



February 7, 2022

VIA ELECTRONIC SUBMISSION

The Honorable Michael S. Regan, Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

The Honorable Michael L. Connor, Assistant Secretary of the Army (Civil Works)
Department of the Army
108 Army Pentagon
Washington, D.C. 20310

Re: Comments on EPA and Army’s proposed rule defining “the waters of the United States” under the Clean Water Act (EPA Docket EPA-HQ-OW-2021-0602 and Army Docket COE-2021-0001-0016).

Dear Administrator Regan and Assistant Secretary Connor:

On December 7, 2021, the Environmental Protection Agency (EPA) and the Department of the Army (Army; collectively, the Agencies) published a notice of proposed rulemaking defining “the waters of the United States” (WOTUS) under the Clean Water Act (CWA).¹ This letter constitutes the Office of Advocacy’s (Advocacy) public comments on the proposed rule. Advocacy believes that the Agencies have improperly certified the proposed rule under the Regulatory Flexibility Act (RFA) because it would likely have direct significant impacts on a substantial number of small entities. Although the Agencies have characterized the proposed rule as codifying the Agencies’ current implementation of WOTUS under the 1986 and 1988 regulations as well as the Agencies’ Rapanos Guidance and SWANCC Guidance, the Agencies’ proposed definition expands the scope of “the waters of the United States” beyond what is stated in either the 1986 and 1988 regulations or the Rapanos and SWANCC Guidance documents. Because the proposed rule will likely impose a significant impact on a substantial number of small entities, Advocacy recommends the Agencies hold the proposed rule in abeyance for further development as the Agencies consider alternative approaches for small entities by convening a Small Business Advocacy Review (SBAR) panel in accordance with the Regulatory Flexibility Act prior to promulgating any further rule on this issue.

¹ 86 Fed. Reg. 69372 (Dec. 7, 2021).

The Office of Advocacy

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 the U.S. Small Business Administration (SBA), so 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 a response to these written comments in any 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

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁶

Background

The CWA was enacted in 1972 to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."⁷ The CWA accomplishes this by regulating 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 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."¹⁰ EPA generally administers these permits, but EPA and the Army Corps of Engineers jointly administer and enforce certain permit programs under the Act.¹¹

Supreme Court Precedent on Definition of "the Waters of the United States"

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. First, in 1985, the Supreme

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 (Pub. L. No. 111-240) § 1601.

⁵ *Id.*

⁶ 5 U.S.C. § 601 note.

⁷ 33 U.S.C. § 1251(a) (1987).

⁸ 33 U.S.C. § 1251(a)(1) (1987).

⁹ 33 U.S.C. § 1362(7) (2019).

¹⁰ 33 U.S.C. § 1341 et. seq. (2019).

¹¹ 33 U.S.C. Section 1344 (1987).

Court determined that adjacent wetlands may be included in the regulatory definition of “the waters of the United States.”¹²

In 2001, the Court next held that migratory birds’ use of isolated “non-navigable” intrastate ponds was not sufficient cause to extend federal jurisdiction under the CWA.¹³ In response to this decision, the Agencies issued regulatory guidance (SWANCC Guidance),¹⁴ which attempted to provide clarification to the regulated community that “waters of the United States” did not include isolated, intrastate, and non-navigable waters where the sole basis for asserting jurisdiction was based upon the use of such waters by migratory birds.¹⁵

In 2006, the Supreme Court next considered whether wetlands near ditches or manmade drains that eventually empty into traditional navigable waters were considered “waters of the United States.”¹⁶ 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.”¹⁷ 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.¹⁸

In response, the Agencies issued regulatory guidance (Rapanos Guidance), which again attempted to provide additional clarification to the regulated community that “waters of the United States” include those “tributaries and their adjacent wetlands . . . that have a significant nexus to a traditional navigable water” as well as “similarly situated wetlands” that significantly affect the chemical, physical, and biological integrity of traditional navigable waters. Per the Rapanos Guidance, similarly situated wetlands are only those that are “adjacent to the same tributary.”¹⁹

Recent Rulemakings by the Agencies

In 1986, Army promulgated the first attempt at a regulation defining “the waters of the United States.” The regulation defined a “water of the United States” as “[a]ll waters which are currently used, were used in the past, or may be susceptible to us[e] in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide,” “[a]ll interstate waters including interstate wetlands,” “[a]ll other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which would or

¹² United States v. Riverside Bayview Homes, 474 U.S. 121, 134-135 (1985).

¹³ Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC), 531 U.S. 159, 174 (2001).

¹⁴ 68 Fed. Reg. 1991 (Jan. 15, 2003).

¹⁵ Id.

¹⁶ Rapanos v. United States, 547 U.S. 715, 729 (2006).

¹⁷ Rapanos v. United States, 547 U.S. 715, 742 (2006).

¹⁸ Id. at 779 (Kennedy, J., concurring).

¹⁹ U.S. Environmental Protection Agency and U.S. Department of Army, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States, https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.prd (last visited Jan. 31, 2022).

could affect interstate or foreign commerce including any such waters: [w]hich are or could be used by interstate or foreign travelers for recreational or other purposes; or [f]rom which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or [w]hich are used or could be used for industrial purposes by industries in interstate commerce,” “impoundments of waters otherwise defined as waters of the United States,” “[t]ributaries of waters identified [elsewhere in this section],” “territorial sea,” and “[w]etlands adjacent to waters (other than those waters that are themselves wetlands).”²⁰ Following Army’s lead, EPA promulgated its own regulations in 1988 mirroring the Army’s 1986 regulations.²¹ The 1986 and 1988 regulations were in effect until 2015.

In 2015, the Agencies attempted to clarify the definition of “the waters of the United States” through the Clean Water Rule.²² However, the Clean Water Rule was enjoined by the United States District Court for the District of North Dakota on August 27, 2015, the day before the rule was to become effective.²³ On October 9, 2015, the Sixth Circuit stayed the Clean Water Rule nationwide, reasoning that procedural and constitutional deficiencies existed.²⁴ The Clean Water Rule was repealed by the Agencies on October 22, 2019.²⁵

Not only was the Clean Water Rule repealed on October 22, 2019, the 1986/1988 regulations were recodified with minor modifications, including creating a uniform definition of “navigable waters” and “the waters of the United States” applicable to all sections of the Clean Water Act (the Repeal Rule).²⁶ Six months later, on April 21, 2020, the Navigable Waters Protection Rule (NWPR) was finalized with an effective date of June 22, 2020, replacing the Repeal Rule.²⁷ The Navigable Waters Protection Rule modified the 2019 regulation and concluded that “the waters of the United States” included only “territorial seas and traditional navigable waters; perennial and intermittent tributaries that contribute surface water flow to such waters; certain lakes, ponds, and impoundments of jurisdictional waters; and wetlands adjacent to other jurisdictional waters.”²⁸

The Navigable Waters Protection Rule was vacated by the United States District Court for the District of Arizona on August 30, 2021.²⁹ Beginning in September 2021, both EPA and the Army Corps of Engineers stopped implementation of the Navigable Waters Protection Rule

²⁰ 51 Fed. Reg. 41206 (Nov. 13, 1986).

²¹ 53 Fed. Reg. 20764 (June 6, 1988).

²² 80 Fed. Reg. 37054 (June 29, 2015).

²³ See *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015).

²⁴ *Murray Energy Corp. v. United States DOD*, 817 F.3d 261 (6th Cir., Feb. 22, 2016).

²⁵ 84 Fed. Reg. 566626 (October 22, 2019).

²⁶ See *id.*

²⁷ 85 Fed. Reg. 22250 (April 21, 2020).

²⁸ *Id.*

²⁹ *Pascua Yaqui Tribe v. EPA*, 2021 U.S. Dist. LEXIS 163921 (2021).

nationwide.³⁰ The Agencies are currently implementing the 1986 and 1988 regulations as well as the SWANCC Guidance and the Rapanos Guidance.³¹

Proposed Rule

To address the uncertainties that remain as the result of multiple court decisions and frequent regulatory changes, the Agencies proposed this rule which would revise the regulatory definition of “the waters of the United States.”³²

The proposed definition contains seven categories of “the waters of the United States,” four of which are identical or nearly identical to the regulatory text of the 1986 and 1988 regulations. These four unchanged categories include: (1) waters that have been used, are used, or could be used for either interstate or foreign commerce,³³ (2) interstate waters,³⁴ (3) impoundments of waters otherwise considered “waters of the United States,”³⁵ and (4) territorial seas.³⁶

Three categories are not identical to the 1986 and 1988 rules. First, the rule proposes that a “water of the United States” would now include all other waters that either have relatively permanent flow with a surface connection to traditional navigable waters, or significantly affects the chemical, biological, or physical integrity of traditional navigable waters.³⁷

Second, a “water of the United States” under the proposed rule would now include tributaries of

1. traditional navigable waters;
2. interstate waters and wetlands;
3. impoundments; and
4. territorial seas

that are either relatively permanent, standing or continuously flowing bodies of water or that alone, or with other similarly situated waters in the region, significantly affect the chemical, biological, or physical integrity of traditional navigable waters, interstate waters and wetlands, or territorial seas.³⁸

³⁰ See U.S. Environmental Protection Agency, Current Implementation of Waters of the United States, <https://www.epa.gov/wotus/current-implementation-waters-united-states> (last visited Jan. 31, 2022).

³¹ See U.S. Environmental Protection Agency, Current Implementation of Waters of the United States, <https://www.epa.gov/wotus/current-implementation-watrs-united-states> (last visited Jan. 31, 2022).

³² 86 Fed. Reg. 69372 (Dec. 7, 2021).

³³ Id. See U.S. Environmental Protection Agency, Current Implementation of Waters of the United States, <https://www.epa.gov/wotus/current-implementation-watrs-united-states> (last visited Jan. 31, 2022).

³⁴ 86 Fed. Reg. 69372 (Dec. 7, 2021). See U.S. Environmental Protection Agency, Current Implementation of Waters of the United States, <https://www.epa.gov/wotus/current-implementation-watrs-united-states> (last visited Jan. 31, 2022).

³⁵ 86 Fed. Reg. 69372 (Dec. 7, 2021). See U.S. Environmental Protection Agency, Current Implementation of Waters of the United States, <https://www.epa.gov/wotus/current-implementation-watrs-united-states> (last visited Jan. 31, 2022).

³⁶ 86 Fed. Reg. 69372 (Dec. 7, 2021). See U.S. Environmental Protection Agency, Current Implementation of Waters of the United States, <https://www.epa.gov/wotus/current-implementation-watrs-united-states> (last visited Jan. 31, 2022).

³⁷ 86 Fed. Reg. 69372 (Dec. 7, 2021).

³⁸ 86 Fed. Reg. 69372 (Dec. 7, 2021).

Third, under the proposed rule, a “water of the United States” would now include wetlands that are adjacent to

1. Traditional navigable waters;
2. interstate waters or interstate wetlands;
3. territorial seas;
4. impoundments with a relatively permanent, standing, or continuous flow;
5. impoundments where the adjacent wetland, either alone or in combination with similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of (a) traditional navigable waters, (b) interstate waters or interstate wetlands, or (c) territorial seas;
6. tributaries with a relatively permanent, standing, or continuous flow; or
7. tributaries that, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of (a) traditional navigable waters, (b) interstate waters or interstate wetlands, or (c) territorial seas.³⁹

In the economic analysis of the rule, the Agencies have compared the costs of the proposed rule to both (1) the 1986/1988 regulations paired with the SWANCC Guidance and Rapanos Guidance (the Primary Baseline), and (2) the Navigable Waters Protection Rule (the Secondary Baseline). Comparing the proposed rule to the Primary Baseline, the Agencies conclude there are no additional annualized costs to small entities.⁴⁰ Comparing the proposed rule to the Secondary Baseline, the Agencies conclude the total national annualized Sec. 404 permit costs range from \$23.0 million to \$74.8 million and the total national annualized Sec. 404 mitigation costs range from \$85.3 million to \$190.0 million.⁴¹ These estimated costs by the Agencies are only for twenty-six States, and the Agencies did not provide any additional cost estimate for the remaining States or other jurisdictions subject to CWA jurisdiction.⁴²

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 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.”⁴³ 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

³⁹ Id.

⁴⁰ United States Environmental Protection Agency, Economic Analysis for the Proposed, Revised Definition of Waters of the United States, Rule, available at <https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0083> (last visited Jan. 31, 2022).

⁴¹ Id.

⁴² Id.

⁴³ 5 U.S.C. § 603 (2010).

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 and significant alternatives to the proposed rule. 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.⁴⁴ When certifying, the agency must provide a factual basis for the certification.⁴⁵ 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 entities.

The Proposed Rule Has Been Improperly Certified

Advocacy believes that the Agencies have improperly certified this proposed rule. Advocacy, and the small entities we have spoken to, believe that the Agencies have failed to state a factual basis for its certification that the rule will not have a significant economic impact on a substantial number of small entities. The proposed rule imposes costs directly on small entities, and those costs will be significant for a substantial number of them.

The Agencies attempted an economic comparison of the proposed rule with the 1986/1988 regulations as well as the SWANCC Guidance and the Rapanos Guidance (the Primary Baseline), and the Navigable Waters Protection Rule (the Secondary Baseline).⁴⁶ Although the Agencies have certified that the proposed rule would not have a significant impact on a substantial number of small entities using either baseline, Advocacy finds that certification under either baseline is unavailable.

A. The Agencies Failed to State a Factual Basis for its Certification Using the Primary Baseline

Advocacy believes that the Agencies failed to state a factual basis in its RFA certification for the Primary Baseline used by the Agencies. In certifying the rule, the Agencies state that, “This rule would codify a regulatory regime generally comparable to the one currently being implemented nationwide due to the vacatur of the [Navigable Waters Protection Rule].”⁴⁷ On this basis, the Agencies conclude that, “the proposed rule would not impose any requirements on small entities.”⁴⁸

However, the Agencies admit that the proposed rule and the rule currently being enforced by the Agencies are not identical. The Agencies state the current and the proposed rule are “generally comparable” and “very similar,” but the Agencies fail to identify what the differences between

⁴⁴ 5 U.S.C. § 605 (1996).

⁴⁵ Id.

⁴⁶ See 86 Fed. Reg. 69372 (Dec. 7, 2021). See United States Environmental Protection Agency, Economic Analysis for the Proposed, Revised Definition of Waters of the United States, Rule, available at <https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0083> (last visited Jan. 31, 2022).

⁴⁷ 86 Fed. Reg. 69372 (Dec. 7, 2021).

⁴⁸ Id.

the two are.⁴⁹ The Agencies are required to state what the specific differences are to be able to use a factual basis to support whether certification is proper or not. Advocacy has concluded that the two regulatory regimes are not “generally comparable” or “very similar.” Rather, the two regulatory regimes have several differences, and, specifically, the proposed rule expands the jurisdiction of the CWA substantially to waters that, under the current regulatory regime being implemented by the Agencies, would not be deemed a “water of the United States.”

The proposed rule, unlike the regulatory regime currently being implemented by the Agencies, deems a water to be a “water of the United States” if it affects any one of the chemical, physical, or biological integrities of a traditional navigable water. The current regulatory implementation only deems a water to be a “water of the United States” if it affects all three components. Similarly, the proposed rule, unlike the regulatory regime currently being implemented by the Agencies, expands “other waters” deemed to be a “water of the United States” from those that are used only for interstate or foreign commerce to those that either have relatively permanent, standing, or continuous flow or that have a significant nexus to a traditional navigable water even if the subject water has not, is not, and cannot be used in interstate or foreign commerce.

In addition, the proposed rule expands the definition of a “water of the United States” to include certain tributaries of territorial seas, wetlands adjacent to additional types of impoundments, and wetlands adjacent to additional types of tributaries. Importantly, the proposed rule allows, unlike the current regulatory regime being implemented which only allowed “aggregating” of wetlands directly adjacent to the same traditional navigable water “aggregating” of all types of waters and allows the “aggregating” of waters that are not directly adjacent to a traditional navigable water by expanding the definition of “similarly situated” from those that are directly adjacent to a traditional navigable water to those that are “within the same region.”⁵⁰

With these clear expansions of what will be deemed a “water of the United States” under the proposed rule, more small entities and small entity projects will be impacted by this proposed rule by becoming subject to CWA jurisdiction and, thus, permitting, mitigation and other CWA obligations.

B. The Agencies Cannot Certify Using the Secondary Baseline

The Agencies concluded that “the NWPR would result in an increase in non-jurisdictional findings in jurisdictional determinations compared to prior regulations and practice, and that compared to the NWPR, the proposed rule would define more waters as within the scope of the Clean Water Act.”⁵¹ Failing to adequately analyze the costs to small entities, the Agencies simply conclude that the proposed rule – compared to NWPR – would result in “benefits between \$375.8 and \$590.1 million” and “total social costs ranging from \$108.6 million to \$275.9 million.”⁵² The Agencies define “total social costs” as “cost of compliance (404

⁴⁹ See *id.*

⁵⁰ See generally *id.*

⁵¹ 86 Fed. Reg. 69372 (Dec. 7, 2021).

⁵² United States Environmental Protection Agency, Economic Analysis for the Proposed, Revised Definition of Waters of the United States, Rule, available at <https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0083> (last visited Jan. 31, 2022).

permitting and mitigation costs) and state costs from an increased section 401 reviews.” The Agencies do not define “benefits” although it is implied that “benefits” include “social benefits” to the public.⁵³

The Agencies’ attempt to show the existence of a “net benefit” to the public at large of moving away from NWPR to the proposed rule has failed to comply with the RFA, which mandates agencies only consider the economic impact that small entities will directly bear.⁵⁴ Furthermore, the Agencies have failed to capture in their economic analysis all direct costs to small entities of moving from NWPR to the proposed rule. The Agencies only cite certain Section 404 permitting and mitigation costs, but fail to account for other permitting, mitigation, and other costs to small entities under the entirety of the CWA such as Section 402 permitting or Section 311 oil spill prevention plans. The Agencies similarly fail to account for additional costs related to any of the administration of the rule by small entities, jurisdictional determinations sought by small entities, or project delays borne by small entities.

Because the Agencies have not properly quantified the full direct costs to small entities in transitioning from the NWPR to the proposed rule, the Agencies cannot certify under the RFA, and the Agencies must conduct an IRFA. If EPA is unable to conclude that the proposed rule would not have a significant impact on a substantial number of small entities after completing its IRFA, EPA must convene a SBAR panel before proceeding further.

C. The Rule Imposes Costs Directly on Small Businesses

The second basis for certification under the RFA used by the Agencies – whether the Primary or the Secondary Baseline is applicable – is that the impact on small entities will be indirect, hence not requiring an IRFA or a SBAR panel.⁵⁵ EPA cites *Mid-Tex Electric Cooperative, Inc., v. Federal Energy Regulatory Commission*⁵⁶ and *American Trucking Associations, Inc., v. EPA*⁵⁷ in support of their certification.⁵⁸ Advocacy believes that the Agencies’ reliance on *Mid-Tex* and *American Trucking* is misplaced because the proposed rule will have direct effects on small entities.

In *Mid-Tex*, 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. The issue raised in this case was whether the agency had improperly certified the rule because it failed to consider the impact on small business customers. The court noted that an agency is required to produce an IRFA only in cases where a regulation directly affects small businesses. If it does not, an agency may properly certify. In *Mid-Tex*, the proposed regulation applied directly to the generating

⁵³ See Id.

⁵⁴ See 5 U.S.C. § 601 et seq.

⁵⁵ 86 Fed. Reg. 69372 (Dec. 7, 2021).

⁵⁶ See 86 Fed. Reg. 69372 (Dec. 7, 2021). *Mid-Tex Electric Cooperative, Inc. v. Federal Energy Regulatory Commission* (FERC), 773 F.2d 327, 342 (D.C. Cir. 1985).

⁵⁷ 86 Fed. Reg. 69372 (Dec. 7, 2021). *American Trucking Associations v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999).

⁵⁸ 86 Fed. Reg. 69372 (Dec. 7, 2021).

utilities themselves, not their customers. 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 actor. The CWA and the revised definition proposed in this rule directly determine permitting requirements and other obligations. It is unquestionable that small businesses and other small entities will continue to seek permits under the CWA. 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 CWA 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*, 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 only indirectly through state implementation plans. The rules gave states broad discretion to determine how to achieve compliance with the NAAQS. The rules required EPA to approve any state plan that met the standards, but it could not reject a plan based upon its view of the wisdom of a state's choices. Under these circumstances, the court concluded that EPA had properly certified because any impacts to small entities would flow from the individual states' actions and thus be indirect.

Here, 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. An increase 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 CWA and is therefore subject to it.

These examples, as well as comments that Advocacy has received from small entities in various 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.

D. The Rule Will Have a Significant Economic Impact on Small Entities

The Agencies' economic analysis clearly, although incompletely, indicates that this rule is likely to have a significant economic impact on small entities. 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 United States).⁵⁹ The Agencies estimate that CWA Sec. 404 permit costs would increase between \$108.6 million to \$275.9 million for projects based in 26 States in transitioning from the NWPR to the proposed rule.⁶⁰ These amounts do not reflect costs for Sec. 404 projects in the remaining States and other jurisdictions subject to CWA jurisdiction, nor do they reflect additional cost increases associated with other CWA programs, such as Section 402 permitting or Section 311 oil spill prevention plans.

In addition, Advocacy is very concerned by the Agencies' failure to include exemptions into the proposed rule that would have codified long-standing practice by the Agencies as well as confirmation of certain exclusions stated or alluded to within the statutory text. These include exemptions for stormwater control features, farm and stock watering ponds, puddles, and certain ditches. The Agencies have previously stated that it is "[t]he agencies] long-standing practice . . . to view stormwater control features that are not built in 'waters of the United States' as non-jurisdictional."⁶¹ Similarly, the Agencies have previously stated that "[a]rtificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds" "are not 'waters of the United States.'"⁶² Lastly, the Agencies previously stated that ditches along roadways, airports, and rail lines as well as certain agricultural ditches are not "waters of the United States."⁶³ Despite these statements and actions confirming the Agencies' position regarding these exemptions for decades, the Agencies have failed – whether intentionally or unintentionally – to codify this existing practice.

In light of the Agencies' failure to include these long-accepted exemptions, it must be concluded that the Agencies will claim some of these features are "waters of the United States," thus increasing the jurisdiction and therefore the direct permitting, mitigation, and other compliance costs to any entity that owns, operates, or desires to construct a stormwater control feature, a farm or stock watering pond, a puddle, or a ditch. Although the Agencies have failed to quantify the costs related to such activities, it is fair to say the cost to small entities if such features are jurisdictional under the CWA has risen by hundreds of millions of dollars in the aggregate. If it is the Agencies' intent to codify the current regulatory practice, the Agencies' must also include the long-accepted exclusions for stormwater controls, farm and stock watering ponds, puddles, and most ditches.

The Agencies have obligations under OMB guidance and the RFA to measure and communicate these cost increases. Their certification of no small entity impact is inappropriate in light of the foregoing. Because the Agencies have failed to analyze the impacts of the proposed rule on small

⁵⁹ See United States Environmental Protection Agency, Economic Analysis for the Proposed, Revised Definition of Waters of the United States, Rule, available at <https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0083> (last visited Jan. 31, 2022).

⁶⁰ Id.

⁶¹ U.S. Environmental Protection Agency, The Clean Water Rule Fact Check, https://archive.epa.gov/epa/sites/production/files/2015-05/documents/fact_sheet_fact_check_clean_water_rule.pdf#:~:text=Rule%20text%20%20%2030.3%28s%29%282%29%28vi%29%3A%20%20%20The%20following%20are%20not,in%20'waters%20of%20the%20United%20States'%20as%20non-jurisdictional. (last visited Jan. 31, 2022).

⁶² Id.

⁶³ Id.

entities and because it is likely there will be a significant impact on a substantial number of small entities the RFA requires the Agencies to consider alternative approaches that would accomplish the aims of the statute while minimizing the costs. EPA can best satisfy their RFA obligations by convening a SBAR panel to assist in the consideration of alternatives and then publishing an IRFA for notice and comment.

Conclusion

The rule will have a direct and potentially costly impact on small entities. Because of the limited economic analysis which the Agencies submitted with the proposed rule and the lack of data on the impacts to small entities, Advocacy advises the Agencies to hold the proposed rule in abeyance for the purpose of convening a SBAR panel prior to promulgating any further rule on this issue. If we can be of any further assistance, please contact Astrika Adams, Assistant Chief Counsel, at astrika.adams@sba.gov. Thank you for your attention to this matter.

Sincerely,

Major Clark III
Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
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/s/
Astrika W. Adams
Assistant Chief Counsel
Office of Advocacy
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