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Congress of the United States

U.S. House of Representatives

Committee on Small Business

2361 Rayburn House Office Building
Washington, DC 20515-6315

To: Members, Committee on Small Business
From: Committee Staff
Date: May 27, 2014
Re: Hearing: "Will EPA's 'Waters of the United States' Rule Drown Small Businesses?"

On Thursday, May 29, 2014 at 1:00 pm in Room 2360 of the Rayburn House Office Building, the Committee on Small Business will meet for the purpose of examining the proposed rule issued by the Environmental Protection Agency (EPA) and United States Army Corps of Engineers (Corps) (collectively, the "agencies") to change the scope of waters subject to federal jurisdiction under the Clean Water Act.[1] The hearing will examine the potential effects of this proposed rule on small businesses.

I. Overview of the Clean Water Act (CWA or Act)[2]

The objective of the CWA is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters"[3] and is accomplished by eliminating "the discharge of pollutants into the navigable waters."[4] Thus, the regulatory structure of the CWA depends on the definition of navigable waters. "Navigable waters" are defined under the Act as "the waters of the United States, including the territorial seas."[5] 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[6] and dredged and fill materials[7] cannot be discharged without a permit. While the CWA is generally administered by the EPA,[8] the EPA and Corps jointly administer and enforce the Section 404 Program.[9] Through regulatory actions and litigation, the scope of waters subject to the CWA has changed over time.

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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. The Federal Water Pollution Control Act amendments of 1972, as amended, established the modern CWA. Proposed Rule, 79 Fed. Reg. at 22,191.
[3] 33 U.S.C. § 1251(a).
[4] *Id.* at § 1251(a)(1).
[5] *Id.* at § 1362(7).
[6] *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"). *Id.* at § 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).
[7] *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).
[8] *Id.* at § 1251(d).
[9] *Id.* at § 1344. States may operate their own Section 402 and 404 permit programs. *Id.* at §§ 1342(b), 1344(g). State permitting programs and rules are beyond the scope of this hearing.

II. Supreme Court Decisions and Regulatory Responses

Given the potential regulatory 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 *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*[10] ("*SWANCC*"), the Supreme Court held that CWA jurisdiction did not extend to isolated "nonnavigable" intrastate ponds by virtue of migratory birds using them as habitat.[11] Five years later, in *Rapanos v. United States*[12] ("*Rapanos*"), the Supreme Court was asked whether wetlands near ditches or man-made drains that eventually connected to traditional navigable waters were "waters of the United States."[13] 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."[14] 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.[15]

The *SWANCC* and *Rapanos* decisions did not resolve the matter of what body of water constitutes a water of the United States.[16] Nor have the current regulatory definitions[17] or agency guidance resolved this issue. According to the agencies, the uncertainty over the geographic scope of the CWA has resulted in frequent case-by-case jurisdictional determinations that create uncertainty for regulated entities and require a significant allocation of agency resources.[18] In an attempt to remedy these problems, the agencies have issued a proposed rule that would revise the regulatory definition of "waters of the United States."

III. Proposed Rule – Definition of "Waters of the United States"

The agencies have proposed a rule that would revise the definition of "waters of the United States" for all sections of the CWA. While the proposed rule retains some of the existing definitions, it asserts categorical jurisdiction over waters that previously were subject to case-by-case determinations and defines certain terms for the first time.

Under the proposed rule, the following categories of water fall within the parameters of the CWA: 1) traditional navigable waters; 2) interstate waters and wetlands; 3) the territorial seas; 4) impoundments of the first three categories and tributaries; 5) tributaries of the first four categories; and 6) waters and

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[10] 531 U.S. 159 (2001).
[11] *Id.* at 174. At issue was whether jurisdiction extended to an abandoned sand and gravel pit with old trenches that evolved into permanent and seasonal ponds. *Id.* at 162-63.
[12] 547 U.S. 715 (2006).
[13] *Id.* at 729.
[14] *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.*
[15] *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.
[16] Since there was no majority opinion in *Rapanos* (other than the judgment), there was no definitive Supreme Court interpretation of the term "waters of the United States."
[17] The existing regulations define "waters of the United States" as: 1) traditional navigable waters; 2) interstate waters; 3) waters that could affect interstate or foreign commerce; 4) impoundments of waters of the United States; 5) tributaries of waters of the four aforementioned categories of waters; 6) territorial seas; and 7) adjacent wetlands. Waste treatment systems and prior converted cropland are excluded. 33 C.F.R. § 328.3(a); 40 C.F.R. § 230.3(s).
[18] Proposed Rule, 79 Fed. Reg. at 22,188.

wetlands adjacent to the first five categories.[19] "Other waters" (those not set out in the aforementioned six categories) may be found jurisdictional on a case-by-case basis if either alone, or in combination with "other similarly situated waters" in the same region, they have a "significant nexus" to traditional navigable waters, interstate waters or the territorial seas.[20] The extant regulatory definitions for "adjacent" and "wetlands" are retained, but "neighboring," "riparian area," "floodplain," "tributary," and "significant nexus" are defined for the first time.[21]

Many of the definitions in the proposed rule lack precision. For example, the definitions of "riparian area," "floodplain," "tributary" and "significant nexus" are vague or self-reinforcing and do not include precise boundaries that indicate where the CWA's jurisdiction ends. "Riparian area" 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."[22] "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."[23] "Tributary" is defined as a water that indirectly or directly contributes flow to category 1 through 4 waters and has "a bed and banks and ordinary high water mark." However, wetlands, lakes and ponds with no bed and banks or ordinary high water mark that contribute flow to category 1 through 4 waters are defined as "tributaries," as well as rivers, streams, impoundments, canals and ditches. "Significant nexus" is defined as one that "significantly affects the chemical, physical or biological integrity" of a traditional navigable water, interstate water or territorial sea, and "significant" is described as "more than speculative or insubstantial."[24] To understand which waters will be covered by the proposed rule, the definitions must be read together. For example, both "floodplain" and "riparian area" are used in the definition of "neighboring," which is used in the definition of "adjacent." Thus, any water or wetland in a "floodplain" or "riparian area" will be a "water of the United States."

The agencies claim that the proposed rule will provide clarity to regulated entities.[25] However, the imprecision of these terms, along with the agencies' statement that they will use their "best professional judgment and experience"[26] in interpreting the terms creates more not less confusion about whether a certain body of water is a "water of the United States."

In developing a proposed rule, the agencies are required to follow certain procedures to ascertain the consequences of a proposed rule on those subject to the rule. One of those procedural requirements involves analysis of economic impacts on small entities. Had the agencies complied with these requirements, they might have uncovered that the definitional changes do not resolve uncertainty and may

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[19] *Id.* at 22,198-99.
[20] *Id.* at 22,262-63. The proposed rule retains the waste treatment systems and prior converted croplands exclusion and proposes to exclude specific waters from the definition including: upland ditches; ditches that do not contribute flow to a traditional navigable water, interstate water, territorial sea or impoundment; artificial reflecting or swimming pools; groundwater; and gullies, rills and non-wetlands swales. *Id.* at 22,263.
[21] *Id.* at 22,189.
[22] 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.* at 22,263.
[23] *Id.*
[24] *Id.* Of course, the dictionary definition of "significant" is quite different than that utilized by the agencies in the proposed rule. In fact, the definition of significant in the proposed rule also is quite different from the term "significant" used by the Council of Environmental Quality in the regulations that provide guidance on compliance with the National Environmental Policy Act's requirements to prepare an environmental impact statement for significant federal actions affecting the environment. *See* 40 C.F.R. § 1508.27.
[25] *Id.* at 22,188.
[26] *Id.* at 22,208-09.

create even greater confusion for small entities, such as small businesses and small governmental jurisdictions.

IV. Regulatory Flexibility Act Analysis in the Proposed Rule

Under the Regulatory Flexibility Act, 5 U.S.C. §§ 601-12 (RFA), agencies must assess the impacts of rules on small businesses, small governmental jurisdiction and small non-profits (collectively, "small entities"). Before an agency issues a proposed rule, it must conduct a threshold analysis of the economic impact of the proposed rule. 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 "initial regulatory flexibility analysis" (IRFA).[27] 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.[28] The certification statement must include a "factual basis for the certification."[29]

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."[30] EPA has an additional outreach requirement for any proposed rule that requires preparation of an IRFA. Pursuant to § 609(b) of the RFA, EPA must convene a small business advocacy review (SBAR) panel[31] before the rule is proposed to receive input from small entities.[32]

The EPA and Corps have certified that the proposed rule would not have a "significant economic impact on a substantial number of small entities." However, the agencies failed to provide any factual basis for the certification,[33] as required by the RFA, despite the potential consequences for small businesses.

To the extent that the agencies conducted a threshold analysis of small business impacts, it appears that they did so in a manner that minimized the potential costs on small businesses, which is in contrast to the economic analysis performed for the regulatory impact analysis required by Executive Order 12,866.[34] The agencies used a different baseline in their threshold analysis of small business impacts than for their regulatory impact analysis.[35] It appears that the agencies adopted this approach (without adequate

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[27] 5 U.S.C. §§ 603, 605(b). 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. *Id.* at § 603(a)-(c).

[28] *Id.* at § 605(b).

[29] *Id.*

[30] *Id.* at § 609(a).

[31] 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.*

[32] *Id.* at § 609(b)-(d). 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.*

[33] Proposed Rule, 79 Fed. Reg. at 22,220.

[34] Under Executive Order 12,866, agencies must prepare a regulatory impact analysis for significant rules (of which the proposed rule is one). 3 C.F.R. 638 (1993), *reprinted in* 58 Fed. Reg. 51,735 (Oct. 4, 1993).

[35] The agencies' used the existing regulations as the baseline to determine whether there would be a "significant economic impact on a substantial number of small entities." *Id.* In contrast, the agencies used 2009-2010 field practices based on the 2008 guidance as the baseline in the economic analysis. 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 (2014) [hereinafter Economic Analysis]. Following *SWANCC* and *Rapanos*, agency field practices were changed to limit assertions of CWA jurisdiction for certain

explanation) in an effort to avoid the requirements imposed on EPA by § 609(b) of the RFA to conduct a SBAR panel to obtain the small business input before the rule was proposed.

Even if the agencies had used the same baseline for its analysis under the RFA as for its regulatory impact analysis, that still would have resulted in an underestimate of the impacts on small business.[36] 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. 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.[37] Finally, the analysis inaccurately characterizes all the impacts of the proposed rule as "indirect."[38] These flaws call into question the validity of the economic analysis and its ability to be helpful in understanding the potential consequences of the proposed rule.

V. Impacts on Small Businesses

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. 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,[39] 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 this rule.[40]

Small businesses such as construction firms, land developers, natural resource extraction operations, and farmers and ranchers 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.

The permitting process can be lengthy and expensive. 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."[41] This does not include

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types of waters. *Id.* Thus, the agencies determined that the 2009-2010 field practices was the most useful baseline to determine impacts and found an approximately three percent increase in jurisdiction. *Id.*

[36] *Id.*

[37] 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.

[38] Economic Analysis, *supra* note 35, at 2. This contravenes the decision of the D.C. Circuit in *National Ass'n of Home Builders v. United States Army Corps of Eng'rs*, 417 F.3d 1272 (D.C. Cir. 2005) in which the court held that changes to nationwide permits under § 404 of the CWA directly affect small businesses. *Id.* at 1248.

[39] The fact that an entity may have to apply for the permit in no way undermines the direct impact of changing the jurisdictional scope of the term "waters of the United States" under the CWA, as the agencies should be aware from the D.C. Circuit's similar decision that changing the scope of a nationwide permit under § 404 affects all potential small businesses that wish to dredge or fill a water of the United States. *National Ass'n of Home Builders*, 417 F. 3d at 1284-86.

[40] This section of the memo focuses on the burdens imposed on small businesses due to § 402 and § 404 permitting requirements; 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.

[41] *Rapanos*, 547 U.S. at 721 (citation omitted). 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).

the time and expense of any design changes or mitigation.[42] 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.[43]

Small businesses have raised concerns with the proposed rule's potential consequences.[44] In addition, the agriculture industry has raised concerns with an interpretative rule[45] issued by the agencies to clarify which Natural Resources Conservation Service (NRCS) conservation practice standards are "normal farming" activities and thus are exempt from § 404 permitting requirements.[46] Concerns have been raised that instead of providing clarity, the interpretive rule will restrict the exemption's coverage for activities for which a conservation standard is listed as exempt from § 404 pursuant to the interpretive rule.[47] NRCS standards are voluntary and not necessarily designed for water quality purposes; thus, their use for CWA § 404 permitting exemption purposes raises concerns.

VI. Conclusion

While the agencies assert that the proposed rule will reduce confusion and uncertainty surrounding the scope of the Act's jurisdiction, that assertion is belied by the new regulatory text. Imprecise terms and broad definitions will result in an expansion of CWA jurisdiction to waters that have marginal connections to traditional navigable waters. As a result, small businesses will be required to comply with the CWA's provisions for activities affecting waters previously not subject to the Act's jurisdiction.

Had the agencies performed a sufficient and accurate assessment of impacts on small businesses, they may have identified potential problems with the proposed rule and included more precise and less discretionary terms in the revised definition. This would have provided certainty to, and reduced impacts on, small businesses while accomplishing the goals of the CWA. The EPA and Corps should conduct outreach to, and assess the impacts of the proposed rule on, small businesses, before proceeding with the rulemaking.

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[42] *Id.*

[43] 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.*

[44] Federal Regulation of Waters: Impacts of Administration Overreach on Local Economies and Job Creation: Hearing Before the H. Comm. on Transp. and Infrastructure, 113th Cong. (2014) (statements of Warren Peter, President, Warren Peter Construction and Thomas R. Nagle, Jr., President, Cambria County Farm Bureau).

[45] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND UNITED STATES DEPARTMENT OF THE ARMY INTERPRETIVE RULE REGARDING THE APPLICABILITY OF CLEAN WATER ACT SECTION 404(F)(1)(A) (2014), *available at* http://www2.epa.gov/uswaters/interpretive-rule-regarding-applicability-clean-water-act-section-404.

[46] "Normal farming, silviculture, and ranching activities," infrastructure maintenance activities, construction or maintenance of farm or stock ponds and ditches, and certain other activities are exempt from § 404 permitting requirements. 33 U.S.C. § 1344(f)(1)(A)-(F). However, those exemptions do not apply if "the flow or circulation of navigable waters may be impaired or the reach of such waters may be reduced." *Id.* at § 1344(f)(2).

[47] A memorandum of understanding ("MOU") signed by the EPA, United States Department of Agriculture and the United States Department of the Army provides a list of 56 NRCS conservation practice standards that are considered exempt from § 404 permitting as of the date of the MOU. MOU AMONG THE UNITED STATES DEPARTMENT OF AGRICULTURE, THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND THE UNITED STATES DEPARTMENT OF THE ARMY CONCERNING IMPLEMENTATION OF THE 404(F)(1)(A) EXEMPTION FOR CERTAIN AGRICULTURE CONSERVATION PRACTICE STANDARDS 6-7 (2014). The conservation practice standards listed are for activities such as brush management, fishpond management, building a fence, clearing land, and range planting. *Id.* The agencies plan to annually meet and discuss changing the list of exempted practices. *Id.* at 3.