



555 12th St. NW, Ste. 1001  
Washington, D.C. 20004

Via [www.regulations.gov](http://www.regulations.gov)  
and U.S. First Class Mail

August 21, 2021

Hon. Michael S. Regan  
Administrator  
Environmental Protection Agency  
Mail Code 1105A  
Docket EPA-HQ-OW-2021-0328  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

Hon. Christine Wormuth  
Secretary of the Army  
Attn: Mr. Jaime A. Pinkham,  
Acting Assistant Secretary for  
Civil Works  
The Pentagon  
Washington, DC 20310

Dear Mr. Administrator and Madam Secretary:

RE: Environmental Protection Agency and Department of the Army Notice Titled "Notice of Public Meetings Regarding 'Waters of the United States'; Establishment of a Public Docket; Request for Recommendations," 86 *Fed. Reg.* 41911 (August 4, 2021)

This letter presents comments of the National Federation of Independent Business (NFIB) in response to the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE) notice titled "Notice of Public Meetings Regarding 'Waters of the United States'; Establishment of a Public Docket; Request for Recommendations" and published in the *Federal Register* of August 4, 2021. The notice sought recommendations concerning revision of the regulatory definition of "waters of the United States," a phrase used in the statutory definition of "navigable waters" in section 502(7) of the Clean Water Act (33 U.S.C. 1362(7)).

NFIB is an incorporated nonprofit association representing small and independent business members across America. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and ensures that governments of the United States and the fifty states hear the voice of small business as they formulate public policies. NFIB members and other small businesses depend upon government respect for their property rights in the administration of environmental statutes, including those relating to waters of the United States. NFIB recommendations appear below in bold typeface for the convenience of the reader.

The phrase "waters of the United States" plays a crucial role in determining over what waters the federal government may exercise various authorities granted by statute that relate to the environment, including with respect to discharges into such waters of pollutants<sup>1</sup> and dredged or fill material.<sup>2</sup> Too broad a definition of the phrase "waters of the United States" diminishes the property rights of Americans and their freedom from governmental intrusion; to narrow a definition can deprive Americans of clean water. Thus, EPA and USACE must tread carefully in determining what falls within the phrase "waters of the United States."

**NFIB recommends that EPA and USACE retain in force the Navigable Waters Protection Rule (NWPR),<sup>3</sup> which implemented faithfully the statutory text of the Clean Water Act, adhered carefully to the decisions of the Supreme Court construing that text, and properly respected the property rights of Americans.** NFIB recognizes that EPA and USACE may not accept that recommendation, given: (1) President Biden's revocation with Executive Order 13990<sup>4</sup> of the previous president's Executive Order 13778,<sup>5</sup> which had called for the regulatory review that resulted in the NWPR; (2) EPA and USACE self-criticism with the statement that "EPA and the Army have substantial and legitimate concerns that the NWPR did not appropriately consider the effect of the revised definition of 'waters of the United States' on the integrity of the nation's waters;"<sup>6</sup> and (3) the EPA and USACE statement that they "intend to propose restoring the longstanding Clean Water Act regulations that were in place for decades prior to 2015" and, more vaguely, "intend to propose a second rule that builds on that regulatory foundation."<sup>7</sup>

---

<sup>1</sup> Section 301 of the Clean Water Act (33 U.S.C. 1311) (regulation of discharge of pollutants into navigable waters). The commonly-used term "Clean Water Act" generally refers to the Federal Water Pollution Control Act of 1948 (Public Law 80-845), as amended by the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92-500), as further amended.

<sup>2</sup> See section 404 of the Clean Water Act (33 U.S.C. 1344) (issuance by the Secretary of the Army of permits for discharge of dredged or fill material into navigable waters at specified disposal sites). See also section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) (prohibiting obstruction of navigable waters without the approval of the Secretary of the Army) and section 301(f) of the Clean Water Act (33 U.S.C. 1311(f)) ("Notwithstanding any other provisions of this Act it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.").

<sup>3</sup> The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 *Fed. Reg.* 22250 (April 21, 2020).

<sup>4</sup> Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis" (January 20, 2021), 86 *Fed. Reg.* 7037 (January 25, 2021), sec. 7(a).

<sup>5</sup> Executive Order 13778, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule" (February 28, 2017), 82 *Fed. Reg.* 12497 (March 3, 2017).

<sup>6</sup> 86 *Fed. Reg.* at 41912, col. 3.

<sup>7</sup> 86 *Fed. Reg.* at 41912, col. 3.

If EPA and USACE, instead of retaining in force the NWPR, choose to proceed with new rulemakings to redefine "waters of the United States," then NFIB recommends that EPA and USACE adhere to the following principles:

**1. Faithfully Execute the Clean Water Act by Following Its Text.** The U.S. Supreme Court has said that "it's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary, contemporary, common meaning ... at the time Congress enacted the statute.'"<sup>8</sup> The stretching of the words "waters of the United States" that EPA and USACE undertook, to expand their bureaucratic jurisdiction in the decades before adoption of the NWPR, count for nothing in properly construing the words "waters of the United States." What counts is the "ordinary, contemporary, common meaning" of the words when Congress enacted them as section 502(7) of the Clean Water Act. For example, when section 502(7) defines "navigable waters" to mean "the waters of the United States, including the territorial seas," it is crystal clear that, at an absolute minimum, something cannot be part of the "waters of the United States" if it lacks water. EPA and USACE should follow the definition of "waters of the United States" of the four-Justice plurality in *Rapanos v. United States*:

In sum, on its only plausible interpretation, the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] ... oceans, rivers, [and] lakes." The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.<sup>9</sup>

Application of that definition based on the original public meaning of the words in the statute will help minimize the burdens and costs imposed on the American people by a rule defining "waters of the United States," while achieving the environmental and other goals of the Clean Water Act.

**2. Take Account of the Special Needs of Small Businesses in Establishing and Applying the Definition of "Waters of the United States."** Congress has established by law a clear policy that federal agencies should consider the special needs of small businesses when the agencies issue regulations. In section 2(a)(4) of the Regulatory Flexibility Act (RFA),<sup>10</sup> Congress declared that "the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in

<sup>8</sup> *Wisconsin Central Limited v. United States*, 138 S. Ct. 2067, 2074 (2018).

<sup>9</sup> *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (opinion of Justice Scalia, joined by Chief Justice Roberts, Justice Thomas, and Justice Alito) (citation omitted).

<sup>10</sup> Public Law 96-354 (5 U.S.C. 601 note).

productivity.” Congress also noted in section 2(a)(6) of the RFA that “the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation.” Accordingly, EPA and USACE should take special account of the needs of America's small and independent businesses as they define and apply the phrase "waters of the United States" in administering the Clean Water Act. As EPA and USACE develop their two proposed regulations on "waters of the United States," NFIB urges them to:

**(a) Remember the small business half of the economy when the big business half speaks.** Federal agencies often respond to big businesses; such institutions are highly visible in the economy and people see their brands, products, services, and advertising daily. Big institutions also can afford armies of lobbyists to watch every step EPA and USACE take as they move toward a decision and to bring their influence to bear on EPA and USACE at every stage of that process. As EPA and USACE consider what the big institutions say, think also about what the other half of the economy -- America's small businesses -- need so they can continue to grow and create jobs. As the Biden White House stated in a fact sheet on February 22, 2021, "[s]mall businesses account for 44 percent of U.S. GDP, create two-thirds of net new jobs, and employ nearly half of America's workers." When EPA and USACE write regulations, they should hear and heed the voice of small business.

**(b) Recognize That One Size Does Not Fit All.** Big businesses with large revenues and regulatory compliance departments often can afford to implement a regulation that a small business cannot. When EPA and USACE decide to issue a "waters of the United States" regulation, they should consider whether they can achieve their goal satisfactorily without imposing unneeded burdens on small businesses. Depending upon the nature of the regulation, an exemption of small businesses, an exemption of the smallest businesses (such as those with fewer than 50 employees), or a simpler and less costly alternative for small businesses than EPA and USACE require of big businesses may be in order.

**(c) Understand That Small Business Compliance is Largely Do-it-Yourself.** Small businesses cannot afford the lawyers, accountants, and clerks that larger companies use to decipher complex regulations and implement costly systems necessary to comply with the regulations. Small businesses mostly engage in do-it-yourself compliance, in which a business owner trying to keep the business afloat attempts to keep up with regulations as much as the owner can. Thus, EPA and USACE should focus their efforts on making regulations concise and simple. In particular, EPA and USACE should ensure that a small business owner can determine whether the owner's planned use of the

owner's land falls under EPA and USACE requirements for permits without having to hire a lawyer or expert to figure that out. Also, EPA and USACE enforcement regulations and policies should protect small businesses owners who have done the best they can in good faith to understand and comply with the large, ever-growing, and ever-changing body of environmental regulations.

**(d) Remember That Assistance with Compliance is More Valuable than Punishment through Enforcement.** The statutory objective of EPA and USACE is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"<sup>11</sup> and not to fill the nation's prisons or stoke its coffers with penalty money. When EPA and USACE help small businesses to comply with regulations, EPA and USACE serve the goals of federal environmental laws much better than when they imposes fines or refer for prosecution. Accordingly, EPA and USACE should emphasize efforts to educate small businesses about their regulations. Often, a small business owner hears of a regulation for the first time when EPA or USACE informs the owner of a failure to obtain a permit required by the regulation. Small business owners acting in good faith should have an opportunity to correct such a violation and come into compliance, without fines or enforcement actions. Thus, when the EPA and USACE write regulations implementing the Clean Water Act with respect to "waters of the United States," the regulations should provide for enforcement against small businesses only in cases of willful or repeated violations.

**(e) Listen to Small Business Before Issuing Commands.** Many federal agencies have fallen into a bad habit of regulating first and consulting later, through the issuance of a binding interim final rule accompanied by a request for subsequent public comment. EPA and USACE should under no circumstances issue a rule, whether interim or final, defining "waters of the United States" without first completing a thorough process involving public comments that EPA and USACE take into account. As a U.S. Court of Appeals has said: "Notice and comment are not mere formalities. They are basic to our system of administrative law. They serve the public interest by providing a forum for the robust debate of competing and frequently complicated policy considerations having far-reaching implications and, in so doing, foster reasoned decisionmaking."<sup>12</sup> With respect to most regulations, EPA and USACE must provide an opportunity to comment to, and consider the comments of, small businesses and others because the Administrative Procedure Act (APA) (5 U.S.C. 553) requires it. But, even in the rare cases in which EPA and USACE legally can issue a regulation without seeking the views of small businesses in advance, EPA and USACE should seek such views in advance formally or informally as a matter of good practice. The

---

<sup>11</sup> Sec. 101(a) of the Clean Water Act (33 U.S.C. 1251(a)).

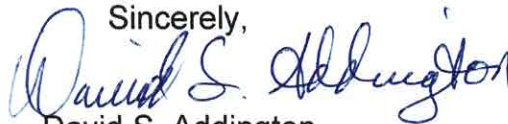
<sup>12</sup> *Natural Resources Defense Council v. National Highway Traffic Safety Administration*, 894 F. 3d 95, 115 (2d Cir. 2018).

**agencies, small businesses, and the American economy benefit from such a cooperative approach to the development of regulations and other guidance. The EPA and USACE also should adhere carefully to the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), which among other things requires them to analyze carefully the effects of their regulations on small businesses and to give small businesses an opportunity to participate in the rulemaking process.**

\* \* \* \* \*

As the Environmental Protection Agency and the U.S. Army Corps of Engineers consider what to do with respect to defining "the waters of the United States" for purposes of the Clean Water Act, they should recall the importance of protecting private property rights. As the U.S. Supreme Court recently said, "[t]he Founders recognized that the protection of private property is indispensable to the promotion of individual freedom"<sup>13</sup> and "[p]roperty rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them."<sup>14</sup> In moving forward on their proposed two regulations on "waters of the United States," EPA and USACE should bear in mind the vital importance of the property rights and freedom of Americans and minimize, insofar as the Clean Water Act allows, government interference with those rights and that freedom.

Sincerely,



David S. Addington  
Executive Vice President  
and General Counsel

---

<sup>13</sup> *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021).

<sup>14</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017).