



April 11, 2019

VIA ELECTRONIC SUBMISSION

The Honorable Andrew Wheeler
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: Revised Definition of “Waters of the United States” (Docket No. EPA-HQ-OW-2018-0149)

Dear Administrator Wheeler and Lieutenant General Semonite:

On February 14, 2019, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) published a proposed rule titled: “*Revised Definition of “Waters of the United States.”*”¹ This proposed rule defines the scope of waters subject to federal jurisdiction and regulation under the Clean Water Act. This proposed rule is the second step in a two-step process to both rescind the previous definition, and here, to revise the existing definition.

¹ Revised Definition of “Waters of the United States”, 84 Fed. Reg. 4154 (proposed February 14, 2019).



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The Office of Advocacy (Advocacy) applauds EPA and the Corps' efforts to revise the definition of "waters of the United States" to provide a clear, concise, and consistent definition and application that can be used to determine which waters are jurisdictional, thereby providing additional certainty to regulated entities as to the current definition. While Advocacy and small businesses are generally in favor of this proposed rule, additional specificity is necessary to ensure that the rule provides the utmost clarity. Advocacy is concerned that the agency improperly certified that the rule will not have a significant economic impact on a substantial number of small entities. This certification appears to lack a factual basis as required by statute.

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 and Procedural History

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

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).

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 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 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, because the proposed rule would have a significant economic impact on a substantial number of small entities.¹²

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, 2015.¹³ 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 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.¹⁶

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.’”¹⁷ As part of their review, and consistent with the Executive Order, EPA and the Corps proposed to rescind the 2015 final rule. On July 12, 2018 the agencies published a supplemental notice of proposed rulemaking titled: *Definition of “Waters of the United States” - Recodification*

¹⁰ 33 U.S.C. §§ 1311(a), 1342, 1344.

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 (Oct. 9, 2015).

¹⁶ See *National Ass’n of Mfrs. v. Dep’t of Defense*, 583 U.S. ___, ___ S.Ct. ___, 2018 WL 491526, No. 16-299 slip op. (January 22, 2018).

¹⁷ Exec. Order No. 13778, 82 Fed. Reg. 12497 (February 28, 2017).

of Pre-Existing Rules.¹⁸ This supplemental notice followed publication of a proposed rule of the same title published on July 27, 2017.¹⁹ The proposed rule was the first in a two-step process to revise the definition of “waters of the United States.” The first step proposed 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.

This proposed rule, revises the definition of “waters of the United States” by attempting to create distinct definitions for those waters that are and are not subject to the permitting requirements. In addition, 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.²⁰ The rulemaking addressing the applicability date was the subject of litigation as well. As a result of various court rulings, the 2015 final rule is currently in effect in 22 states, while it remains stayed in 28 states, thus further complicating matters and necessitating the need for this proposed rule.²¹

Main Features of the Proposed Rule

The proposed rule defines waters of the United States, as traditional navigable waters (TNW) and the territorial seas. In addition to these main categories, there are several subcategories including ditches,²² lakes and ponds,²³ tributaries to TNWs,²⁴ impoundments,²⁵ and adjacent wetlands.²⁶

Exclusions include those waters not otherwise defined as waters of the United States in the proposed rule, as well as waters in the following specific categories: groundwater, ephemeral

¹⁸ Definition of “Waters of the United States”- Recodification of Pre-Existing Rules, 83 Fed. Reg 32227 (proposed July 12, 2018).

¹⁹ Definition of “Waters of the United States”- Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899 (proposed July 27, 2017).

²⁰ 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).

²¹ See *South Carolina Coastal Conservation League, et al., v. Pruitt*, No. 2-18-cv-330-DCN, 2018 U.S. Dist. LEXIS 138595 (D.S.C. Aug. 16, 2018). See also *Puget Soundkeeper Alliance, et al. v. Andrew Wheeler, et al.*, No. C15-1342-JCC (W.D. Wash. November 26, 2018).

²² In the proposed rule, ditches have been separated into their own category. Ditches are defined as jurisdictional when they meet the definition of a TNW, are constructed in waters that meet the definition of a tributary, or constructed in a wetland, meet definition of adjacent wetland, and have elements of a tributary. See 84 Fed. Reg. 4154 at 4179.

²³ In the proposed rule, this category is jurisdictional if it is a TNW, contributes perennial or intermittent flow to a TNW, or is flooded by a TNW in a typical year. See *id.* at 4182.

²⁴ The regulatory definition of tributary does not change. The agencies in the proposed rule have added a definition for “typical year”, as the normal range of precipitation over a 30-year period for a geographic region. The new definition does not include an ordinary high-water mark, and the significant nexus test has been eliminated. The definition also excludes ephemeral flow. See *id.* at 4173.

²⁵ This definition was not changed from the previous rule. See *id.* at 4172.

²⁶ The existing regulatory definition of wetland has not been changed. In the proposed rule, an adjacent wetland is jurisdictional if it has a direct hydrologic surface connection to a jurisdictional water. If it is separated by other features, it is not considered. The proposed rule does not use distance thresholds that existed in the prior rule, nor the significant nexus evaluation. See *id.* at 4184.

features and diffuse storm-water runoff,²⁷ ditches,²⁸ prior converted cropland (PCC),²⁹ artificially irrigated areas,³⁰ water-filled depressions in upland,³¹ stormwater control features,³² wastewater recycling structures,³³ and waste treatment systems.³⁴

I. Small Businesses are Generally in Favor of the Rule but Specific Modifications Are Needed

Following the publication of the proposed rule, Advocacy engaged in significant outreach efforts with small business stakeholders. Advocacy promoted to small entity stakeholders two days of public hearings hosted by the agencies in Kansas City, MO on February 27th and 28th, 2019, and a small entity outreach meeting hosted by the agencies on March 19, 2019 in Washington, D.C. Advocacy attended all these events.

In addition to official agency activities, Advocacy convened small business roundtables in Kansas City, KS on February 27th, 2019; Denver, CO on March 27th, 2019; and Tampa, FL on April 4, 2019. The purpose of the roundtables was to hear comments on the proposed rule directly from small entities. In addition to the roundtables, Advocacy spoke with numerous small entities via teleconferences and in-person meetings in Washington, D.C. Advocacy also heard about the need to revise the definition of “waters of the United States” during its regional regulatory reform roundtables that took place in numerous states.

Small businesses are generally in support of the proposed rule, with various suggestions for modification. Advocacy agrees with the agencies that the proposed rule has appropriately reduced the overall scope of “waters” in comparison to the 2015 final rule. This should substantially reduce the regulatory burdens on small entities through both the reduction in scope and the increased clarity of the regulation. Below Advocacy outlines areas where multiple stakeholders have commented on the need for revision or clarification to the proposed rule, and we agree that those comments merit consideration. This list is not exhaustive, and Advocacy strongly urges the agencies to review and consider the public comments of all small business concerns with the rule.

1) Traditional Navigable Waters

²⁷ The 2015 rule did not have an exclusion for ephemeral features. *See id.* at 4190.

²⁸ The proposed rule excludes all ditches except those that are TNWs, former tributaries, or adjacent wetlands. This is more than the previous rule. *See id.* at 4190-4191.

²⁹ The definition of abandonment of a PCC in the proposed rule states that it is no longer a PCC if it is not used for or in support of agricultural purposes at least once in the immediately preceding 5 years. *See id.* at 4158-4159.

³⁰ The proposed rule includes specific exclusions for cranberry and rice growing activities. *See id.* at 4190.

³¹ The rule specifically includes those depressions created incidental to mining or construction activities. *See id.* at 4155.

³² The rule does not include an exclusion in all cases for municipal separate storm sewer systems (MS4s), despite their being subject to other permitting requirements. *See id.* at 4190.

³³ The proposed rule clarifies the practice that waters and water features used for water reuse and recycling are not jurisdictional when constructed in upland. *See id.*

³⁴ The 2015 rule did not have a definition for waste treatment systems. This proposed rule defines them as components designed for pollutant removal from wastewater prior to discharge. *See id.*

A few stakeholders indicated that the definition of TNW's, "waters used in interstate commerce" should be revised to say, "waters used to transport interstate commerce." They also asked the agencies to consider removing "may be susceptible to use in interstate commerce" from the definition.

2) Tributaries

Several stakeholders stressed the need to further clarify the definition of tributaries, stating that the terms "certain times" and "typical year" remain vague. Some stakeholders suggested having an actual numerical minimum value and clarifying the data sources and methods that could be used to determine that amount, understanding that that value would be different based on geography, and year-to-year. Others suggested using a seasonal flow standard instead of "typical year" and limiting the duration to times with continuous flow only. Stakeholders also stressed clarifying the process for determining ephemeral waters.

3) Ditches

Stakeholders suggested that the agency continue to use some form of physical marker or historical indication for determining ditches. The agencies should issue guidance on how they will determine historic ditches. One stakeholder mentioned that it should be clear that roadside ditches are not jurisdictional. They stressed that in rural communities these ditches are used for both agricultural and roadside uses and despite being county-owned and thus inter-jurisdictional at a municipal level, they function as interconnected continuous ditches. Stakeholders therefore stressed the need to clarify that these ditches are not jurisdictional for purposes of the definition of waters of the United States.

Stakeholders also indicated that currently, the maintenance exemption³⁵ is not being consistently applied and that in some areas it is a blanket exemption while in other parts of the country, entities must apply to receive the exemption. They asked that this be clarified in the rule and/or subsequent agency guidance on implementation.

4) Lakes and Pond

Similar to the tributary's category, stakeholders found the terms used to define lakes and ponds vague, and confusing. They stated the need to further define and clarify "intermittent" and "typical year" and exclude activities that displace water through artificial means and pumping.

"Intermittent flow" was problematic for many stakeholders nationwide. They stressed that this definition could mean several different things depending on geography, and unpredictable rain events or a lack thereof and were worried that the definition as

³⁵ The Clean Water Act provides an exclusion from WOTUS for discharges that result from the construction or maintenance of irrigation ditches, maintenance of drainage ditches, or minor drainage associated with normal farming activity. 33 U.S.C. 1344(f)(1)(A), (C).

proposed would not withstand a legal challenge. They were hesitant to have one nationwide standard rather than assessing and developing flow thresholds geographically based on data for the area in question. They suggested the agency determine quantifiable amounts, time, and a measurement for the flow of the water.

5) Adjacent Wetlands

Stakeholders were strongly in favor of the elimination of the significant nexus test, as well as the elimination of the definition “similarly situated” and ecological considerations. They stressed that in the final rule the agencies should further clarify what is meant by “typical year.” They opposed the artificial separation thresholds used in the 2015 final rule. Advocacy agrees that the proposed “hydrologic surface connection”³⁶ provides a more appropriate and precise identification of adjacent wetlands.

6) Stormwater Control Features

A few stakeholders indicated that municipal separate storm sewer systems (MS4s) should be excluded in all instances because they are already subject to federal permitting requirements. Making them jurisdictional under this rule would be redundant and cause significant additional permitting delays. Congress created the MS4 permitting scheme in the 1987 Clean Water Act amendments and did not intend for MS4s to be both point sources and U.S. “waters”. EPA also could consider whether any portion of the MS4 would otherwise be defined as a tributary with perennial flows, which could fall outside the MS4 exclusion.

Duplicative coverage could also be applied to already permitted areas for concrete mixing and settling basins (construction and development permits). Some small industry stakeholders stated that those areas that are already subject to federal water permitting requirements should be otherwise excluded as it would be redundant and causes additional significant delays.

7) Upland

The definition of upland was not clear to some stakeholders who stated that the agency should make this clear, or issue subsequent guidance on what is considered upland. They stated that there is no widely established regulatory definition of an upland and that this should be included in the final rule. They were especially concerned about coastal and ravine areas.

8) Use of Geospatial Datasets

Stakeholders agreed that the use of proper maps, data sets and reference tools would greatly enhance agency transparency and accuracy. Conversely, they were worried about potential misuse of the data, delays due to attempting to create new data, or

³⁶ See 84 Fed. Reg. 4154 at 4155.

inconsistent agency determinations as a result of the availability of this data and stressed the need for consistent and nationwide agency guidance as to use and implementation.

9) Impoundments

Stakeholders have indicated that this category is redundant and unclear and should be eliminated or combined with the lakes and ponds category.

10) Prior Converted Cropland (PCC)

Stakeholders have asked that this regulatory exclusion be extended to ditches, impoundments, and water features within a PCC area that would be become jurisdictional under other categories, and specifically state this in the final rule.

II. The Agencies' Certification of the Rule Lacks a Factual Basis

While stakeholders and Advocacy are in favor of the proposed rule, with additional clarification and modification, Advocacy believes that the agencies have improperly certified this rule. An agency may certify that no initial RFA is required when it determines that the rule will not have a significant economic impact on a substantial number of small entities.³⁷ Agencies must provide a factual basis for the certification that clearly shows that the new rule will not have a significant economic impact on a substantial number of small entities.³⁸ Certification that a rule will not have a significant economic impact on a substantial number of small entities on the basis that the rule is deregulatory in nature is insufficient to rise to the level of a definitive showing.

The agencies base their certification on the deregulatory nature of the proposed rule, positing that an agency may certify a rule in accordance with the RFA if the rule “relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities to the rule.”³⁹ The agencies further conclude that “the impact of concern is any significant *adverse* economic impact”.⁴⁰ In our view, these conclusions are a misinterpretation of the RFA’s standard for certification. First, under the statute the term “significant” is neutral with respect to whether the proposed rule is harmful or beneficial to small businesses, as agencies may promulgate rules which simultaneously benefit small entities and result in substantial economic impacts, thereby prompting RFA analysis.⁴¹ The RFA is “designed not only to avoid harm to small entities but also to promote the growth and well-being of such entities.”⁴² Second, while the rule rescinds the 2015 rule and codifies the pre-2015 WOTUS definition, certification of this rule on the basis that it is deregulatory or otherwise maintains the status quo does not address the potential

³⁷ 5 U.S.C. 605(b).

³⁸ *Id.*

³⁹ 84 Fed. Reg. 4154, 4202 (proposed Feb. 14, 2019).

⁴⁰ *Id.* (emphasis added).

⁴¹ 126 Cong. Rec. H8,468 (daily ed. Sept. 8, 1980) (Legislative History of H.R. 4660 of the House Small Business Committee); *see also* A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act (2017).

⁴² *Id.*

adverse impacts that the rule will have on some small businesses. The agencies' statement that the action is deregulatory overall, and that the burden for all entities will be reduced overlooks the fact that some small entities may face adverse consequences.

Advocacy encourages the agencies to consult with the Office of Advocacy's RFA guide for government agencies, where they will find a detailed certification checklist and explanation.⁴³ As set forth above, the threshold issue that triggers the RFA requirement for analysis under Sections 603 and 604 is whether the agency action has significant economic effects on a substantial number of small entities, not simply whether the action is deregulatory or regulatory in nature. Advocacy urges the agencies to provide a factual basis for the certification, that is not accompanied by conclusory or vague language, but clearly and definitively shows that the rule will not have a significant economic impact on a substantial number of small entities.

Conclusions and Recommendations

Advocacy applauds EPA and the Corps' efforts to revise the definition of "waters of the United States," thereby ensuring that it is clearer and not overly broad in scope. Advocacy urges the agencies to consider the comments of small businesses to further clarify portions of the rule to make them more succinct and easier to understand. Additionally, Advocacy urges the agencies in their final rulemaking, to conduct a proper RFA analysis, and if appropriate certify with a clear and definitive factual basis that the rule will not have a significant economic impact on a substantial number of small entities.

Advocacy urges EPA and the Corps to give full consideration 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,

/s/

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/s/

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⁴³ See "A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act (2017)." Available at <https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf>.

/s/

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/s/

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Copy to: Paul Ray, Acting Administrator
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