy (Advocacy Comments), EPA Docket No. EPA-HQ-OW-2011-0880-7958 (filed October 1, 2014).

¹³ Clean Water Rule: Definition of "Waters of the United States", 33 C.F.R. § 328, 40 C.F.R. §§110, 112,116-117,122,230,232,300,302,401 (2015).

¹⁴ *State of North Dakota et al. v. US EPA*, No. 15-00059, slip op. at 1-2 (D.N.D. Aug. 27, 2015, as clarified by order issued on September 4, 2015).

¹⁵ *In re U.S. Dep't. of Def. and U.S. Env'tl. Protection Agency Final Rule: Clean Water Rule*, No. 15-3751 (lead), slip op. at 6.

¹⁶ Exec. Order No. 13778, 82 Fed. Reg. 12497 (February 28, 2017).

States.¹⁷ Furthermore, the agencies estimate that CWA Section 404 permit costs would increase between \$19.8 million and \$52.0 million dollars annually, and they estimate that Section 404 mitigation costs would rise between \$59.7 million and \$113.5 million annually.¹⁸

Small businesses have stated that they will see a definite and substantial cost increase. They are in favor of rescinding this rule provided that EPA and the Corps propose a new rulemaking that includes a less-stringent definition.

Advocacy's Comments to the Proposed Rule and Future Rulemaking

Advocacy is pleased with EPA and the Corps proposal to rescind and replace the 2015 definition of waters of the United States. The final rule is far too broad in its scope and imposes significant and burdensome costs on small business.

Advocacy urges EPA and the Corps in the second phase of this process to properly consider the impacts to small business as is required by the RFA, and to conduct a thorough and detailed RFA analysis of any rule that it is considering proposing.

If after conducting a thorough economic analysis, EPA and the Corps intend to certify the rule, Advocacy urges that the agencies follow specific RFA guidelines for certification of a rule under Section 605 (b) of the RFA¹⁹, and only so certify if they can provide a factual basis for the certification that clearly and definitively shows that the new rule will not have a significant economic impact on a substantial number of small entities.²⁰

Advocacy encourages EPA and the Corps to conduct meaningful and productive outreach with small business stakeholders, and when available provide small entities with options to consider in revising the rule so as to obtain helpful feedback.

Conclusions and Recommendations

Advocacy applauds EPA and the Corps' efforts to revise the definition of "waters of the United States" by first rescinding the 2015 rule, thereby providing certainty to small business as to the current definition, and to then revise the definition to ensure that it is clear and not overly broad in scope. Advocacy strongly encourages EPA and the Corps in the second step of the rule-making to consider the impacts to small business, and to conduct a thorough RFA analysis. Advocacy is available to provide assistance in outreach efforts to small entities.

Advocacy urges EPA and the Corps to give full consideration to the above issues and recommendations. If you have any questions or require additional information please contact me

¹⁷ Economic Analysis of Proposed Revised Definition of Waters of the United States, U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, (March 2014).

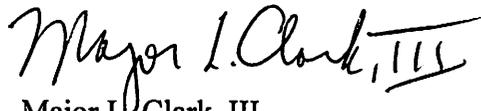
¹⁸ Id. at 16.

¹⁹ 5 U.S.C. § 605 (b).

²⁰ As mentioned, Advocacy filed a public comment letter on October 1, 2014 stating that the Agencies improperly certified the rule, and that the proposed rule would have a significant economic impact on a substantial number of small entities. See Advocacy Comments *supra* note 12.

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Sincerely,



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Copy to: Neomi Rao, Administrator
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