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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

May 23, 2014

The Hon. Gina McCarthy
Administrator
Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, DC 20460

The Hon. Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
Department of the Army
108 Army Pentagon
Washington, DC 20310

Dear Administrator McCarthy and Assistant Secretary Darcy:

The members of the Committee on Small Business are writing to express our concern that the Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) (collectively, the "agencies") have not fulfilled their obligations under the Regulatory Flexibility Act, 5 U.S.C. §§ 601-12 (RFA), to conduct outreach to and assess the impacts of the proposed rule revising the definition of "waters of the United States" under the Clean Water Act (CWA)[1] on small businesses. We have conducted a preliminary review of the proposed rule and we are writing to bring our initial concerns to your attention.

We are concerned that the proposed rule could have a significant economic impact on small businesses yet the agencies have not assessed those consequences as required by the RFA. We believe the agencies should withdraw the proposed rule and conduct the required small business outreach and analysis before proceeding with the rulemaking. In the alternative, we request the public comment deadline for the proposed rule be extended by 90 additional days to ensure that small businesses have adequate time to review and provide input on this proposal.

Small businesses such as farmers and ranchers, home builders and transportation construction firms that conduct activities and projects on lands with "waters of the United States" will be directly affected. For example, permits may be required for activities such as removing debris and vegetation from a ditch, applying pesticides, building a fence, or discharging pollutants. Permitting can be a costly and time-consuming process that requires small businesses to hire attorneys and environmental consultants. In addition, the future development potential of certain land may be affected which could diminish its value. Small businesses also could be subjected to litigation under the CWA's citizen suit provisions.

By expanding the definition of "waters of the United States" to incorporate many more small bodies of water that are found on land across the United States, from farm fields and ranches to suburban neighborhoods and city centers, the agencies' proposal could have significant consequences

[1] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,187 (Apr. 21, 2014).

for small businesses. The proposed definition includes a number of imprecise and broadly-defined terms such as "adjacent," "riparian area" and "floodplain" that do not clearly delineate which waters are covered. For the first time, "tributary" is defined and includes bodies of water such as manmade and natural ditches. "Other waters" also may be subject to the jurisdiction of the CWA on a case-by-case basis if there is a "significant nexus" to a traditional navigable water. The expanded jurisdiction and the imprecision of the terms used by the agencies may result in significant added legal and regulatory costs for small businesses – impacts that the agencies should have assessed under the RFA.

The agencies certified that the proposed rule would not have a significant economic impact on a substantial number of small entities, including small businesses. In doing so, the agencies failed to provide any factual basis for the certification[2] as required by the RFA despite the evident consequences for hundreds of thousands of small businesses. To the extent that the agencies attempted to assess the economic impact on small businesses, it did so in a manner that limited 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. It appears to us that the agencies adopted this approach (without adequate explanation) in an effort to avoid the requirements imposed on EPA by § 609(b) of the RFA to conduct a small business advocacy review panel that would require EPA to obtain the input of small businesses before proposing a rule of such significance.

The agencies are required to comply with the RFA and EPA has additional obligations under the statute. Considering small businesses are likely to make up the greatest percentage of additional entities subject to regulation under an imprecise and expanded definition of the waters of the United States, it is absolutely critical that the agencies comply with the letter and spirit of the RFA (as directed by the President in a letter to agencies on January 18, 2011). Therefore, the agencies should withdraw the proposed rule and repropose it after undertaking an appropriate analysis of the impacts on small entities and conducting the outreach mandated by § 609(b) of the RFA. If the agencies fail to do that, then they should extend the comment period another 90 days to ensure that small entities, including small businesses, have adequate time to provide their input into the regulatory process – input that otherwise would have been made had the agencies adequately complied with the RFA in the first instance.

Should you or your staff have any questions concerning this letter, please contact Viktoria Ziebarth of the Committee staff at (202) 225-5821.

Sincerely,

Sam Graves
Chairman

Steve Chabot
Member of Congress

Steve King
Member of Congress

Mike Coffman
Member of Congress

[2] 79 Fed. Reg. at 22,220.

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cc: Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget
Winslow Sargeant, Chief Counsel for Advocacy, United States Small Business Administration