



August 13, 2018

VIA ELECTRONIC SUBMISSION

The Honorable Andrew Wheeler
Acting 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 Acting Administrator Wheeler and Lieutenant General Semonite:

On July 12, 2018 the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) published a supplemental notice of proposed rulemaking titled: *Definition of “Waters of the United States”-Recodification of Pre-Existing Rules.*¹ This supplemental notice follows publication of a proposed rule of the same title published on July 27, 2017.² 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

¹ Definition of “Waters of the United States”- Recodification of Pre-Existing Rules, 83 Fed. Reg 32227 (proposed July 12, 2018).

² Definition of “Waters of the United States”- Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899 (proposed July 27, 2017).



the 2015 Clean Water Rule, and instead apply the definition of “waters of the United States” as it existed before the 2015 rule. This supplemental notice of proposed rulemaking seeks to clarify that the regulatory action would permanently repeal the 2015 Rule. Furthermore, the supplemental notice seeks additional comments from the public on reasons and considerations for the agencies’ proposal to repeal 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 certainty to small entities as to the current definition. Advocacy believes that an additional important consideration for repeal of the 2015 Rule is that the rule did not properly consider small entity impacts under the Regulatory Flexibility Act (RFA). Advocacy urges EPA and the Corps in the second step of this rulemaking to consider the impacts to small entities when revising the definition, and conduct a proper and thorough regulatory flexibility analysis when writing the new 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),³ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁴ 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.⁵ 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.⁶

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.”⁷ The CWA accomplishes this by eliminating the “discharge of pollutants into the navigable waters.”⁸ The CWA defines “navigable waters” as “the waters of the United States, including the territorial seas.”⁹ Existing

³ 5 U.S.C. § 601 et seq.

⁴ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

⁵ Small Business Jobs Act of 2010 (PL. 111-240) §1601.

⁶ Id.

⁷ 33 U.S.C. § 1251(a) (1972).

⁸ Id. at § 1251(a)(1).

⁹ Id. at § 1362(7).

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.¹⁰

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.”¹¹ The EPA generally administers these permits, but EPA and the Corps jointly administer and enforce certain permit programs under the Act.¹²

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 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 soliciting public comments on the proposed definition. 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.¹³

EPA and the Corps reviewed the public comments and finalized a rule titled, “Clean Water Rule: Definition of ‘Waters of the United States’” on June 29, 2015.¹⁴ 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.¹⁵ The rule was stayed by the U.S. Court of Appeals for the Sixth Circuit on October 9, 2015.¹⁶ Due to the stay, the 2015 rule was not implemented. On January 22, 2018 the U.S. Supreme Court ruled on the question of which court should hear challenges to the CWA. The Court held that those lawsuits must be filed in federal district court. The Court did not discuss the rule’s merits.¹⁷

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

¹¹ 33 U.S.C. §§ 1311(a), 1342, 1344.

¹² *Id.* at § 1344.

¹³ See Comments of SBA Office of Advocacy (Advocacy Comments), EPA Docket No. EPA-HQ-OW-2011-0880-7958 (filed October 1, 2014).

¹⁴ 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).

¹⁵ *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).

¹⁶ *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.

¹⁷ See *Nat’l Ass’n of Manufacturers v. Dep’t of Defense*, 583 U.S. ___, slip opinion (2018).

EPA Failed to Conduct Meaningful Consultation With Small Entities

EPA failed to conduct meaningful outreach with small entities on the rule pursuant to Section 609(b) of the RFA. Under 609 (b) EPA is required to conduct small business advocacy review panels, often referred to as SBREFA panels, when it is unable to certify that a rule will not have a significant economic impact on a substantial number of small businesses. SBREFA panels give small entity representatives a chance to understand an upcoming proposed rule and to provide meaningful input to help the agency comply with the RFA.

In the final rule, EPA and the Corps cited a “Summary of the Discretionary Small Entity Outreach for Planned Proposed Revised Definition of ‘Waters of the United States.’”²⁵ This summary described efforts by the Agencies to conduct outreach with small entities on the rulemaking. In conducting this outreach, however, the Agencies did not provide alternatives to be considered nor did they seek specific input on the economic impact of the rule. As Advocacy stated in its comment letter, the RFA requires agencies to convene a SBREFA panel and produce an IRFA when small entities are likely to be impacted by a rule.²⁶ The Agencies in this instance failed to convene such a panel.

EPA Should Consider Small Entities When Revising the Definition of the Waters of the United States in its Forthcoming Step II Rulemaking

Advocacy urges EPA and the Corps in the second phase of this process to properly consider the impacts to small business as 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 RFA²⁷, 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.²⁸ If the agencies are unable to certify that the rule will not have a significant economic impact on a substantial number of small entities, a SBREFA panel should be convened.

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

²⁵ See ENVIRONMENTAL PROT. AGENCY, SUMMARY OF THE DISCRETIONARY SMALL ENTITY OUTREACH FOR PLANNED PROPOSED REVISED DEFINITION OF “WATERS OF THE UNITED STATES” (June 10, 2014), *available at* <https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-1927>.

²⁶ See Advocacy comments *supra* note 13.

²⁷ 5 U.S.C. § 605 (b).

²⁸ See Advocacy Comments *supra* note 13.

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.’”¹⁸ 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. In addition to these actions, on February 6, 2018, the Agencies finalized a rule adding an applicability date of February 6, 2020 to the 2015 final rule. With this rule the Agencies attempted to maintain the status quo as it existed prior to the 2015 rule.¹⁹

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. Small entities are in support of rescinding the rule, as it creates substantial uncertainty. The 2015 rule is far too broad in its scope and imposes significant and burdensome costs on small business.

The 2015 Rule Did Not Properly Consider Small Entity Impacts under the RFA.

Pursuant to EPA and the Corps request for additional comments on the reasons and considerations for repeal of the 2015 Rule, Advocacy believes that an important consideration for repeal is that the agencies improperly certified that the 2015 rule would not have a significant economic impact on a substantial number of small entities, and that the agencies did not conduct meaningful small entity outreach.

Certification Under Section 605 (b) Was Improper

Section 605(b) of the RFA allows an agency to certify that a rule will not have a significant economic impact on a substantial number of small entities in lieu of preparing an IRFA.²⁰ When certifying, the agency must provide a factual basis for the certification.²¹ In the 2015 rule, the Agencies certified that revising the definition of “waters of the United States” would not have a significant economic impact on a substantial number of small entities.²² As Advocacy stated in its comment letter at the time, this certification lacked a factual basis.²³

As Advocacy indicated in its 2014 comment letter, the proposed CWA jurisdiction would have increased compared to current practice. Furthermore, the Agencies claimed that the impact on small entities would have been indirect and therefore did not require an IRFA. Based on ample testimony from small business owners, Advocacy believed that the rule would directly and significantly impact small business.²⁴ Therefore, the Agencies’ improper RFA certification in the 2015 rule should be a consideration for repeal.

¹⁸ Exec. Order No. 13778, 82 Fed. Reg. 12497 (February 28, 2017).

¹⁹ Definition of “Waters of the United States”- Addition of an Applicability Date to 2015 Clean Water Rule, 33 C.F.R. § 328, 40 C.F.R. §§ 110,112,116-117, 122, 230, 232, 300, 302, 401 (2018).

²⁰ 5 U.S.C. §605.

²¹ Id.

²² 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).

²³ See Advocacy comments *supra* note 13.

²⁴ Id.

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 entities as to the current definition, and to then revise the definition to ensure that it is clear and not overly broad in scope. Advocacy believes that an important consideration for repeal of the 2015 rule is the improper certification that the rule would not have a significant economic impact on a substantial number of small entities. Advocacy strongly encourages EPA and the Corps in the second step of the rule-making to consider the impacts to small entities, 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 or Assistant Chief Counsel Prianka Sharma at (202) 205-6938 or by email at prianka.sharma@sba.gov.

Sincerely,



Major L. Clark, III
Acting Chief Counsel
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Copy to: Neomi Rao, Administrator
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