



October 1, 2014

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

Maj. Gen. John Peabody
Deputy Commanding General
Civil and Emergency Operations
U.S. Army Corps of Engineers
Attn: CECW-CO-R 441 G Street, NW
Washington, D.C. 20314-1000

Re: Definition of “Waters of the United States” Under the Clean Water Act¹

Dear Administrator McCarthy and Major General Peabody:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits these comments regarding the proposed rule to the U.S. Army Corps of Engineers (the Corps) and the Environmental Protection Agency (EPA, and together, “the agencies”). Advocacy believes that EPA and the Corps have improperly certified the proposed rule under the Regulatory Flexibility Act (RFA) because it would have direct, significant effects on small businesses. Advocacy recommends that the agencies withdraw the rule and that the EPA conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking.

The Office of Advocacy and the Regulatory Flexibility Act

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so our views do not necessarily reflect those of SBA or the Administration. The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),² requires small entities to be considered in the federal rulemaking process. The RFA requires federal agencies to consider the impact of their proposed rules on small businesses. When a rule is expected to have a significant economic impact on a substantial number of small entities, agencies must evaluate the impact, consider less

¹ Definition of Waters of the United States Under the Clean Water Act, 79 *Fed. Reg.* 22188 (April 21, 2014).

² Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

burdensome alternatives, and in the case of EPA, convene a Small Business Advocacy Review panel.³ The RFA directs Advocacy to monitor agency compliance with the RFA. To this end, Advocacy may file written comments reflecting small business concerns about the impact of a rulemaking.⁴ Because of small business concerns with the proposed rule, Advocacy held a roundtable on July 21, 2014 and has heard from numerous small entities in many industries.

Background

The Clean Water Act (CWA) was enacted in 1972 to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”⁵ The CWA accomplishes this by eliminating the “discharge of pollutants into the navigable waters.”⁶ The CWA defines “navigable waters” as “the waters of the United States, including the territorial seas.”⁷ 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.⁸

The CWA requires a permit in order to discharge pollutants, dredged, or fill materials into any body of water deemed to be a “water of the United States.”⁹ The EPA generally administers these permits, but EPA and the Corps jointly administer and enforce certain permit programs under the Act.¹⁰

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 1985, the Supreme Court determined that adjacent wetlands may be included in the regulatory definition of “waters of the United States.”¹¹
- In 2001, the Court held that migratory birds’ use of isolated “nonnavigable” intrastate ponds was not sufficient cause to extend federal jurisdiction under the CWA.¹²
- In 2006, the Supreme Court considered whether wetlands near ditches or man-made drains that eventually empty into traditional navigable waters were

³ 5 U.S.C. § 603, 605.

⁴ The Small Business Jobs Act of 2010 (Pub. L. 111-240 § 1601) also requires agencies to give every appropriate consideration to Advocacy’s written comments on a proposed rule. This response must be included in an explanation or discussion accompanying the final rule’s publication in the *Federal Register* unless the agency certifies that the public interest is not served by doing so.

⁵ 33 U.S.C. § 1251(a) (1972).

⁶ Id. at § 1251(a)(1).

⁷ Id. at § 1362(7).

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

⁹ 33 U.S.C. §§ 1311(a), 1342, 1344.

¹⁰ Id. at § 1344.

¹¹ *United States v. Riverside Bayview Homes*, 474 U.S. 121, 134-135 (1985).

¹² *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 174 (2001).

considered “waters of the United States.”¹³ Justice Scalia, writing for the plurality, determined 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.”¹⁴ Justice Kennedy concurred in the judgment, but concluded that the Corps must establish the existence of a “significant nexus” when it asserted jurisdiction over wetlands adjacent to non-navigable tributaries.¹⁵

The courts have left much uncertainty regarding what constitutes a “water of the United States.” Such uncertainty has made it difficult for small entities to know which waters are subject to jurisdiction and CWA permitting.

To address this uncertainty, the EPA and Corps proposed this rule which would revise the regulatory definition of “waters of the United States” and would apply to all sections of the Clean Water Act. The proposed rule defines “waters of the United States” within the framework of the CWA as the following seven categories:

- 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;
- All interstate waters, including interstate wetlands;
- The territorial seas;
- All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;
- All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;
- All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary; and
- 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 traditional navigable water, interstate water or the territorial seas.¹⁶

The proposed rule defines several terms for the first time: “neighboring,” “riparian area,” “floodplain,” “tributary,” and “significant nexus”; and it clarifies the terms, “adjacent” and “wetlands.”¹⁷ The rule leaves the regulatory definitions of “traditional navigable waters,” “interstate waters,” “the territorial seas,” and “impoundments” unchanged.¹⁸

Regulatory Flexibility Act Requirements

The RFA states that “[w]henever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or

¹³ *Rapanos v. United States*, 547 U.S. 715, 729 (2006).

¹⁴ *Id.* at 742.

¹⁵ *Id.* at 779 (Kennedy, J., concurring).

¹⁶ 79 *Fed. Reg.* at 22,198.

¹⁷ See *Id.* at 22,263, for the complete definitions of “adjacent,” “neighboring,” “riparian area,” “floodplain,” “tributary,” “wetlands,” and “significant nexus.”

¹⁸ *Id.*

publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis [IRFA]. Such analysis shall describe the impact of the proposed rule on small entities.”¹⁹

Under Section 609(b) of the RFA, 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 consist of representatives of the rulemaking agency, the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA), and the Chief Counsel for Advocacy. SBREFA panels give small entity representatives (SERs) a chance to understand an upcoming proposed rule and provide meaningful input to help the agency comply with the RFA. SERs help the panel understand the ramifications of the proposed rule and significant alternatives to it.

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 current case, the agencies have certified that revising the definition of “waters of the United States” will not have a significant economic impact on a substantial number of small businesses.

The Proposed Rule Has Been Certified in Error

Advocacy believes that the agencies have improperly certified this rule. Advocacy, and the small businesses we have spoken to, believe that

- The agencies used an incorrect baseline for determining their obligations under the RFA;
- The rule imposes costs directly on small businesses; and
- The rule will have a significant economic impact on small businesses.

A. The Agencies Use the Incorrect Baseline for its Regulatory Flexibility Act Certification

Advocacy believes that the agencies used the wrong baseline for their RFA certification. In certifying the rule, the agencies state that, “This proposed rule is narrower than that under the existing regulations...fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations.”²² On this

¹⁹ 5 U.S.C. §603.

²⁰ 5 U.S.C. §605.

²¹ Id.

²² Id.

basis the agencies conclude that, “This action will not affect small entities to a greater degree than the existing regulations.”²³

The “existing regulations” that the agencies refer to in this reasoning is the 1986 rule defining the scope of waters of the United States. Compared to the 1986 definition, the proposed changes represent a narrowing of coverage. However, in the economic analysis accompanying the rule, the agencies assess the regulation vis-à-vis current practice and determine that the rule increases the CWA’s jurisdiction by approximately 3 percent.²⁴ The agencies’ certification and economic analysis contradict each other.

Advocacy believes that the proper baseline from which to assess the rule’s impact is current practice. Guidance from the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA) substantiates this view. OIRA’s Circular A-4 provides guidance to federal agencies on the development of regulatory analysis.²⁵ It states that “The baseline should be the best assessment of the way the world would look absent the proposed action.”²⁶ The 1986 regulation has been abrogated by several Supreme Court cases and is no longer in use.²⁷ The Corps and EPA also issued a guidance document in 2008 which sought to bring jurisdictional determinations in line with these Supreme Court cases.²⁸ The 1986 regulation does not represent the current method for determining jurisdiction and has not served that purpose for more than thirteen years. Using an obsolete baseline improperly diminishes the effects of this rule. Advocacy agrees with the agencies’ economic analysis that uses current practice as the appropriate baseline for evaluating the rule.

B. The Rule Imposes Costs Directly on Small Businesses

The second basis for the certification appears to be the agencies’ position that the impact on small businesses will be indirect, hence not requiring an initial regulatory flexibility analysis or a SBAR panel.²⁹ EPA cites *Mid-Tex Electric Cooperative, Inc., v. Federal Energy Regulatory Commission*³⁰ and *American Trucking Associations, Inc., v. EPA*³¹ in support of their certification.³² Advocacy believes that the agencies’ reliance on *Mid-Tex* and *American Trucking* is misplaced because the proposed rule will have direct effects on small businesses.

²³ Id.

²⁴ Id.

²⁵ Office of Management and Budget, *Circular A-4*, http://www.whitehouse.gov/omb/circulars_a004_a-4/#e (September 17, 2003).

²⁶ Id.

²⁷ See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 174 (2001); *Rapanos v. United States*, 547 U.S. 715, 729 (2006).

²⁸ Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* and *Carabell v. United States*, December 2, 2008, <http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm> .

²⁹ 79 *Fed. Reg.* at 22,220.

³⁰ *Mid-Tex Electric Cooperative, Inc. v. Federal Energy Regulatory Commission (FERC)*, 773 F.2d 327, 342 (D.C. Cir. 1985).

³¹ *American Trucking Associations v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999).

³² 79 *Fed. Reg.* at 22,220.

In *Mid-Tex*,³³ the Federal Energy Regulatory Commission (FERC) issued regulations instructing generating utilities how to include costs of construction work in their rates. Although the generating utilities were large businesses, their customers included small entities, to whom they may or may not have been able to pass on these costs through any rate changes.³⁴ The issue raised in this case was whether the agency had improperly certified the rule because it failed to consider the impact on the small business customers. The court concluded that an agency is required to file an IRFA only in cases where a regulation directly affects small businesses;³⁵ if it does not, an agency may properly certify.

In *Mid-Tex*, the proposed regulation's applicability to small businesses is akin to the FERC regulation's applicability to the generating utilities themselves, not their customers, as EPA seems to believe. Generating utilities were an intervening actor between the regulatory agency and the small business customers; the utilities had a substantial amount of discretion as to whether they would pass on their construction costs to their small entity customers and, if so, how much of those costs they would pass on.

Such is not the case with this rule. First, there is no intervening regulated actor. In *Mid-Tex*, the generating utilities were the entities regulated and bound by FERC guidelines, and it was not certain that they would pass on the costs of the new guidelines to their small business customers. In the current case, the Clean Water Act and the revised definition proposed in this rule directly determine permitting requirements and other obligations. It is unquestionable that small businesses will continue to seek permits under the Clean Water Act. Therefore they will be subject to the application of the proposed definition and the impacts arising from its application.

Second, the rule defines the scope of jurisdiction of the Clean Water Act without any discretion left to any entity or intermediary. The rule does not, for example, set a goal for which types or how many waters must be included in jurisdiction, leaving the Corps or states to determine the exact definition of waters of the United States in particular instances. This rule establishes the definition and all small entities are bound by it.

In *American Trucking*,³⁶ the EPA's certification of rules to establish a primary national ambient air quality standard (NAAQS) for ozone was challenged. The basis of the EPA's certification was that the NAAQS regulated small entities indirectly through state implementation plans. The rules gave states broad discretion to determine how to achieve compliance with the NAAQS.³⁷ The rules *required* EPA to approve any state plan that met the standards; it could not reject a plan based upon its view of the wisdom of a state's choices.³⁸ Under these circumstances, the court concluded that EPA had properly

³³ 773 F.2d at 342.

³⁴ Id. The generating utilities were not required to pass on the rate increases and in some cases were limited by state law in how much of the rate increase could be passed on to customers.

³⁵ Id.

³⁶ 175 F.3d 1027 (D.C. Cir. 1999).

³⁷ Id.

³⁸ Id. at 1044.

certified because any impacts to small entities would flow from the individual states' actions and thus be indirect.³⁹

EPA's proposed rule is distinguishable from the regulations at issue in *American Trucking*. The states were intervening actors with broad discretion regarding how to implement the federal standards. The EPA rules only told the states what the goal was; the states were left to develop the plans that would implement those goals and thereby impose impacts on small businesses.⁴⁰ In the current case, the agencies are not defining a goal nor are they authorizing any third party to determine the means and methods for reaching the goal. To the contrary, the agencies are defining the term governing the applicability of their own CWA programs. A change in the scope of the definition of "waters of the United States" necessarily leads to an increase in the scope and impact of the CWA since the programs thereunder only apply to waters that fall within this definition. The agencies, not a third party, determine whether a given body of water is within the jurisdiction of the requirements of the Clean Water Act and therefore subject to it.

Small businesses have also provided specific examples of how this rule will directly impact them. For example, during a May hearing of the U.S. House of Representatives Committee on Small Business, Jack Field of the Lazy JF Cattle Co. testified that the rule would essentially eliminate an exemption for normal farming practices that he relies upon to do things such as building a fence to control his grazing cattle.⁴¹ The proposed rule would eliminate the exemption for farmers whose actions do not comply with Natural Resources Conservation Services standards.⁴²

Small entities in the utility industry have expressed that this proposed rule could eliminate the advantages of Nationwide Permit 12 – Utility Line Projects (NWP 12). Utility companies use NWP 12 to construct and maintain roads that provide access to the utility grid. Under NWP 12 a "single and complete" project that results in less than a ½ acre loss of waters of the U.S. is allowed to proceed under NWP 12 rather than obtain an individual CWA permit.⁴³ Currently, each crossing of a road over a water of the U.S. is treated as a "single and complete" project. The proposed rule creates large areas in which NWP 12 could no longer be used at all. Under this proposed rule waters in the same riparian area or floodplain all become adjacent waters and therefore waters of the U.S. If all of the waters in the riparian area or floodplain are treated as one interconnected water of the U.S. it would be virtually impossible for small utility companies to use NWP 12. Small utilities would need to apply for the more costly and time consuming individual

³⁹ Id. at 1045.

⁴⁰ Id. at 1044.

⁴¹ Testimony of Jack Field, Owner Lazy JF Cattle Co. at U.S. House of Representatives Committee on Small Business Hearing entitled "Will EPA's Waters of the United States Rule Drown Small Businesses?", May 29, 2014 at <http://smallbusiness.house.gov/calendar/eventsingle.aspx?EventID=373099>.

⁴² 79 Fed. Reg. at 22,194; Notice of Availability Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices, 79 Fed. Reg. 22,276.

⁴³ Reissuance of Nationwide Permits, 77 Fed. Reg. 10195 (February 21, 2012).

permits. This is a direct cost imposed solely as a result of the changes to the definition of the term “waters of the United States” proposed in this rule.

These examples, as well as comments that Advocacy has received from small entities in other industries, demonstrate that the impact of the proposed rule will be direct. Therefore, the agencies are required to measure the impacts of the rule and to determine whether those impacts are significant for a substantial number of small entities.

C. The Rule Will Have a Significant Economic Impact on Small Businesses

The economic analysis clearly indicates that this rule is likely to have a significant economic effect on small businesses. In the analysis, the agencies examine the anticipated changes to permitting under CWA Section 404 (development projects that discharge dredge or fill materials into waters of the U.S.). They find that in current practice 98 percent of streams and 98.5 percent of wetlands meet the definition of waters of the U.S.;⁴⁴ under the revised definition these figures rise to 100 percent.⁴⁵ They find zero percent of “other waters” (the seventh category in the revised definition) to be covered in current practice, but the revised definition would cover 17 percent of this category.⁴⁶ The agencies evidence an understanding that this increase in jurisdiction will lead to greater costs stating, “A change in assertion of CWA jurisdiction could result in indirect costs of implementation of the CWA 404 program: a greater share of development projects would intersect with jurisdictional waters, thus requiring the sponsors of those additional projects to obtain and comply with CWA 404 permits.”⁴⁷

The agencies estimate that CWA 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.⁴⁸ These amounts do not reflect additional possible cost increases associated with other Clean Water Act programs, such as Section 402 permitting or Section 311 oil spill prevention plans.⁴⁹ The agencies further state that the economic analysis done with respect to the 404 program increase is likely not representative of the changes that may occur with respect to 402 and 311 permitting,⁵⁰ leaving small businesses without a clear idea of the additional costs they are likely to incur for these Clean Water Act programs.

The economic analysis also singles out a particular class of businesses potentially affected by the revised definition, yet fails to evaluate any of these potential effects. EPA acknowledges that “a large portion of traditional 402 permit holders are located nearby large water sources to support their operations.”⁵¹ The agencies do not identify how many

⁴⁴ Economic Analysis of Proposed Revised Definition of Waters of the United States, U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, 11 (March 2014).

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id. at 13. Advocacy disagrees with the agencies’ assertion that this cost is indirect (see above).

⁴⁸ Id. at 16.

⁴⁹ Id. at 12.

⁵⁰ Id.

⁵¹ Id.

of these businesses may be small nor do they discuss the expected impact of this rule on them. Yet this proposed rule would directly affect those small businesses that may be located next to large water sources and which fall within the 3 percent of waters that will be newly included in the definition “waters of the U.S.”

Concerns raised by small businesses as well as the agencies’ own economic analysis both indicate that small businesses will see a cost increase as a result of the revised definition. The EPA and the Corps have obligations under OMB guidance, and the RFA to measure and communicate this increase. Their certification of no small business impact is inappropriate in light of this information. Because of this probable small business impact, the RFA requires the agencies to complete an IRFA and a SBAR panel.

Conclusion

Advocacy and small businesses are extremely concerned about the rule as proposed. The rule will have a direct and potentially costly impact on small businesses. The limited economic analysis which the agencies submitted with the rule provides ample evidence of a potentially significant economic impact. Advocacy advises the agencies to withdraw the rule and conduct a SBAR panel prior to promulgating any further rule on this issue.

If we can be of any further assistance, please contact Kia Dennis, Assistant Chief Counsel, at (202) 205-6936.

Thank you for your attention to this matter.

Sincerely,

/s/ Winslow Sargeant, Ph.D.

Chief Counsel for Advocacy

/s/ Kia Dennis

Assistant Chief Counsel

/s/ Stephanie Fekete

Legal Fellow