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July 29, 2014

The Honorable Sam Graves
Chairman
House Small Business Committee
Washington, DC 20515

The Honorable Nydia Velázquez
Ranking Member
House Small Business Committee
Washington, DC 20515

Re: Definition of "Waters of the United States" under the Clean Water Act (CWA), 79 Federal Register 22188 [April 21, 2014]

Dear Chairman Graves and Ranking Member Velázquez:

One million members of the National Association of REALTORS® (NAR) thank you for investigating the Environmental Protection Agency's (EPA) compliance with the Regulatory Flexibility Act (RFA) in the above captioned rulemaking. Section 609 of the RFA generally requires that the EPA convene small business panels to review draft rules and explore major regulatory alternatives which minimize small business impacts while still achieving statutory objectives. To date, EPA has conducted more than 40 small business panels, including for many of the industries subject to the proposal before the Committee today. We believe that all these panels have not only produced more cost effective rulemakings but also proven that the EPA can protect the environment and preserve competition at the same time; both are equally valid public policy goals and neither is mutually exclusive.

Yet for the "Waters of the U.S." proposal, the EPA chose not to convene a small business panel and instead certify that "the rule will not have a significant economic impact on a substantial number of small entities." This requires that the Agency provide a factual basis for the decision. According to SBA's Office of Advocacy which monitors RFA compliance, "factual basis" means "at a minimum … a description of the number of affected entities and the size of the economic impacts and why either the number of entities or the size of the impacts justifies the certification."[1] EPA's RFA guidance provides a similar definition and goes further by directing its rule writers to conduct a "screening analysis" of potential small business impacts, even if the Agency does not believe the RFA applies.[2]

Here, the sole basis for the RFA certification is

> "Because fewer waters will be subject to the Clean Water Act under the proposed rule than are subject to regulation under the existing regulations; this action will not affect small entities to a greater degree than the existing regulations."[3]

[1] See page 13 of http://www.sba.gov/sites/default/files/rfaguide_0512_0.pdf
[2] Page 11 of EPA's "Final Guidance for EPA Rulewriters: Regulatory Flexibility Act:" "…[A]s a matter of Agency policy, even if your rule is not subject to the RFA, to the extent that you foresee that your rule will have an adverse economic impact on small entities, you should assess those impacts and make efforts to minimize them through consultation with the small entities likely to be regulated, while remaining consistent with applicable statutory requirements." The EPA devotes an entire chapter (2) to how to conduct a screening analysis, and the full document may be found at: http://www.epa.gov/rfa/documents/Guidance-RegFlexAct.pdf
[3] 79 Fed. Reg. 22220.

EPA does not provide an estimate of the number or even attempt to narrow the universe of potentially affected small businesses. If the Agency conducted a screening analysis pursuant to its own RFA guidance, it is not evident from the certification. EPA simply refers to any one of 28 million "industrial small entities" that meet the SBA's size standards. There is no description of what "significant economic impact" means in this context, even if only to show how impacts have been reduced. Apparently, the EPA does not see the value of the RFA in this instance. On page 22220 of the Federal Register notice, "This question of CWA jurisdiction will be informed by tools of statutory construction and the geographical and hydrological factors… *which are not factors readily informed by the RFA*" (emphasis added). While questioning the RFA's importance, the EPA nevertheless notes that it conducted one small-entity outreach meeting back in 2011, when it was drafting a separate guidance document. We are concerned that an agency summary of a single meeting could never achieve the same results as a SBREFA panel or fulfill the RFA's requirements.

According to Oxford, a "fact" is "a thing that is indisputably the case,"[4] but the only thing indisputable in this certification is the amount of disagreement between EPA and the small business community over the scope of the proposed regulation. Here are NAR's concerns regarding the facts about this U.S. waters proposal:

- **In fact, the proposed rule makes it easier for EPA to regulate more small businesses near "waters of the U.S., including wetlands."** Currently, before issuing most letters finding U.S. waters/wetlands on private property, the Agency must first physically visit the site and collect data showing that regulation could prevent significant pollution to an ocean, estuary, lake or river that is navigable. Because site-specific data analysis is "so time consuming and costly," the EPA is not now able to enforce the CWA in places like Arizona and Georgia, according to the Agency's own website. For this reason, the proposed rule would eliminate the site specific analysis for two broad, new categories of water – i.e., "all tributary streams" and "all adjacent waters including wetlands." According to the Federal Register notice,[5] "waters in these categories would be jurisdictional "waters of the United States" by rule – no additional analysis would be required." It is puzzling how the EPA can propose to remove what it considers to be THE barrier to regulation but still maintain that there will be less regulation under the proposal.

- **In fact, the proposed rule does not clarify which small businesses will be regulated.** According to EPA, not all owners of property with U.S. waters are subject to regulation, only those who engage in regulated activities around them. Yet, nowhere in the proposed rule is there a list of what a property owner can or cannot do without a federal permit. On the other hand, the EPA identifies more than 50 land-use activities, such as digging, planting, mulching and clearing, that are specifically exempted for those involved in on-going normal farming as part of the proposal. Many of these activities do not appear to be uniquely agricultural, yet the small businesses who engage in them would not be expressly exempted and therefore could be regulated under this proposal. In fact, many property owners have already been sued under the CWA for engaging in these very same activities without first obtaining a federal permit. Property buyers require information about permitting restrictions, costs and delays before they can make informed decisions at

[4] http://www.oxforddictionaries.com/us/definition/american_english/fact
[5] See 79 Fed. Reg. 22,189.

the closing table, yet U.S. water/wetlands letters could introduce another variable into already complex real estate transactions. We believe that, had EPA conducted a small business panel, it would have discovered this and considered some regulatory alternatives such as streamlining the permitting process that could have helped to provide some certainty to the small businesses.

- **In fact, the proposed rule would impose significant and direct economic impacts on small businesses.** The EPA appears to be playing a regulatory shell game by separating the "who is regulated" from the "what is regulated." By dividing the regulation into two parts – this first part defines which waters are jurisdictional, a separate, second rulemaking will be necessary to determine which activities are regulated and what is required of owners of property with jurisdictional waters. It also places small business owners in the untenable position of having to comment on a proposed rule without knowing its full impact or being able to make recommendations regarding a range of regulatory flexibility alternatives (such as streamlining the 404 permitting process).

- **In fact, changing who could be required to get a permit would have a direct permitting impact on the regulated small business community.** Contrary to the agency citations, neither Mid-Tex vs. FERC (773 F.2d 327 [DC Cir 1985]) nor American Trucking Association vs. EPA (175 F.3d 1027 [D.C. Cir. 1999]) applies to the U.S. waters proposal.

    1. These regulations are directly set and imposed by the federal government, not the states. In fact, 48 states do not have primacy under CWA Section 404, for instance.
    2. The impacts are reasonably foreseeable, even if all that may be required is a ½-hour federal consultation over whether a permit is required for each real estate project. However, the transaction costs are likely to be much higher for many development or construction projects.

  Even the general permit can cost tens of thousands of dollars for the application alone, according to EPA's low-range estimates. This does not include the cost of project redesign, for instance. U.C. Berkeley Professor David Sunding also found that one of these lower cost permits can take an average of 6 months to obtain.[6] According to an Environmental Law Institute report, it is not uncommon for small businesses to go through a year-long federal permitting negotiation, only to learn that the federal staff has turned over, the new staffer has different ideas about the permit, and the small business owner must start the negotiation over again.[7] And all this is for a nationwide permit that is not allowed unless the project's environmental impact is *de minimis*. In other words, it's potentially all cost for little environmental benefit. EPA claims that part of the rationale for this proposal is to save businesses money, yet there appears to be no attempt to reduce the real delays and uncertainty caused by the lengthy negotiation and broken permitting process that will be directly triggered by this proposed rule.

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[6] http://areweb.berkeley.edu/~sunding/Economcs%20of%20Environmental%20Regulation.pdf
[7] ELI's full report may be read here: http://www.eli.org/sites/default/files/eli-pubs/d18_03.pdf

- **In fact, this proposal shifts the CWA burden of proof to small businesses**. Currently, it's up to the federal agency to conduct site-specific analysis proving that the Clean Water Act applies before it can regulate most small businesses, according to the U.S. Supreme Court. Under this proposal however, the presumption would flip for "all tributary streams" and "all adjacent waters including wetlands." Private property with one of these waters would be categorically regulated unless the owner somehow proves the CWA does not apply. In fact, under this proposal the Agency could regulate any "other water" that has more than a "speculative or insubstantial" impact on jurisdictional water, according to the best professional judgment of staff. Yet, nowhere in this proposal does the EPA provide an appeals process for small businesses to contest U.S. water determinations. Nor does the proposal define for small businesses precisely what level of analysis or types of data the owner would need to provide in order to prove that there is only an "insubstantial or speculative" impact. Defining this appeals process would be another important issue that a SBREFA panel could effectively address and provide recommendations.

Appended to this letter, please find NAR's written statement to the House Transportation and Infrastructure Committee on the proposed rule. It applies more broadly to all property owners and buyers (including small businesses) but includes important details on the impacts which have only been summarized above.

In conclusion, we believe that the EPA has improperly certified the proposed "U.S. waters" rule and it will have a significant economic impact on a substantial number of small entities. There are enough questions about the factual basis for the certification to justify withdrawal of the proposed rule until EPA convenes a small business panel in accordance with the RFA. NAR respectfully requests that the House Small Business Committee urge EPA to conduct a SBREFA panel before the Agency moves forward with this unjustified regulatory proposal.

Thank you for the opportunity to submit these comments. We look forward to working with you, the Congress and EPA to find meaningful ways to protect high value wetlands while at the same time, preserving small businesses and all the benefits that competition provides the U.S. economy.

Sincerely,

Steve Brown
2014 President, National Association of REALTORS®