SMALL BUSINESS PERSPECTIVES ON THE IMPACTS OF THE BIDEN ADMINISTRATION'S WATERS OF THE UNITED STATES (WOTUS) RULE

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS
UNITED STATES
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTEENTH CONGRESS

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SMALL BUSINESS PERSPECTIVES ON THE IMPACTS OF THE BIDEN ADMINISTRATION'S WATERS OF THE UNITED STATES (WOTUS) RULE

WEDNESDAY, MARCH 8, 2023

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The Committee met, pursuant to call, at 2:10 p.m., in Room 2360, Rayburn House Office Building, Hon. Roger Williams [chairman of the Committee] presiding.

Present: Representatives Williams, Luetkemeyer, Alford, Stauber, Crane, Meuser, Bean, Van Duyne, Ellzey, Mann, LaLota, Velázquez, Scholten, Thanedat, Davids, McGarvey, and Gluesenkamp Perez.

Chairman WILLIAMS. Before we get started, I want to ask Mr. Mann to lead us in prayer.

Please stand.

All. I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation, under God, indivisible, with liberty and justice for all.

Mr. MANN. Bow your heads with me.

Thank you, Dear God, that we get to live in the greatest country in the history in the world. Thank you for all the small businesses that provide work and goods and services all over our great land. We pray for the ability to distinguish between right and wrong. And give us wisdom and continue to bless our great country.

In the name of Jesus. Amen.

Chairman WILLIAMS. Good afternoon, everyone.

I now call the Committee on Small Business to order.

I will turn my mike on.

Without objection, the Chair is authorized to declare a recess of the Committee at any time.

The Committee is here today to hear testimony about the harmful impact of the Biden administration's Waters of the United States Rule on small businesses.

I now recognize myself for my opening statement.

And first I want to thank our witnesses for joining us today. I understand that all of you have traveled a long way to be here, and we appreciate it. I know how hard it is to step away from your day-to-day operations, and I am extremely grateful that you chose to give us your time today.

Since President Biden was sworn into office, the regulatory actions of this administration has cost the private sector nearly $360 billion in compliance costs, an estimated 220 million hours in our new paperwork requirements to meet those compliance costs.

Later this month, the Biden administration will increase these costs by finalizing the new Waters of the United States Rule. For any business, certainty is key, and enforcing the rule is leaving many people in the dark on if they will be in compliance with the new regulations.

For the last decade, small businesses have hoped for clarity around what is the definition of a waterway that is subject to regulations by the federal government. Unfortunately, this rule fails to resolve these issues and will leave business owners wondering if they need to get permission from the federal government before they make even minor adjustments on their private property.

There are laws on the books that are supposed to protect small businesses from regulatory overreach from the federal government. Specifically, the Regulatory Flexibility Act is in place to ensure agencies are conducting analysis on how their actions will affect small entities and propose alternatives.

However, the EPA certified that this rule would not have any impact on small businesses and, therefore, unilaterally decided that they do not need to conduct any further analysis on the rule.

According to the SBA's Office of Advocacy, which is charged with speaking out against overly burdensome regulations, this determination by the EPA was not based on any factual analysis.

Today we listen to the small businesses whose opinions have been disregarded by agencies far too long, and we will hear how this rule will have a significant impact on many types of small businesses, such as farming, ranching, mining, and real estate development, just to name a few.

The past several years have caused tremendous hardship for Main Street America. Whether it be the COVID-19 pandemic, out-of-control inflation, broken supply chains, high interest rates, or a national labor shortage, the federal government should not be giving small businesses yet another challenge to overcome.

I want to thank you all again for being here with us today, and I'm looking forward to today's conversation.

And lastly, without objection, I would like to submit letters for the record from the National Federation of Independent Business and the U.S. Chamber of Commerce.

So with that, I will yield to our distinguished and my friend the Ranking Member from New York, Ms. Velázquez.

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

I'd like to welcome all of the witnesses. Thank you for being here.

Clean water is an essential building block of any functioning economy. We depend on it for drinking, bathing, cooking, farming, fishing, manufacturing, tourism, recreation, and many other activities. Without clean water, our health, environment, and economy will be at serious risk.

For the past 50 years, the Clean Water Act has safeguarded our rivers, streams, and wetlands from pollution and degradation. Since its inception, it has prevented billions of pounds of pollutants

from entering our waters and restored thousands of miles of impaired rivers and streams.

This environmental benefit has saved billions of dollars in health care costs by reducing water-borne diseases and supported millions of jobs in industries that rely on clean water. Whether it is our growing craft beer industry, which brings investment to communities across the country, or our behemoth outdoor recreation economy, which provides $862 billion in economic output, robust federal protection for clean water is a prerequisite for the success of a variety of industries.

Unfortunately, the 2006 Supreme Court ruling in the Rapanos case upended longstanding protections for many of our nation's precious rivers, streams, and wetlands. As a result, many stakeholders have faced confusion and uncertainty as industries seeking to pollute have attacked the scope of the Clean Water Act.

In 2020, the Trump administration imposed the Navigable Waters Protection Rule, which significantly limited federal protection for clean water by excluding safeguards for many wetlands and streams. This rule allowed industries to pollute our waters, and was shifting the cost of pollution to the families, businesses, and communities downstream.

Fortunately, this rule was struck down by courts as it largely failed to recognize the scientific evidence on the interconnectedness of our water systems. As a result, the Biden administration has worked to revise the WOTUS rule and provide greater clarity to stakeholders while codifying important exclusions for prior converted cropland, ditches, and artificial ponds.

Over the past two years, the EPA has conducted extensive meetings with stakeholders, including many small businesses, and I believe the final product adequately reflects that.

This rule demonstrates a clear middle ground between the 2015 clean water rule and the 2020 rule. It makes clear that we cannot sacrifice the economy for environmental protection, nor sacrifice the environment for economic growth. As you will hear from our witness today, those two things go hand in hand.

Nobody here wants small businesses to deal with excessive, burdensome regulations. However, we must recognize that many regulations, especially those safeguarding our waters, serve an essential purpose in protecting families, communities, and entrepreneurs. In fact, a national survey of small businesses found that 80 percent of small business owners favor federal rules to protect upstream headwaters and wetland.

To that end, I want to take this opportunity to announce my opposition to the resolution of this approval filed by Republicans under the Congressional Review Act. Not only will this resolution not achieve the outcome Republicans seek, but it could also actively harm the exclusions they are seeking to protect. It only adds to the confusion and uncertainty that stakeholders are currently experiencing.

I advise my colleagues to carefully consider the costs that blanket deregulation could have on businesses that rely on clean water to function.

With that, Mr. Chair, I would like to ask unanimous consent that this letter in support of the new revised definition of Waters of the

U.S., signed by over 400 businesses that are dependent on clean water, be submitted to the record.

Chairman WILLIAMS. So ordered.

Ms. VELAZQUEZ. Thank you. I yield back.

Chairman WILLIAMS. I will now introduce our witnesses.

It is my privilege to introduce a fellow Texan as our first witness, Mr. Frank Murphy, for today's hearing.

Mr. Murphy is the Senior Vice President and CFO and COO of Wynne/Jackson, Inc., a real estate development firm and small business based in Dallas that employs eight people.

Starting in the early 1970s, by its name sake, Clyde C. Jackson and Toddie L. Wynne, Wynne/Jackson now has a presence throughout Texas, Oklahoma, and New Mexico. And since joining the company in 1985, Mr. Murphy has played a role in over $2 billion worth of projects encompassing everything from apartments to retail space to golf courses, hotels, marinas, and storage facilities. These projects not only have helped spur economic development in countless communities but have also served as the actual foundations for where families live, work, and make lasting memories.

In addition to real estate development, Wynne/Jackson has also a long history of participating in philanthropic initiatives, including religious education centers, institutes promoting the responsible use of land, and several international projects.

Mr. Murphy's experience in all types of development make him exceptionally qualified to speak about the regulatory burdens facing businesses, such as Wynne/Jackson. He understands the real-world implications of what happens when vital projects that would otherwise benefit whole communities cannot be started due to bureaucratic uncertainty and red tape.

So, Mr. Murphy, thank you for joining the Committee today, and I look forward to today's conversation.

I now yield my time to Mr. Bean to introduce our next witness.

Mr. BEAN. A very good afternoon, Mr. Chairman, to you and the Committee Members, everybody here, small business family. What an honor it is to introduce a fellow Floridian, Ms. Katherine English, for today's hearing.

A native of Southwest Florida, Ms. English has worked at the Pavese Law Firm since 1994 and became partner in the year 2000. Her law practice focuses on agriculture, environmental, and land use law, which should be no surprise considering her primary occupation is overseeing her family farm, which has been in the English family for over 100 years.

It is no exaggeration to say that Ms. English is one of the most qualified people in America to speak with us today about the impact that cumbersome and unclear regulations have on family farms, such as her own.

Her legal work has been recognized by her being selected as one of the—you ready for this, Committee Members?—best lawyers in America for 2021 due to her expertise in land use and zoning law.

And in addition to family farming and law, it also should be no surprise to any Committee Member here that Ms. English is a community superstar because she has served just so many: Chair of the Farm Bureau Association, the Natural Resource Advisory Committee, a past Chair of the American Farm Bureau of Federation,

National Issue Advisory Committee, on Water and Water Quality. And yes, the United Way is blessed with her presence on the Board of Directors for Lee, Hendry, and Glades Counties.

Ms. English, welcome to Washington, D.C., the House of Representatives, and to the Small Business Committee. Thank you for joining us, and I'm looking forward to today's conversation.

Chairman WILLIAMS. Thank you very much.

And I now recognize the Ranking Member, Ms. Velázquez, to introduce her witness for today's hearing.

Ms. VELÁZQUEZ. Thank you, Mr. Chairman.

Our final witness today is Mr. Rick Baumann, a business leader, veteran, and environmental advocate from Murrells Inlet, South Carolina.

He was born in New York City in 1948 and went on to enlist in the military in 1966. During his military service he studied at American University. After his honorable discharge in 1969, he founded the business he continues to run today, Murrells Inlet Seafood.

In 2012, he founded a non-profit, Trees For Tomorrow. In 2019, he became a Riley Fellow at Furman University.

Throughout his career he has been a tireless advocate for wildlife, the environment, and clean water.

Thank you for being here, and you are welcome.

I yield back.

Chairman WILLIAMS. Thank you, Ranking Member Velázquez.

And I want to say today we appreciate all of you being here today, as I said earlier.

Before recognizing the witnesses, I would like to remind them that their oral testimony is restricted to five minutes in length. If you see the light in front of you turn red in front of you, it means your five minutes has concluded, and you should wrap it up as quickly as possible.

I now recognize Mr. Murphy for his 5-minute opening remarks.

STATEMENTS OF FRANK MURPHY, CHAIRMAN OF THE ENVIRONMENTAL ISSUES COMMITTEE OF THE NATIONAL ASSOCIATION OF HOME BUILDERS; KATHERINE ENGLISH, ON BEHALF OF THE AMERICAN FARM BUREAU FEDERATION; AND RICK BAUMANN. FOUNDER, MURRELLS INLET SEAFOOD, BOARD OF DIRECTORS, SOUTH CAROLINA SMALL BUSINESS CHAMBER OF COMMERCE

STATEMENT OF FRANK MURPHY

Mr. MURPHY. Mr. Chairman, thank you for the kind introduction, sir.

Chairman Williams, Ranking Member Velázquez, and Members of the Committee, on behalf of more than 140,000 Members of the National Association of Home Builders, I appreciate the opportunity to testify today on the 2023 WOTUS rule's impacts on small businesses.

My name is Frank Murphy, and I am the Chief Operating Officer at Wynne/Jackson, a small business in Dallas, Texas, with eight employees. I have been employed in the real estate industry for

nearly 40 years and am currently honored to serve as the NAHB's Chairman of its Environmental Issues Committee.

As to the new WOTUS Rule, it is difficult to overstate the impacts of regulations on small businesses and our ability to provide affordable housing. An NAHB study found that governmental regulations already account for up to 25 percent of the price of a new single family home and over 40 percent of multi-family development. So for every $1,000 of increase in a medium-priced home, it will price out over of 117,000 households from being able to afford such home.

EPA has indicated that the new 2023 rule will not have a significant economic impact on small entities. In contrast, the Small Business Administration determined just the exact opposite, acknowledging that the rule would have significant direct impacts on a substantial number of small entities.

As an example of this, the 2023 rule inappropriately expands federal authority by relying on undefined regulatory terms and concepts, such as relatively permanent, material influence and its reliance on a more stringent definition and nexus test to assert federal control over otherwise isolated features.

This rule increases federal control in wetlands permitting requirements over private property and, thus, increases delays to small businesses awaiting jurisdictional determinations.

Ironically, the agencies rushed to finalize this rule before the U.S. Supreme Court issues its Sackett v. EPA, which focuses on the legality of the significant nexus test.

As to issues with the new rule itself, I have three main concerns. First, the rule's heavy reliance on the usage of the significant nexus test will cause delays to small businesses awaiting jurisdictional determinations. NAHB Members already report waiting for a year or more for the Corps to to complete such determinations today.

Further, under the significant nexus test, the rule authorizes the agencies to base determinations of WOTUS on my property by considering isolated wetlands and tributaries outside the boundaries of my land. Such an approach is just not feasible in practice because I can normally not obtain legal access to the adjoining properties in order to conduct such studies and determinations. I can't do it.

I cannot afford the cost nor the time to hire third-party consultants to analyze these waters similarly situated in the region to determine if my property collectively has an impact on the Waters of the U.S. as navigable waters out here.

Overall, as a result of the complexity and delays inherent in the significant nexus test, many small businesses will simply give up. Instead, they will opt for preliminary jurisdiction or determination, which allows the agencies to assume a feature is WOTUS. This would then allow a property owner to advance directly to the permitting stages.

The usual result of this is that more land will then be classified as WOTUS and reduce the amount of developable land associated therewith.

Second, the rule includes many undefined concepts and lacks clear guidance. Instead, small businesses and their consultants must interpret conflicts within the final rule's preamble, regulatory

text, and scientific technical documents. Such an approach by the agencies ensures confusion and uncertainty for small businesses seeking to comply with the law.

Third, the agencies have cast doubt by stating that determinations issued under the Navigable Waters Protection Rule are no longer valued. As a result, land owners are forced to start over if they want a valid determination. These determinations are supposed to be valid for five years.

Further, with the final rule's preamble, the agencies state that even when prior determination found that no permit was required, land owners could now risk violations of the law if they move ahead with a project without obtaining a new determination. This is a clear example of moving the goalposts on small businesses.

In closing, I want to thank the Members of the T and I Committee for reporting out the CRA to rescind the Biden WOTUS rule last week. I look forward to a swift passage on the House floor.

Until the CRA is passed or enacted, I encourage Congress to direct the agencies to delay this rule until the Supreme Court decides Sackett. NAHB believes there should be no WOTUS before SCOTUS.

Thank you for the opportunity, Mr. Chairman and Committee Members, to testify before you, and I look forward to your questions.

Chairman WILLIAMS. Thank you, Mr. Murphy.

And now I recognize Ms. English for her 5-minute opening remarks.

STATEMENT OF KATHERINE ENGLISH

Ms. ENGLISH. Thank you, sir.

Chairman Williams and Ranking Member Velázquez, thank you for the opportunity to testify today.

My name is Katherine English, and I am a farmer, rancher, small business owner, and environmental lawyer from Fort Myers, Florida. It is an honor today for me to represent the American Farm Bureau Federation, and I speak on behalf of the thousands of hardworking farmers and ranchers who produce the food, fiber, and renewable fuel that our nation and the world depend upon.

Farmers and ranchers' livelihoods depend on healthy soil and clean water. We support the Clean Water Act and its goals. What we cannot support is a Waters of the United States rule that is so ambiguous, it creates unmanageable risk and confusion for farmers, farmers who struggled with uncertainty for decades with near constant rulemaking in litigation regarding WOTUS.

A workable definition of WOTUS is critically important to our Members, and they are extremely disappointed that the Biden administration's new WOTUS rules fail to provide that. This new rule greatly expands the federal government's reach over private property, asserting jurisdiction over ephemeral drainages, ditches, swales, and low spots in farm fields and pastures.

The significant nexus test allows the agencies to aggregate and regulate waters that would not otherwise be subject to permit, relying on vague language vulnerable to subjective interpretation to do so. It is impossible with this new rule for any farmer or rancher

to know whether their irrigation and drainage infrastructure and fields are jurisdictional waters requiring Clean Water Act permits.

Considering these features as jurisdictional waters risk federal regulation of everyday farm and ranch activities that move dirt and apply products to the land, such as planting, cultivating, fence building, or ditch maintenance. Doing work in or near these features without a jurisdictional determination or a permit risks triggering the Clean Water Act's harsh civil and even harsher criminal penalties. This is the experience that farmers will have with this new definition of WOTUS.

Before the 2020 WOTUS rule went into effect, I worked with a Florida farmer seeking authorization to insert earth blocks totaling less than a half an acre of fill into existing upland cut ditches on a farm that had been in operation for decades. The ditch blocks were needed to hydrate an existing wetland mitigation area.

The farmer waited for more than a year for a nationwide permit only to be told an archeological study of the farm was needed to comply with the federal historical preservation requirements for the permit, even though the property had an archeological study that had previously been completed, reviewed, and accepted by the State's historical preservation agency.

The Army Corps of Engineers' archeologist decided the existing study was insufficient and wanted a new study that would cost tens of thousands of dollars and months of delays to resolve his concerns. Shortly thereafter, the 2020 rule went into effect, and the Corps' staff determined that the project no longer required a permit since the proposed work affected only upland cut ditches upstream of the project's State permanent outfall structure.

Also frustrating to our Members is the agency's claim that the costs associated with this rule are de minimis. The only way this conclusion is possible is to ignore all the costs that farmers incur to comply with the rule. The agencies ignore the cost of the team of experts required to successfully navigate the permitting process, biologists, hydrogeologists, attorneys, and engineers.

The agencies also ignore the cost of mitigating impacts and the lost opportunity cost caused by years of delay. These permits are beyond the means of many farmers who already operate on thin margins and discourage the kinds of agricultural innovation we need to remain competitive and sustainable.

A key factor in the WOTUS debate centers around the Supreme Court's consideration of the highly consequential Sackett v. EPA case. This case should provide clarity regarding the appropriate scope of a WOTUS definition. By finalizing this rule before the Supreme Court issues its decision, the agencies reinforce the perception that they want this rule in place before the court clarifies the significant nexus test.

Farmers and ranchers are extremely frustrated that our concerns were ignored in the final rule, as were our efforts at participation in the process. This new rule creates confusion, more legal and financial risk, discouraging the entrepreneurial spirit that small family farms and ranchers rely on to survive.

This rule may well result in irreparable harm to our rural communities who rely on these small businesses who are being disproportionately burdened by this overreaching rule.

Thank you for the opportunity to share our perspective on this important issue, and I look forward to taking your questions.

Chairman WILLIAMS. Thank you, Ms. English.

And next I want to recognize Mr. Baumann for his 5-minute opening remarks.

STATEMENT OF RICK BAUMANN

Mr. BAUMANN. Thank you, Mr. Chairman.

Before I push my button, I just want to compliment the previous speakers, and I respect their views very much, and I understand them.

Here is my statement: Good afternoon, Chairman Williams, Ms. Velázquez, and distinguished Committee Members.

I am Rick Baumann from the fishing village of Murrells Inlet in the seafood capital of South Carolina.

Thank you for this opportunity to speak to you today.

I would like to begin with a very short dedication to the testimony I am about to give to my late friend and mentor Dr. Ian W. Marceau, Ph.D.

Ian was from Australia, but he spent many years of his life in the United States, both in Washington and as an advisor to the Governor of New York before he retired to South Carolina.

In his lifetime, Mr. Marceau did a lot of great work, both for the environment and agriculture. He had a Ph.D. on either side there. All over the world he worked, but his proudest days were spent here in D.C. helping to write and negotiate the Clean Water Act into law to fulfill President Nixon's vision of clean air and water for all Americans.

During our many days spent together enjoying the outdoors, Ian and I talked a lot about clean water. He tempered his pride about the Clean Water Act while lamenting the fact that so much more had been learned since the Act was written that desperately needed to be addressed.

So many new chemicals of convenience had come into existence: Pesticides and fertilizers and so many others, and we were just beginning to understand their negative impacts on land, water, wildlife, and human beings. We were starting to learn the profound impacts of non-point source pollution, how toxic man-made compounds and chemicals spread on the land were ending up in the wetlands, streams, and rivers, and how they were being found in our drinking water.

In 2004, when I was appointed to my county's Stormwater Advisory Committee, I was fortunate to have two geniuses advising me at every meeting, Dr. Marceau and Dr. Kraner, Ph.D., formerly of Brookhaven National Laboratory on Long Island. And together, using only the facts, we were easily able to make a very strong case that our fast-developing area was threatening our small business economy by failing to address non-point source pollution and its effects on that economy, which so specifically require clean water to survive and thrive.

As those meetings progressed, we received a great deal of pushback from the exact name special interest and industries that we've heard from today. I have often seen this scenario play out in many areas of the country.

When I was young, I worked on a Black Angus farm in Upstate New York, and I have been a waterfowl hunting guide in many areas of the country, in the agricultural Eastern Shore of Maryland to the Rice Belt in Texas and everywhere in between. I am keenly aware of the challenges facing today's farmers. They are immense. And I am a Member of the South Carolina Farm Bureau.

Like farmers, I am in the business of feeding people, too. Since 1967, I have fed many millions of folks with their seafood dinners, but I am not just speaking for the seafood industry. I am speaking for all the small businesses, which exist in the vicinity of watersheds all across America.

When we think of a recreational and commercial fishery, we need to realize that there is a very large group of small businesses which are intertwined with that fishery. We have ice companies, boat mechanics, dry docks, and marinas. Plus, there are assorted rental businesses. We have boat companies, fiberglass works, tour guides, bait shops, bait catchers, rig and tackle shops, crabbers, oystermen, clammers, wholesale seafood processors, charter fishing guides, commercial fishermen, retail stores like mine.

In the secondary market are the restaurants that purvey local seafood and all of their employees, right down to the dishwashers. Then you have the gift shops, cafes, breakfast houses, the Airbnb's, rental cottages and condos, convenience stores and more.

Also, in the secondary market requiring clean water are the campers, hunters, birders, and recreational anglers who are part of the $887 billion outdoor recreation economy. On and on I could go with examples.

I can assure you folks, without a doubt, that anywhere in our great country where there is navigable water, there is another plethora of small businesses which relies on clean water for their businesses to thrive. I can also assure you that wherever there is navigable water, there are wetlands, sometimes isolated. There are ditches, creeks, and ephemeral streams that flow into those navigable waters at various times, if not perpetually.

The credible science speaks much louder than the fallacious disinformation. These waters absolutely need CWA protection if we are to ensure President Nixon's vision of clean water, land, and air for all Americans.

Thank you so much for your kind attention.

Chairman WILLIAMS. Well, I want to thank all of you. You all hit your number right on, all three of you. You don't see that too often. Thank you.

We will now move to the Member questions and the 5-minute rule.

And I now recognize myself for five minutes.

As a business owner of over 50 years, I know what happens when uncertainty is added to a business, and I still own my businesses. Some of you might not know this, but I operate a small calf/cow operation in Texas, Angus. And I remember when this rule initially came out under the Obama administration, people in the industry were asking me if a ditch on their property would now be subject to EPA and regulations.

So Ms. English, you have been in the business for long enough to know the legal battles with the different iterations of this rule.

So my question is: Can you describe how this new WOTUS rule adds more uncertainty, and could it be even worse than the Obama era rule?

Ms. ENGLISH. Thank you, Mr. Chairman. Yes, I think I can help with that.

The biggest problem that we have with this rule is its uncertainty. The Obama rule was clear about what it covered, which was essentially everything even though that is not what was contemplated under the Clean Water Act. Specifically, 101(b) of the Clean Water Act talks about the fact that this is an exercise in cooperative federalism where some waters are protected by the federal government for those that are important to them, and the others can be regulated by the States.

This rule is simply unknowable. Unless you have hired a lawyer, a biologist, an engineer, and, in some instances, a geologist, you have no idea of knowing what your jurisdiction is, and you won't know then until you actually file an authorized jurisdictional determination with the Army Corps of Engineers.

Chairman WILLIAMS. Thank you for that.

Last week we held a hearing with small business owners from a wide variety of industries, from different corners of the country, and every one of our witnesses discussed how inflation is affecting their operations. Something that I am very concerned about is how this rule could add fuel to the fire and make inflation even worse for all Americans.

Many business owners have no choice but to pass the high cost of compliance with new rules like WOTUS on to their consumers, but in many cases you can't do that.

So Mr. Murphy, in your testimony, you discussed how this new rule could force you to hire more environmental compliance officers, and it could lead to permitting delays for projects. So the question would be: Can you discuss your business' ability to absorb these costs and some of the changes that you are considering making in order to comply with the confusing new EPA guidelines?

Mr. MURPHY. That is a very detailed question. So I am going to try to keep it very simple in deference to time, Mr. Chairman.

Yes. First off, it will have significant impact because we have to go through the additional determinations on already existing jurisdictional JDs to have them redone and validated. We presently have projects that are in the development pipeline that have existing JDs. We have to stop the process now, as we are going through the engineering, construction, and permitting process, while we redetermine under the new WOTUS rules whether those projects are subject to WOTUS or not. We don't know.

Now, consultants may not know it either, based upon some of the criteria set forth. So what do we do? We stop; we pause; we reconsider, which has the impact of delaying projects.

We are already facing inflationary issues, as you have already addressed here, which leads to compounding of affordability, housing shortages, and so forth.

So by delaying this while we reconsider the impacts associated, and we receive new JDs, we are going to shut projects down, and that will lead directly to increased housing costs, increased lack of affordability, and shortages of homes and lots.

Chairman WILLIAMS. And jobs, too.

Mr. MURPHY. And jobs, too, sir, yes. Good point.

Chairman WILLIAMS. Thank you.

There are always laws in the books that are supposed to protect small businesses from some of the worst regulations coming out of Washington. Unfortunately, it appears many of these required checks against regulatory overreach are not being taken seriously by the agencies, and I am proud to say this Committee sent out 25 letters seeking more information on how they are complying with the laws in the books. We want to know how they are helping us.

Now, Ms. English, I want to ask you about any suggestions you might have to force these agencies that we are talking about to seriously consider small business interests as they make these large rules.

Ms. ENGLISH. The Small Business Administration has already sent a scathing letter exercising its concern with EPA about their failure to comply with your rules. I would suggest to you that, perhaps, at this point, the most effective tool is the pocketbook. I would consider removing authorization for expending funds for enforcement of this rule or, in the alternative, remove appropriations that were intended for the enforcement of this rule.

I am not sure that anything else would help.

Chairman WILLIAMS. Thank you.

With that, I yield my time back.

And I now recognize the Ranking Member, Ms. Velázquez, for 5 minutes of questions.

Ms. VELAZQUEZ. Thank you.

This question I will ask each Member of the panel to please answer yes or no.

Tomorrow the House is scheduled to vote on a CRA resolution to block implementation of the 2023 revised WOTUS rule. Do you believe that enactment of this CRA will reinstate the Trump administration's Navigable Waters Protection Rule that was vacated by a federal district court in 2021?

Mr. MURPHY. I assume you want me to answer first.

I hate to say yes but good chance, yes.

Ms. VELAZQUEZ. Ms. English?

Ms. ENGLISH. The House resolution will not re-implement the notice of the Trump era rule.

Ms. VELAZQUEZ. Mr. Baumann?

Mr. BAUMANN. As I understand it, the new rule, the Biden rule will pretty much mirror what was on the books prior to 2015. What I would like to point out is that from 1986 until 2015, there were no lawsuits. There was no arguing. There was no hearing. Everybody got along. I don't understand what the big deal is, but I am being enlightened somewhat.

Ms. VELAZQUEZ. When the court vacated the Trump rule in 2021, the federal agencies reverted back to using the pre-2015 rule approved by former President Reagan and later defined by President Bush.

If this resolution is enacted it will not only do away with the Biden rule, it will also prevent agencies from interpreting any new rule that is substantially the same meaning that this will likely tie

the hands of the Corps and EPA from further clarifying the scope of WOTUS unless Congress enacts some additional law.

Do you believe that indefinitely tying the hands of the agencies to further clarify the WOTUS issue is good for small businesses' clarity and certainty?

Mr. Murphy?

Mr. MURPHY. We need clarity at the end of the day. The new Biden rule basically expands the definition of significant nexus test, which is much more cumbersome than the pre-2015 rule.

Do I believe it should bind the hands of the Corps ultimately? No. But we need some guidance by which to establish the certainty of the rule and not be subject to continual changes every time a new administration comes in and takes issues with the existing rule.

Ms. VELÁZQUEZ. Ms. English, do you believe that indefinitely tying the hands of the agencies to further clarify the WOTUS issue is good for small businesses' clarity and certainty?

Ms. ENGLISH. I don't believe that the resolution will tie the hands of the Corps and EPA.

Ms. VELÁZQUEZ. Okay.

Ms. ENGLISH. Frequently, in dealing with the Corps staff now, I am struggling with being back in the 1980s.

Ms. VELÁZQUEZ. Thank you.

And Mr. Baumann?

Mr. BAUMANN. You know, lawyerese is not my forte, but I am concerned about the drinking water and the fishing water and so forth for my grandchildren and great grandchildren.

Ms. VELÁZQUEZ. Thank you. Thank you, Mr. Baumann.

I would like to ask another follow-up question. Under the Trump WOTUS rule, EPA estimated 50 percent of wetlands and up to 70 percent of rivers, lakes, and streams lost protection under the Clean Water Act. How did this impact your business?

Mr. BAUMANN. Honestly, until it was struck down, it didn't have a profound impact, but it had a lot of impact from Mr. Murphy's business in my area because so much land that was under water, so much land that was swampland was filled and built with very small lots and houses close together, taking natural ground that absorbs the water and looks after our drinking water and absorbs rainwater, trees, and so forth that sequester rainwater and pollutants. Okay?

These were—clearcut houses were built, and, you know, the swamps were filled. And when it rained, when we had a tropical storm or a hurricane or even just a hard summer thunderstorm, we had profound runoff and flooding.

Ms. VELÁZQUEZ. Thank you.

I yield back.

Chairman WILLIAMS. Thank you, Ms. Velázquez.

I now recognize Mr. Luetkemeyer.

Before I do that, reminding myself and all of you, make sure your button is on when you speak. Okay?

Mr. Luetkemeyer from Missouri.

Mr. LUETKEMEYER. Thank you, Mr. Chairman.

And, yes, I have heard from a lot of my constituents from Missouri with regards to the Navigable Waters Protection Rule of the

Trump administration, and they believed that it gave certainty and predictable, at least more than what we have now.

Ms. English, could you compare that rule with what is being proposed today? Just give me three or four differences that you can point to that are problematic.

Ms. ENGLISH. Certainly.

Under the Navigable Waters Protection Rule, it was clear that upland cut ditches were not included in the rule in places where a permanent outfall structure and a surface water management system was authorized behind that structure. It was clear that there was no intention for the Clean Water Act to apply to that; that that was an area that had already been permitted and maintenance in that area, and that is the example that I gave you specifically.

Under the present rule, the proposed rule, all of that would be jurisdictional, and I would be going through the entire process.

What I think is important to remember is the uncertainty of this rule drives the fact that I can't ever look at something with certainty and tell my family or tell a client or tell a friend that I know for certain they are not dealing with Waters of the United States.

The benefit of the Navigable Waters Protection Rule was I could answer that question straight.

Mr. LUETKEMEYER. One of the things that is concerning to me is I come from Missouri, and the Farm Bureau there in Missouri says that this rule would affect 99.9 percent of the land in our State. That means the federal government has control over whatever you want to do on 99.9 percent of the land in my State. That is unconscionable. That can't happen.

You know, I understand. I am not against clean water. I am not against clear air, but there is a limit to the Government's overreach and authority to be able to come out and control what goes on.

You know, Mr. Murphy, you talked about the cost. Have you looked at this rule itself and what the average cost per home that you would build would be incurred by you as a builder or the person who purchased the home from you? What percentage of the cost would increase as a result of that?

Mr. MURPHY. I can't give you the percentage or the cost per individual home because it varies based upon the individual projects, but I can tell you what we looked at, potential price impact or cost impact in total.

Mr. LUETKEMEYER. Okay.

Mr. MURPHY. So for existing jurisdictions that we have, we have to go redo those, and the cost of a new jurisdictional study itself is usually $10 to $20,000 just for the study. Then if we have to go through the individual permitting process, not even talking about time delays but the individual permitting process is usually 50 to 75,000.

Then if we wish to proceed with development impacting the Waters of the U.S. with the mitigation, mitigation costs on two projects we studied recently of our own could be upwards of $600 to $1.5 million per project.

Mr. LUETKEMEYER. That is per home?

Mr. MURPHY. Per project.

Mr. LUETKEMEYER. Per project.

Mr. MURPHY. One of these is a 500-acre project, and the other one is about a 300-acre project. So a significant cost.

So we then have to take that cost, mark it up by interest and debt, carry cost, and associated delay factors, and then pass it through. Ultimately, what we are limited to passing through cost-wise is what the market will accept.

We can't just unilaterally increase the price of the lot, increase the price of the home $10,000, because it may not be marketable. If that is the case, we have to simply shut down and stop development on that project.

Mr. LUETKEMEYER. Wow! That is mind-blowing.

Ms. English, you talked a little bit about the cost to farmers to be able to comply. You know, Mr. Murphy just blew a hole in all of the trying to build new homes here and develop a whole new subdivision.

If a farmer is wanting to do something on his ground or they come out and say that there is some navigable waters on his property and he has to comply, it would seem to me that it would hurt the value of his property, hurt his ability to market and sell that property. Is that a fair assessment?

Ms. ENGLISH. That is absolutely the case. I'm sorry. That is absolutely the case. If you fail to resolve that issue, it will affect the value of your property.

Mr. LUETKEMEYER. So what we are looking at here is devaluing farmers' property, raising the cost to individuals who want to purchase a home or rent an apartment from a multi-family unit development perhaps out of their price range.

Right now we already have a problem with affordability. I mean, I sat on another committee and that is all we talk about all the time is the unaffordability of housing today. And now we are going to add this as one more cost to drive people away from being able to buy their dream home.

Thank you so much for your testimony today.

Mr. Chairman, I yield back the balance of my time.

Chairman WILLIAMS. Thank you very much.

And next I would like to recognize Congressman Thanedar of Michigan for five minutes.

Mr. THANEDAR. Chairman Williams and Ranking Member Velázquez, thank you for convening this hearing on the Waters of the United States.

I want to thank everyone who came to testify before our Committee. Your firsthand knowledge of our country's environment enables our body to contribute more to the work we do in Congress.

There is no doubt of the importance of Clean Water Act. In Michigan, our citizens rely on clean water to protect public health. It has been critical to the significant progress we have made as a State in improving the quality and health of our rivers, streams, lakes, wetlands, and watersheds.

Furthermore, clean water is a basic need for families and businesses across the United States, particularly in Michigan. The Great Lakes support over 1.3 million jobs generating 82 billion in wages annually. It is critical to discuss the importance of Great

Lakes as a water source and the worlds most extensive fresh water system, which extends to the Detroit River.

As a result, it is vital to ensure the safety and quality of waters that are the lifeblood of our district. Any repeal of the Clean Water Act would represent a step back in protecting our water resources.

Wetlands and other critical habitats could be destroyed, affecting human health and the environment. This is a disaster for small businesses, as 80 percent of owners support federal regulations to protect upstream headwaters and wetlands. Our companies rely on the Clean Water Act.

Now, I do appreciate your viewpoints, every one of you. I am a former small business owner, and we have small businesses on both sides of this debate. Quite frankly, I am sympathetic to potential regulatory burden, but I am also struggling to see how we can protect our clean waters while also being mindful of additional cost.

Does anyone on the panel have any proposals on how to help fishermen and oyster farmers like Mr. Baumann and farmers and builders like Mr. Murphy and Ms. English? I'm willing to listen, and I am interested in finding some sort of middle ground and hope today we can help lead to that.

A specific question, Mr. Baumann, to you is: How is this reduced regulation affecting our tourism, say, for example, or recreation?

Mr. BAUMANN. It can be profound at times.

But I would like to, if you don't mind, address the general statement you made and some of the remarks that were recently made about cost to farms and to developers.

The EPI was promulgated a few years ago when our illustrious President appointed a coal lobbyist to head the EPA, a coal lobbyist, and they started the environmental integrity think tank and watchdog. And the EPI has tested 700,000 miles of river in realtime. The EPA, on the other hand, hasn't—and they are required to by the Clean Water Act, has not upgraded their evaluation of our waters in over 30 years.

Can you imagine how much has changed in that much time?

And it is important to know that the Mississippi River alone carries an estimated 1.5 metric tons of nitrogen pollution from agriculture into the Gulf, nearly creating a dead zone each summer the size of New Jersey.

Now, you want to talk about cost? Gulf shrimp? Oysters? Let's think also parallel to that. The BP oil spill and the dreaded Corps exit that they used before they tested. That is what a lot of our problem is. We get out ahead of the science with some human activity. We get out ahead of the science. They used the Corps exit before they found out there was 30 carcinogens in it. All right?

And the agricultural—I mean, the farmers don't mean to do this, but it is a consequence of feeding America. But they are not as careful as they claim to be. It is just that simple. And they are quick to portray a pastoral image of the family farmer. And God bless the family farmer. I have worked for them.

But our problem in our area that is affecting the waters that flow through our State and the conditions of those waters and the cost of cleaning up such things is the fact that we have these big mega farms.

Chairman WILLIAMS. Mr. Baumann, your time has expired.

Mr. BAUMANN. Excuse me.

Mr. THANEDAR. Thank you, Mr. Baumann.

I yield back.

Chairman WILLIAMS. Next I would like to recognize Mr. Meuser from Pennsylvania for five minutes.

Mr. MEUSER. Thank you very much, Mr. Chairman.

Thank you to all of our witnesses. Mr. Murphy, Ms. English, and Mr. Baumann, we appreciate your passion on this issue very, very much, actually.

In eastern Central Pennsylvania, we have thousands of family farms. Every one of them that I speak to, and I speak to a lot of them, is very, very concerned about this new Biden WOTUS regulation going back to what existed before. They were generally pleased with the Clean Water Act prior because there was a certain level of certainty.

But when you start talking about this WOTUS, where there are no nexus limits set, no distance limits set, what is considered navigable, what isn't, removing the word navigable. So does that mean heavy rains create new requirements? And then when the rains aren't there, it doesn't so much?

You know, most family farms have their creeks and streams lead into other family farms, particularly up in my neck of the woods. So there are great conservationists.

Now, being a great conservationist and being an environmentalist, as I certainly classify myself, doesn't necessarily mean you are going to always follow the most—the rules established, but when you have a family farm for 100 years, it tends to do that.

So, you know, when you are dealing with a WOTUS rule like that, as Vice Chair Luetkemeyer brought up, where 99.8 percent of the private property is going to come under federal jurisdiction, I agree with my colleague who was just speaking that, boy, there needs to be a middle ground here.

And just the fact that this is going to be overturned by SCOTUS, because it can't possibly. I mean, I have more notes here of what I can talk about on all the legal problems that exist with Attorney English. I am sure you could go on, and I would yield to you, and we would hear a lot of that.

So it is going to be overturned and for a good reason, that it is a profound overreach. I mean, I have more quotes from farmers. I couldn't get them off the phone when I asked them to comment on this hearing, as well as all these other quotes from people from Zippy Duvall, to the NFIB, to the president of the Pennsylvania Farm Bureau, home builders. I mean, it just goes on that it is way too nebulous and troubling and potential high levels of costs and unnecessary regulations.

So we need to come up with a fix, and we are the body. You know, the Small Business Committee is the only Committee in the old Congress that is here advocating for small business. So that is what we have to do.

So I will just ask a question. I will go to Ms. English first. Where do you see—we just go back to what we currently have. What do you see as a solution that we should try to focus on?

Ms. ENGLISH. I would encourage Congress to look to the congressional intent that is already expressed in the Clean Water Act.

The fact that this was intended to be an exercise of federalism, that there is responsibility, and there are spaces that require the attention and focus and the power of the federal government to protect. But that is not all the waters in the United States. It was not intended to be all of the water bodies that existed in the United States.

The States, many States have vigorous regulatory programs to protect what they see as State waters that encompass everything from the interior to the isolated to the coastal.

The EPA has been very successful in using the Clean Water Act to encourage States to adopt reasonable water quality standards to protect the water uses in that State. I would suggest gently that Congress has told EPA how to do this and that, perhaps, EPA needs to re-focus on the language in the statute that Congress has given it.

Mr. MEUSER. Excellent.

Mr. Murphy, and then if I have time, I will go to Mr. Baumann.

Mr. MURPHY. Same question, sir?

Mr. MEUSER. Same question.

Mr. MURPHY. I am not an expert in legal affairs, especially regarding Congress.

Mr. MEUSER. You are on the ground field for it.

Mr. MURPHY. We need certainty. Interact directly with the Corps, EPA, to establish a level of certainty that is not going to be subject to change upon each administration's change. We can't afford to change every four years or some other time because that forces us to go back to the JD process and start over.

Mr. MEUSER. I appreciate that.

I am going to have to yield back. But thank you.

Mr. LUETKEMEYER. [Presiding.] The gentlemen yields back.

I am glad you are trying to minimize your concern there.

With that, we go to—I now recognize the gentleman from Kentucky, Mr. McGarvey, for five minutes.

Mr. MCGARVEY. Thank you, Mr. Chairman. I appreciate that.

I appreciate the panel for being here and telling us about your experiences.

And the Chairman mentioned, I am from Kentucky. You all might not know too much about our State but might have heard a little bit about one of our products that we make there, and I can tell you that the four sort of core ingredients of bourbon are corn, yeast. You have to have a new charred white oak barrel and, of course, water.

So bourbon. I won't go into a dissertation on bourbon today for the small business community. It gets its flavor from a lot of things, including the barrel, including the corn, including the products that go into it. But a lot of it does come from the water and from Kentucky's limestone water and from a lot of the properties we possess in our clean water.

We have heard today a lot about the negative impacts that these regulations can have on farmers, on developers, on communities. And I agree. We deserve a clear and straightforward framework.

But I think it is also important to acknowledge the negative impacts that weak water standards have and how they would devastate some industries. Whether it is breweries, whether it is fish-

ing, whether it is my State's home industry of bourbon, these are entries that rely on clean water.

And so, Mr. Baumann, I just wanted to hear from you a little bit about those kinds of benefits that those businesses that benefit from the regulations that we have ensure clean, safe water, and what kinds of small businesses are harmed when these water standards are relaxed.

Mr. BAUMANN. There is so much I can answer that with. I will begin by telling you that we have a lot of beautiful rivers in South Carolina. We have a multi-billion dollar tourist industry. We have billions of dollars in the fisheries and in the outdoor recreation, and all that gets hurt.

I will give you an example. We have polluters. We have coal fired power plants. We have agriculture. We have the aforementioned situations with the fill and build, fill in the wetlands and building on it and causing runoff and flooding and non-point source solution to our estuaries, which are the nursery grounds for everything we catch, you know. So it is really profound.

And in South Carolina, to give you an idea about our recreational fishing and our ocean fishing and commercial fishing, there are health advisories now and have been for years during the EPA and the clean water rule in my view that is just not being addressed properly because we have health advisories telling us that we can't eat the fish we catch.

I mean, that has got to—people go fishing to filet the fish and fry it for dinner. And when you can't eat the fish you catch because of mercury poisoning or some other heavy metal or whatever, it has to have profound impact on how many people go fishing, the money they spend in the community, in restaurants and hotels and everything else like that. It is an economic wheel that is being disrupted by a lack of good water quality.

Our estuary now is an impaired estuary according to the EPA. The reason is non-point source pollution. It is just a small inlet. There is no major fresh water creeks going into it. It is from rain runoff, all of it.

Mr. MCGARVEY. And you bring up something I think is worth noting in this hearing. I think this is something we all inherently know, but I think it is worth pointing out, our waters are connected.

Mr. BAUMANN. All water is connected.

Mr. MCGARVEY. You can't pollute water in one place and not feel the effects somewhere else. We are low on time, Mr. Baumann. I appreciate your testimony.

But, Ms. English and Mr. Murphy, I would like to give you a chance to chime in. I am sympathetic, again, to needing a clear, straightforward framework and the real-life impacts of regulations. What kind of middle ground do you think we can pursue that would address your concerns and those of Mr. Baumann about the need for clean water?

Ms. ENGLISH. Thank you.

Again, I think the idea that the only solution here is at a federal level is very concerning to me. I think a bright line test for where the federal interest stops and where the State responsibility begins would be an important step, because it would then allow the dis-

cussion to take place about the kinds of protections that need to take place locally. It is with that local knowledge I think the middle ground can be found.

Mr. MCGARVEY. And unfortunately, we are out of time, so I am going to yield back.

Chairman WILLIAMS. [Presiding.] The gentleman yields back.

I now recognize Mr. Alford from Missouri for 5 minutes.

Mr. ALFORD. Thank you, Mr. Chairman. Thank you for holding this important hearing about how the Biden administration's WOTUS rule really impacts small businesses. That is why we are here today.

Uncertainty is not a part of the equation for success for small businesses. That is exactly what this WOTUS rule has created for small business. This backwards rule would force family farmers to jump through hoops and likely retain legal counsel before developing or farming their land. I guess, the Biden administration forgot that most small business owners—most farmers are small business owners.

What also concerns me about this haphazard policy is that the EPA and Army Corps have said that the WOTUS rule would not have a significant impact on a substantial number of small entities, despite the Small Business Administration's Office of Advocacy sending a letter to the EPA and Army Corps last February stating the exact opposite.

The decision was a calculated attempt by these groups to circumvent their obligations under the Regulatory Flexibility Act so that they did not have to conduct an initial regulatory flexibility analysis, which would prove just how dangerous this policy is for small businesses across the country.

The Biden administration's failure to look at this rule and how it affects small businesses is just another shameful example that this administration will push its agenda at all costs, including at the cost of our small businesses and hardworking Americans.

I want to begin my questions with you, Ms. English, because we have 95,000 farms in the State of Missouri. I, too, like our Vice Chairman, am from Missouri, and I am honored to represent those, not just here but on the Ag Committee as well.

This has been a large focus that I have heard from farmers for the last 2 years in the 24 counties that I represent. One farmer in Cass County told me this incredulous story, but it is true, that he had to shut down part of his farm because they found the water standing in his cornfield. And until he could prove that it was not a navigable waterway, it turned out to be ruts from his combine and farming equipment that had filled in with water. Where is the commonsense in this ruling?

I want to know from your standpoint, do you have any stories like that that you could share with us of the lack of commonsense of this, and what economic impact has it had on your family farm so far?

Ms. ENGLISH. In regard to a story that is very similar to this, I practice a great deal with the Army Corps of Engineers, and I know the reviewers there. There is one who lives in a home that is not far from our family farm, and he called me to tell me that

I needed to make sure that I filled in a bull hole. For those of you who don't know, bulls like to roll in dirt and get dirty.

And we had a bull hole in front of a gate that was near the road, and he noticed that it was puddling during our rainy season in Florida, which is between May and September-October. And he warned me that I needed to backfill my bull hole before it became a jurisdictional wetland, and that if anything came up that that would be a concern. When an agency staff person uses my personal cell phone and does not send an email to tell me I need to backfill a bull hole, that should tell you that there is a concern in this space.

The only reason I went to law school was having worked for a citrus growers co-op for 5 years—4 years, and watching what had happened with the regulatory creep in that timeframe. I became convinced that the only way my family could continue to farm, to continue to be the good stewards of the land and have the legacy of handing this property down to my children and grandchildren was for us to have a lawyer who understood it. It defined my entire professional life.

Mr. ALFORD. I would submit to you that we don't need to be backfilling bull holes. We need to backfill the BS in WOTUS. And we need to come to the aid of farmers who are conservationists, who are doing everything they can to protect their farms.

And, Mr. Baumann, I agree, you know, I try to listen to people I agree with. I really try to hear people I disagree with. I hear you, brother. I understand, we want clean water. I used to be an environmental reporter in south Florida. I know that pollution does cause bad effects on our seafood and our fishing industries, but we have got to find a way to work together in America that we can have great fisheries, great farms, and be a productive society that has commonsense.

And with that, I yield.

Chairman WILLIAMS. Thank you very much.

Next, we recognize Mr. Ellzey from Texas for 5 minutes.

Mr. ELLZEY. Thank you, Mr. Chairman.

Thanks, everybody, for coming in today.

One of the benefits of being very junior is to get to hear some of the arguments before you get to ask a question, and this is really a fascinating discussion. And as it comes down to it, as I see in my three witnesses here, not a single one of them wants dirty water. We all want clean water. We all depend on clean water. We all depend on it for our food.

Mr. Baumann, I look forward to eating at your place sometime and sampling some of that fine seafood.

And, Mr. Murphy, you build homes in my area.

So I think what it comes down to at the end of the day, the reality is this is about power from agencies that don't answer to anybody else and the agenda of individual administrations. I didn't say what party they were from. Everybody has got their own agenda.

Mr. Baumann, I do have a—this isn't a "stump the chump," and I don't mean it as such. Can you define for me—since we have got some land folks here and then a water guy, can you define for me, in your opinion, what a navigable waterway is?

Mr. BAUMANN. Let me answer that by something that has been left out by everybody who has brought up navigable water, and the phrasing is something to the effect of "or substantially affects navigable waters." Water moves. It don't stay where it is at. It is either going to go down into the aquifer, or it is going to, you know, move with environmental conditions or with weather and so forth like that.

So I don't have the exact definition of navigable water. I have read a few—like you say, it has changed over the years, and I do think it needs to be adopted at a certain level where everybody can count on it, you know. Mr. Murphy, Ms. English, myself, we need to know what the parameters are, but we are getting the short end of the stick in my business, I can tell you.

And it is not just my business. I am speaking for that myriad, that plethora of people who I spoke about that rely on the fishing industry. Our whole town relies on the fishing industry and virtually every business in it. 99.9 percent of the businesses in this country are small businesses. And polluted water, regardless of how it happens, it has consequences for everybody except the people that cause the pollution. Nobody is getting accountability, you know, especially, with all due respect, the big mega farms, you know.

Mr. ELLZEY. Okay. Let me ask you—in my time left, let me ask you another question. In your opinion, who should define navigable waterway? Is it the Congress or is it the EPA and the Corps? Real quick. Real quick.

Mr. BAUMANN. Is it one of those three, who should define?

Mr. ELLZEY. Who should, in your opinion? Real quick. 15 seconds.

Mr. BAUMANN. You can't do it by the States because the States don't have the money or the purview.

Mr. ELLZEY. All right.

Mr. BAUMANN. That has been proven.

Mr. ELLZEY. Okay. All right.

Mr. Murphy, every administration has done its own thing. What would the homebuilders like to see in predictability, and who should define navigable waterway? Who should define these rules, Congress or an agency?

Mr. MURPHY. We need certainty. Homebuilders and developers are adaptable, but we can't adapt to something we don't know. If you provide us certainty, we will deal with it somehow, some way. But as we go to contract to purchase land today, we cannot ascertain with any level of certainty whether we have WOTUS in or not, which forces us to either drop contracts, delay them, or incur the additional cost I testified to earlier.

What is the solution? Give us certainty. Put it in the hands of an independent body. The Corps and the EPA, in my position, have more of a different take on it because they have been dealing with this for years. Put it with Congress, is my suggestion. Put it into an independent body, a committee of Congress, to study it and come up with some type of rule that will provide certainty beyond this single administration. That would be my recommendation, sir.

Mr. ELLZEY. Okay. Ms. English?

Ms. ENGLISH. I am always wary of a special study group. I believe that we need to honor the Constitution and the commerce clause. I believe that we need to honor the concept that was originally written into the Clean Water Act about the separation and the cooperative nature of our governmental associations between the federal government and States.

I think that we need to have a bright line test. Just exactly what Mr. Murphy said, we need certainty and clarity. But by the same token, you are overlooking the power and responsibility of local governments and local States to protect their citizens, and they have the most direct knowledge.

Mr. ELLZEY. Thank you all very much for your testimony.

I yield back. Thank you, Mr. Chairman.

Chairman WILLIAMS. Thank you very much.

And now I recognize Ms. Van Duyne from Texas for 5 minutes.

Ms. VAN DUYNE. Thank you so much, Mr. Chairman. And thank you for holding this important hearing on the persistent threat Waters of the U.S. poses to small businesses across the nation.

I have heard from many small businesses just about how starting—they are just starting to now bounce back from government and post lockdowns and closures, and now this administration is reviving a threat of a vague and very confusing, as we have heard today, regulation that grants the federal government broad authority to regulate nearly every stream, pond, wetland.

I mean, I think, Ms. English, you said it perfectly: Anything that comes on the land is basically—is how they are defining it. And even worse, the agency charged with enforcing this regulation doesn't even understand what they are executing, which in turn causes small businesses and farmers to be susceptible to fines and legal action even if they unknowingly violate these regulations. And honestly, the renewed approach to WOTUS seems designed not to protect the environment but really only to satisfy the administration's unending desire to regulate our job creators out of business.

In the 117th Congress, I, along with all of my Republican Committee Members, sent a letter requesting that the Army Corps of Engineers and the EPA look at how this role will be determined and how it will be detrimental to small businesses. And while all of those questions remain unanswered, I look forward to holding the Biden administration accountable and working to ensure that this harmful rule does not go into effect.

Mr. Murphy, you have provided some great testimony today. You had said—when asked by the Chairman and others what impact this is going to have, you said that basically you are going to have to abandon some projects. You have already had to abandon some projects. You said that as costs increase, and this does add additional cost, that the cost not only increases for the building for your company but that is having to be passed along——

Mr. MURPHY. Right.

Ms. VAN DUYNE.—to your customers as well. Have you had to hire any additional staff? Have you had to hire consultants to help with this compliance?

Mr. MURPHY. Not yet. We have not, because this is brand new. I was speaking to one of our consultants, a third party that we engage, just the other day. And I asked him, under the new 2023 WOTUS rule, how would you interpret this, especially regarding the significant nexus test, which now takes the combination of chemical, physical, and biological tests, along with the culmination of all upstream, i.e., catchment basin, similarly situated properties. How do you calculate that? This is a gentleman who used to be in the Corps office himself. He told me, I don't know.

Ms. VAN DUYNE. Yeah, that is a problem.

Mr. MURPHY. So if our investigative experts can't tell us, how can we understand what to do going forward on projects? We just basically shut projects down. We haven't yet, because everything we have under construction was basically permitted before. This only pertains to projects that haven't yet started construction.

So we are dealing with shutdown on these. This is the first time in my career, not just related to WOTUS, but overall economic situation that we do not have any properties to acquire under contract right now. To sit here today and be faced with compounding the cost and delays associated with this may just force us to discontinue development for some period of time. How long, I don't know.

Ms. VAN DUYNE. I mean, that is a grim look. If you had to estimate—I know you said, you know, this hasn't happened yet, but if you had to estimate, how much time do you think is going to be spent on working on compliance?

Mr. MURPHY. Oh, Lordy.

Ms. VAN DUYNE. Taking away from actually what you do do as part of your business model.

Mr. MURPHY. Yes. We hired third-party consultants to advise us. We also engage third-party engineering, investigative firms to prepare the plans and items associated with it. Let me give you an example of a jurisdictional permit we have. Once we have that jurisdictional determination, that gives us the clarity and the certainty that we can proceed ahead with the development on that project without risk of intruding into WOTUS and incurring civil and criminal penalties. So we rely upon that.

Under the new rule, they basically have noticed us that they will no longer consider existing JDs. That forces us to stop our engineering process, reconsider the impacts of the new WOTUS rule on that particular phase of development or the new development. That, in itself could result in months of delay, redoing the engineering plans, loss of land that we could otherwise develop because we can no longer wait for the timeframe for the agencies to determine jurisdictional determination, which could be, you know, 2, 3, 5 years. We don't know. So it is a significant impact to us.

Ms. VAN DUYNE. Can you tell me—and this is just another—another problem being dumped onto an industry that is already suffering from a whole list of issues.

Mr. MURPHY. Yes.

Ms. VAN DUYNE. Can you tell me the context now in which you guys are working, everything that is like building up. And really, we talk about the importance of having affordable housing.

Mr. MURPHY. Yes.

Ms. VAN DUYNE. Tell me what is happening in your district.

Mr. MURPHY. In just a few seconds, you have got inflation; you have got interest rates; you have got electrification; you have got the shortages of transformers, which are going to be compounded by additional items out there; you have got shortages of houses already; you have got the overall issues with inflation and cost. There is no lack of demand. It is a lack of availability and cost.

Ms. VAN DUYNE. I appreciate that very much and yield back.

Chairman WILLIAMS. Thank you very much.

I now recognize Mr. Bean from Florida for 5 minutes.

Mr. BEAN. Mr. Chairman, a very good afternoon once again.

And thank you so much. I am still learning. I am still learning how vastly it affects a small business. We already know in this committee how hard it is to run a small business already without government interference. But then when you throw government interference, uncertainty, a cloudy future, then it is really hard, especially if you own a family farm for over 100 years, as the English family has.

Ms. English, what is it going to mean should this go forward? And you are an attorney, so you are used to understanding complex things. I understand this rule is hazy and complex, but what does it mean to your family having to deal with another rule such as this?

Ms. ENGLISH. Well, you may be familiar with citrus greening, which has affected citrus groves across the State of Florida decimating the industry. We have pushed the groves on our property, and we are preparing to go back with varieties that are more tolerant of the disease. For those of you that don't know, citrus greening is sort of an autoimmune disease for orange trees. It is deadly. It has decimated the industry.

Under the new rule, I don't know that the groves that we had planted for 140 years aren't actually jurisdictional to the Corps, that I am not going to be required to go get a permit for them, and mitigate if we are going to plant. We are a small family farm. None of us rely entirely on the farm income.

Again, my husband teases me that I farm to support—or I practice law to support my farming habit. But the issue here is it is hundreds of thousands of dollars and it is years. We would be looking—if this is jurisdictional, and it appears to me from the rule that maybe it might be, we would be looking at hiring engineers—I would, of course, be the lawyer, but all of the other consultants that Mr. Murphy needs in order to successfully proceed through a permit or a jurisdictional determination so that we had that protection. Hundreds of thousands of dollars and years of delay, I don't know that we can withstand that.

Mr. BEAN. Has your farm shrunk over the years, the 100 years? Has it grown or has it shrunk or stayed the same?

Ms. ENGLISH. No. We last acquired a piece of property from a cousin, I believe, in the mid 1980s. But since that time, it has been relatively stable at about 880 acres.

Mr. BEAN. I gotcha. But you have seen it—because we are both from the free State of Florida. You have seen the massive influx of people who have voted with their feet, they are coming to Flor-

ida. But you have seen farming threatened in Florida. Is that correct? Have you said you have seen farms close or sell out?

Ms. ENGLISH. Absolutely. And any farm that is within an hour or an hour and a half of an urban area in Florida is under dire threat of development, simply because farmers are price takers not price makers. We compete in a global market. We produce commodities that we can't raise the price on.

So when you reach a point where you can no longer be economically viable, the hard choices for legacy farm families have to be are you selling this to the government or are you selling it to Mr. Murphy's friends, because those are our options. Case in point, I have lost probably 10 percent of my clients over the last year, and how I lost them was I helped them sell their property.

Mr. BEAN. Gotcha. Would you say—some say that growing a nation's—feeding a nation, feeding a nation and for a nation to be able to grow its own food is national security. Would you agree with that statement?

Ms. ENGLISH. I would agree with that 100 percent. I just object to the fact that I have to have an entire herd of consultants in order to successfully do that.

Mr. BEAN. How would a small business—how would a small farmer navigate the waters of running a farm with this new environment of uncertainty, of regulations from the current administration?

Ms. ENGLISH. With great respect, Congressman, I don't think they can.

Mr. BEAN. Mr. Chairman, I yield back. Thank you so much.

Chairman WILLIAMS. Next, we have—I want to recognize Mr. Stauber from Minnesota for 5 minutes.

Mr. STAUBER. Thank you very much, Mr. Chair.

And to the witnesses, thanks for your testimony.

We have a big fight on our hands. As a former small business owner of 31 years, this WOTUS rule, our small businesses, our farmers are against it, and this administration just pushes it and tries to push it upon the American people.

Mr. Murphy, what is the cost of—what does it cost you to hire these consultants to figure out this WOTUS rule and what goes with it? What is the cost for your company?

Mr. MURPHY. The initial cost for a study depending upon the size and complexity of the individual project will usually range from $10,000, $15,000, maybe $20,000. That is the initial study. Then if you have to go through a formal submission to the Corps for a jurisdictional determination, that cost is being priced right now to us between $50,000 to $75,000. And this is under the existing rule, not the new rule.

We don't have the ability to project what the increase in cost may be, because my consultants are telling me they don't know how to enforce it yet or do the inspection. And that is just the cost to do the determination and jurisdictional. If you go through the individual permitting, you have got significant additional costs beyond that.

Mr. STAUBER. So in 30 seconds, you just said that these rules that the government put forward have cost you a minimum of $100,000. In just 30 seconds, that is the minimum. So my question

to you is, let's say it is $300,000, and I don't think that is out of the question once push comes to shove with this ridiculous ruling, who do you pass that onto?

Mr. MURPHY. Well, if we can pass it on, it is to the ultimate home buyer through purchases of the homes from the individual homebuilder. If we can't pass it on——

Mr. STAUBER. So if you pass it on to the home——

Mr. MURPHY. If we could——

Mr. STAUBER. If you could.

Mr. MURPHY. Subject to market acceptability.

Mr. STAUBER. Right. Okay.

Mr. MURPHY. That is who it would go to. But in many cases we can't. So we are forced then to pretty much just mothball this particular development because we can't recover the cost through increases in housing prices, or we have to resize the project, which basically means shrinking the developable land to stay way away from what may be considered significant nexus under the WOTUS test to basically proceed ahead and not run the civil and liability risk associated with it.

So that would allow us to proceed ahead without incurring significant costs, but what it does is have the same effect. It increases the cost of the remaining land and lots and therefore has a direct increase on the remaining homes to be built.

Mr. STAUBER. If it wasn't so devastating, I would find it laughable that the EPA and the Army Corps claim that the WOTUS rule won't significantly impact our American small businesses. That is just simply not true. It is just simply not true. I think it is disingenuous for them to tell the American people. I know the farmers, manufacturers, miners, and homebuilders in northern Minnesota would have had a different story to tell if they were asked.

Ms. English, I have heard from farmers in my great State of Minnesota that are struggling to comply with the strict water regulations already in place in our State. Can you tell me more about the jobs and projects that this rule will make harder for farmers to get done?

Ms. ENGLISH. And I actually have talked with some of my cousins who farm in and around Hawley, Minnesota.

Mr. STAUBER. Yeah.

Ms. ENGLISH. So we have compared notes and cried in each other's beer over some of these issues.

Mr. STAUBER. Yes.

Ms. ENGLISH. But here is what doesn't happen, you can't—you begin not to maintain portions of the systems that need to be maintained because you are afraid of incurring jurisdiction. Catchment basins that you use to capture soils or to treat for water quality don't happen. The improvement projects, like the one I referred to in my testimony, where you are trying to do something that is going to improve the water quality, ultimately being discharged from the property, aren't being addressed and aren't being done.

It is one thing to make a rule to protect water quality; it is another thing if that rule cuts both ways and actually impairs water quality because you could no longer repair the infrastructure or maintain it that treats water quality.

Mr. STAUBER. I will just tell you, in my last 30 seconds, this rule is devastating. I will tell you that the Obama administration, when Joe Biden was Vice President, they allowed a water permit in a mine in Minnesota. The water came out more pure. They had to add sediments to it. And this administration just remanded that same water permit to stop mining. You can't make this up. You just can't make it up.

And I think this WOTUS rule is going to be devastating for small businesses and farmers. And those—the bureaucrats that are getting paid to do this, like your EPA neighbor who calls you and says the bull hole needs to be filled or changed, or my colleague over here who says that the tractor tires—the water and the tractor tire and the groove and the dirt needs to be—something needs to be dealt with, can you imagine?

Ms. ENGLISH. Uh-huh.

Mr. STAUBER. I mean, can you imagine this?

Ms. ENGLISH. Yes.

Mr. STAUBER. And by the way, $320 billion—that is with a "B"—$320 billion of additional regulations this administration has put on our small businesses in just 2 years. I yield back.

Chairman WILLIAMS. Thank you.

Now, I recognize Mr. Crane from Arizona for 5 minutes.

Mr. CRANE. Thank you, Mr. Chairman. I appreciate it.

Thank you to the witnesses for showing up today. I appreciate it. Sorry I was tardy. We were in a Homeland Security meeting. It is one of the tough things about this town is you just get thrown around all over the place.

But real quick, I wanted to start with you, Mr. Murphy, have you ever voted for an official at the EPA in your life that you can remember?

Mr. MURPHY. Voted for an official at the EPA, no, sir.

Mr. CRANE. Okay. Let's see, Ms. English, have you ever voted for an official at the EPA?

Ms. ENGLISH. No, sir.

Mr. CRANE. Mr. Baumann, have you ever voted for an official at the EPA?

Ms. ENGLISH. No, sir.

Mr. CRANE. No, sir. All three of them, no, no, no. Does that bother you guys? Follow-on question to all three of you: Does it bother you that unelected bureaucrats are making rulings and judgments that are affecting your business and lifestyle? We will start with you, Mr. Murphy.

Mr. MURPHY. I would prefer to have a say in that, yes. But I also look to my elected Congressman to help enforce the Clean Water Act and provide the regulatory guidance that provides clarity to what we do.

Mr. CRANE. Yes, sir. And you just made a key word there, "elected." My point was, right now, you guys, your lifestyle, your businesses, and many others across this country are being affected because of unelected bureaucrats, and therefore you have no recourse, right? You can't go—take me, for example. I am a freshman here in Congress. If I screw up really bad, and some of the folks in my district would probably, you know, say that I am, but if I screwed up really bad, they have a recourse. They can get rid of

me in 2 years, right? But you guys can't go and fire somebody at the EPA, can you?

Mr. MURPHY. That is correct. We have recourse, not under what is called a preliminary jurisdiction because that is non-contestable, but there is a jurisdictional determination out that we may have recourse——

Mr. CRANE. Okay.

Mr. MURPHY.—so contested. But directly to answer your question, no, we don't have any authority to approve, vote, or try to oust Members of the EPA or the Corps.

Mr. CRANE. Thank you.

Ms. Bau—or, excuse me, Ms. English, does that bother you?

Ms. ENGLISH. It is a terrible concern when it appears that the agency perspective appears to deviate substantially from the law that has been handed down by Congress and signed by a President.

Mr. CRANE. Thank you.

And the last thing I have to say is just a statement real quick, because I know we are never—we are all never going to agree on, you know, everything that goes on here. But I am just going to tell you guys, my vote will be cast in a manner that acknowledges your private property and keeps unelected bureaucrats and government officials out of your lives as much as possible. And I want to see local officials making these rules and regulations, because I think that they have the best eyes on and the best capability of making sound judgments that are the best for your lives. Okay?

Thank you guys again for coming. I yield back.

Chairman WILLIAMS. Thank you very much.

And I would like to thank our witnesses for their testimony today and for appearing before us.

Without objection, Members have 5 legislative days to submit additional materials and written questions for the witnesses to the Chair, which will be forwarded to the witnesses. I would ask the witnesses to please respond promptly if that happens.

There being no further business, without objection, the committee is adjourned.

[Whereupon, at 3:43 p.m., the committee was adjourned.]

APPENDIX

Testimony of Frank Murphy

Chairman of the Environmental Issues Committee of the National Association of Home Builders

Before the

United States House of Representatives

Small Business Committee

Hearing on "Small Business Perspectives on the Impacts of the Biden Administration's Waters of the United States (WOTUS) Rule"

March 8, 2023

Chairman Williams, Ranking Member Velázquez, and members of the committee, on behalf of more than 140,000 members of the National Association of Home Builders (NAHB), I appreciate the opportunity to testify. My name is Frank Murphy, and I am the Chief Operating Officer at Wynne/Jackson, a small real estate development firm in Dallas, Texas, with eight employees and averages under $5 million in annual revenue. I have been in the real estate industry for nearly forty years, and I serve as the Chairman of NAHB's Environmental Issues Committee.

In my experience, I have participated in development, asset and property management, consulting, leasing, and brokerage activities for over $2.0 billion in real estate projects. Projects have consisted of approximately 17,000 acres of residential and master-planned developments, 12,000 residential lots, 10,000 apartment and condominium units, 4.5 million square feet of office and retail developments, 10 hotels, and numerous mini-storage facilities, marinas, and golf courses. I currently operate the development, special districts, and project consulting areas for the company in addition to my role as Chief Operating Officer.

NAHB's membership includes over 140,000 firms involved in all aspects of residential construction, including home building, remodeling, multifamily construction, land development, property management, subcontracting and light commercial construction industries. Our industry is primarily dominated by small businesses, with our average builder member employing 11 employees. Since the Association's inception in 1942, NAHB's primary goal has been to ensure that housing is a national priority and that all Americans have access to safe, decent and affordable housing, whether they buy or rent a home. Over 80% of new residential housing units in 2023 will be built by NAHB members. Additionally, over 98% of NAHB members meet the U.S. Small Business Administration's definition of "small entity."

NAHB fully endorses the public comment submitted by the U.S. Small Business Administration, Office of Advocacy (Advocacy) on the proposed definition of waters of the United States (WOTUS) by the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps; collectively, the

agencies) that was submitted to the Federal Register on February 7, 2022.[1] The Revised Definition of WOTUS (2023 rule) was printed in the Federal Register on January 18, 2023.[2]

My small business is dedicated to developing, building, and preserving affordable housing options for all citizens. I have a unique understanding of how the federal government's regulatory process impacts businesses in the real world. Additional regulations and their attendant administrative reviews and permitting processes make it more difficult for me to provide homes or apartments at a price point attainable for working families. More importantly, living under a regulatory regime that relies on the significant nexus test and determinations from unelected federal bureaucrats will make home building inefficient, costly and will ultimately exacerbate our nation's housing affordability crisis.

Reducing Burdens on Small Business:

The Regulatory Flexibility Act (RFA) requires federal agencies to consider the effects of its actions on small entities, including small businesses, small non-profit enterprises, and small local governments.[3] When an agency issues a rulemaking proposal, the RFA requires the agency to prepare and make available for public comment an initial regulatory flexibility analysis (IRFA), which will "describe the impact of the proposed rule on small entities."[4] The RFA states that an IRFA shall address the reasons an agency is considering the action; the objectives and legal basis of the rule; the type and number of small entities to which the rule will apply; the projected reporting, record keeping, and other compliance requirements of the rule; and all federal rules that may duplicate, overlap, or conflict with the rule. The agency must also provide a description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes and minimize any significant economic impact of the proposed rule on small entities.[5]

Section 605 of the RFA allows an agency, in lieu of preparing an IRFA, to certify that a rule is not expected to have a significant economic impact on a substantial number of small entities. If the head of the agency makes such a certification, the agency must publish such a certification in the Federal Register at the time of the publication of the notice of proposed rulemaking along with a statement providing the factual basis for the certification.[6] EPA has indicated that the 2023 rule will not have a significant impact on a small number of small entities. Advocacy outlined why the agencies improperly certified the rule and acknowledged that the rule would impose costs directly on small entities. Those costs will be significant for a substantial number of them.[7]

Under the 1996 amendments to the RFA, known as the Small Businesses Regulatory Enforcement Fairness Act (SBREFA)[8], each covered agency (i.e., EPA) must prepare an IRFA. It must first notify the

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[1] U.S. Small Business Administration, Office of Advocacy: (2022), Comments from the U.S. Small Business Administration, Office of Advocacy on the EPA and Army's proposed rule defining waters of the United States. Retrieved on March 6, 2023, from *https//cdn.advocacy.sba.gov/wp-content/uploads/2022/02/08152154/Comment-Letter-Proposed-WOTUS-Definition-2022.pdf?utm_medium=email_source=govdelivery*.

[2] 88 Fed. Reg. 3004 (January 18, 2023).

[3] 5 U.S.C. §§601-612.

[4] 5 U.S.C. §603(a).

[5] 5 U.S.C. §603(c).

[6] 5 U.S.C. §605.

[7] *Id.*

[8] 5 U.S.C. §609.

Chief Counsel for Advocacy and provide them with information on the potential impacts of the proposed regulation on small entities and the type of small entities that may be affected. Advocacy must then identify individual representatives of affected small entities to obtain advice and recommendations about the potential impacts of the proposed rule. The agency must convene a review panel made up of the agency, Advocacy, and the Office of Management and Budget to review the materials the agency has prepared, collect advice and recommendations of the small entity representatives; and issue a report on the comments of the small entity representatives and the findings of the panel. Following this process, the agency shall modify the proposed rule, the IRFA, or the decision on whether an IRFA is required.[9]

Economic Outlook for the Home Building Industry:

Housing is an excellent example of an industry that would benefit from more intelligent and sensible regulation. According to a study completed by the NAHB, government regulations from federal, state and local governments account for up to 25% of the price of a new single-family home and over 40% of multifamily development. Nearly two-thirds of this impact is due to regulations that affect the developer with the rest due to regulations that are imposed on the builder during construction.[10] The regulatory requirements we face as builders do not just come from the federal government. A key component of effective regulation is ensuring that federal, state, and local agencies cooperate and coordinate to streamline permitting requirements and respect the constitutional roles of each level of government. Notably, more sensible regulation will translate into job growth in the home building industry.

The U.S. home building industry is in a recession; few industries have struggled more than home building. The costs of housing for homeowners and renters are increasing due to inflation being at a 40-year high, a broken supply chain, and building costs that are up 19% compared to last year.[11] Residential mortgage rates have more than doubled since the beginning of 2022, and the difference between a 3% and 6% mortgage equates to an increase in a family's monthly mortgage payment of more than $700 for the cost of a typical home. Adding increased regulatory pressure on top of these challenges makes it impossible to provide homes at an attainable price.

2022 was the first year single-family starts declined in 11 years, falling an estimated 12% to 999,000 units. NAHB projects that single-family production will fall to 744,000 units this year before rebounding to its normal pace in 2024.[12] According to a report from Redfin, around 63,000 home-purchase agreements in the U.S. fell through in July 2022, which equates to 16.1% of all homes that went under contract.[13] NAHB economists recognize that we will need to exceed 1.1 million starts annually to reduce

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[9] 5 U.S.C. §§609(b) (1) through (6).

[10] National Association of Home Builders, (2021), Government Regulation in the Price of a New Home: 2021 Retrieved on March 6, 2023, from *https://www.nahb.org/-/media/NAHB/news-and-ecomonics-plus/special-studies/2021-special-study-government-regulation-in-the-price-of-a-new-home-may-2021.pdf.*

[11] National Association of Home Builders, (2022), Building Materials Prices Up More than 19% Year over Year. Retrieved on March 6, 2023, from *https://www.nahb.org/blog/2022/05/building-materials-up-more-than-19-precent-year-over-year.*

[12] National Association of Home Builders, (2023), A Housing Downturn in 2023 Followed by a Recovery in 2024. Retrieved on March 6, 2023, from *https://www.nahb.org/news-and-economics/press-releases/2023/01/housing-downturn-in-2023-followed-by-recovery-in-2024.*

[13] Pan, Jing (August 18, 2022), Homebuyers Are Increasingly Backing Out of Deals: How to Keep Your Sale on Track. Retrieved March 6, 2023, from *https://moneywise.com/investing/real-estate/homebuyers-are-backing-out-of-*

a deficit due to the underbuilding in the prior decade. If the home building industry operated normally, there would be millions more jobs in home building and related trades. Smart regulation can help unleash that growth.

Our impact on the economy is more than just jobs. Buyers of new homes and investors in rental properties add to the local tax base through business, income and real estate taxes; new residents buy goods and services in the community. NAHB estimates the economic impacts of building 100 typical single-family homes include $28 million in wage and business profits, $11.1 million in federal, state and local taxes, and 297 jobs. In the multifamily sector, the impacts of building 100 typical rental apartments include $10.8 million in wages and business profits, $4.2 million in federal, state and local taxes and 113 jobs.[14]

Even moderate cost increases can have significant negative market impacts. This is of particular concern in the affordable housing sector where relatively small price increases can have an immediate impact on low to moderate-income home buyers. Such buyers are more susceptible to being priced out of the market. As the price of the home increases, those on the verge of qualifying for a new home will no longer be able to afford this purchase. As of 2022, an analysis done by NAHB illustrates that a $1,000 price increase will result in 117,932 households are priced out of the market for a median-priced new home.[15] In the final quarter of 2022, a record high 87% of home buyers reported being able to afford fewer than 50 percent of the homes for sale in their markets.[16]

Any effort to advance our nation's housing recovery is smart economic policy. To reach these goals, however, we need policies that streamline and enhance existing efforts and remove regulatory hurdles, not ones that add layers of regulatory red tape and provide minimal benefits, like the 2023 WOTUS rule.

Costs of Regulations Falls Disproportionally on Small Business:

There are several recent economic studies on the cost of regulations on firms including studies conducted by the U.S. Chamber of Commerce Foundation[17] and the National Association of Manufacturers (NAM)[18] that show the disproportionate impact on small businesses and free enterprise in America. The NAM study found that U.S. federal government regulations cost an estimated $2.028

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deals?utm_source=syn_oath_mon&utm_medium=Z&utm_campaign=14843&utm_content=oath_mon_14843_home+purchase+agreements+fell+through.

[14] National Association of Home Builders, (2015), The Economic Impact of Home Building in a Typical Local Area Income, Jobs, and Taxes Generated. Retrieved on March 6, 2023, from *https://www.nahb.org/-/media/nahb/news-and-economics/docs/housing-economics/economic-impact/economic-impact-local-area-2015.pdf.*

[15] National Association of Home Builders, (2022), Households Priced-Out by Higher House Prices and Interest Rates. Retrieved on March 6, 2023, from *https://www.nahb.org/news-and-economics/housing-economics/housing-economic-impact/household-priced-out-by-higher-house-prices-and-interest-rates.*

[16] National Association of Home Builders, (2023), Housing Affordability Goes South. Retrieved on March 6, 2023, from *https://eyeonhousing.org/2023/01/housing-affordability-goes-south/.*

[17] U.S. Chamber of Commerce Foundation,(2016) Understanding Small Business in America. Retrieved on March 6, 2023, from *https://www.uschamberfoundation.org/smallbizregs/.*

[18] National Association of Manufacturers, (2014), The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business. Retrieved on March 6, 2023, from *https://www.nam.org/wp-content/uploads/2019/05/Federal-Full-Study.pdf.*

trillion in 2012, equal to 12 percent of GDP.[19] Furthermore, the studies reflect that small businesses incur regulatory costs that are more than three times the cost borne by the average U.S. company.[20] In the past twenty-two years, federal agencies have published more than 88,000 final rules, of which 15,458 have been identified by federal agencies as having a negative impact on small businesses.[21] Businesses have to comply with federal regulations, as well as more stringent state and local regulations. Complying with a complex regulatory system has a major cost burden for small businesses, affecting the economy directly.

A federal permit under CWA section 404 triggers requirements under the CWA and other federal laws, such as the Endangered Species Act (ESA), the National Historic Preservation Act (NHPA), and floodplain management requirements under the National Flood Insurance Program (NFIP). For example, under the ESA's section 7 consultations regulations activities occurring within areas designated as critical habitat under ESA and requiring a federal wetlands permit must undergo a section 7 consultation process where the U.S. Fish and Wildlife Service (FWS) must consult with the Corps before issuing the requested CWA 404 wetlands permit to determine the project's potential impacts upon designated critical habitat.[22] While identical land development activities occurring within areas designated by FWS as critical habitats, without requiring a CWA section 404 permit, are not subject to the ESA section 7 requirements. Compliance with federal historical preservation requirements under Section 106 of the NHPA requires that each federal agency identify and assess the effects its actions may have on historic properties. Additionally, home builders must comply with CWA section 402 stormwater discharge requirements, which include maintaining a 50-foot buffer around all WOTUS features.[23] Should the agencies deem more isolated and ephemeral features as jurisdictional, home builders will lose developable land and building lots. As a small business, there is a myriad of requirements that slow down the development of projects. The agencies did not include these additional permitting requirements in their economic review of the 2023 rule. They failed to consider that bureaucratic delays cost small businesses money as they must float their finances while the Corps makes its jurisdictional determination and goes through the permitting process.

Small home builders often do not have environmental regulatory compliance staff and must hire outside consultants for help when complying with the CWA. These fees, which may cost tens of thousands of dollars, are passed down to home buyers and renters. The agencies are forcing small businesses to pay these fees to hire consultants since the 2023 rule relies on the overly complicated and convoluted significant nexus test.

The 2023 rule will directly impact small businesses and home builders. In the economic analysis the agencies provided in the docket, it was estimated that CWA section 404 permit costs would increase from $108.6 million to $275.9 million for projects based in 26 states in transitioning from the Navigable Waters Protection Rule (NWPR) to the 2023 rule.[24]

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[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] 50 C.F.R. §402.03.
[23] U.S. Environmental Protection Agency, (2022), EPA's National Pollution Discharge Elimination System (NPDES) 2022 Construction General Permit (CGP), Appendix F – Buffer Requirements. Retrieved on March 6, 2023, from *https://www.epa.gov/system/files/documents/2022-01/2022-cgp-final-appendix-f-buffer-reqs.pdf.*
[24] U.S. Environmental Protection Agency, (2021), EPA's Economic Analysis for the Proposed, Revised Definition of waters of the United States rule. Retrieved March 6, 2023, from *https://www.epa.gov/system/files/documents/2022-01/2022-cgp-final-appendix-f-buffer-reqs.pdf.*

Most small businesses engaged in residential land development evaluate the potential viability of proposed land development or residential construction projects using an Internal Rate of Return (IIR) basis. NAHB members also typically rely upon a combination of debt and equity to finance their land acquisition and land development. Using a typical financing structure of 60% debt and 40% equity, and assuming optimistically current debt rate of 6% (low side) and equity rates being in the 25% IRR range, then the aggregate cost of financing is approximately 14.4% (6.0 debt rate x 60% + 25.0 equity rate x 40%). This means that every year of delay results in an increased cost of development of approximately 14.4%. Small businesses cannot sustain significant regulatory delays as it would result in the final price of the finished lots to the homebuilder and subsequent homebuyer being too expensive to be marketable.

As a small business owner, the most effective way to halt my business is not to deny a project or permit application outright – it is to get caught up in bureaucratic red tape during the jurisdictional determination (JD) or subsequent CWA section 404 permitting process without resolution. Many of NAHB's members are waiting longer than a year for their JDs to be considered. Home building is most often financed using loans. During the highest inflationary period our country has seen in over 40 years, we are being asked to float our finances while we wait for a decision under the significant nexus test. These delays cost real money and directly impact our small businesses and the cost of housing.

2023 WOTUS Rule:

For years, landowners and regulators alike have been frustrated with the continued uncertainty over the scope of federal jurisdiction over WOTUS. NAHB members initially hoped the agencies would create a durable and flexible rule to improve the CWA's implementation. Home builders support removing redundancy, clarifying jurisdictional authority, and having the agencies facilitate compliance while protecting and improving the aquatic environment. Unfortunately, the 2023 rule fails to provide the clarity and certainty the home building industry seeks. This rule increases federal regulatory power over private property and increases litigation, permit requirements, and lengthy delays for any business trying to comply. Equally important, these changes will not significantly improve water quality because much of the rule improperly encompasses water features already regulated at the state level.

Let me discuss some of the problematic features in detail:

Potential Impacts on the Home Building Industry:

Home building is a complex and highly regulated industry. As costs, regulatory burdens, and delays increase, the small businesses that make up much of the industry must adapt. This can include paying higher prices for land or purchasing smaller parcels, redrawing development or house plans, and completing mitigation or resource enhancement projects. All these adaptations must be financed by the builder and ultimately arrive in the market as a combination of higher prices for the consumers and lower output for the industry. As output declines and jobs are lost, other sectors that buy from or sell to the home building industry also contract and lose jobs. Builders and developers, already crippled by the economic downturn, cannot depend upon the future home buying public to absorb the many costs associated with overregulation.

Because compliance costs for regulations are often incurred before home sales, builders and developers must essentially finance these additional carrying costs until the property is sold. Because of the

increased price, it may require a land developer to reduce the number of buildable lots thereby increasing the cost of the remaining building lots. For home builders, the longer it takes for the home to be sold results in either decreased profits for the builder and increased costs for the prospective homebuyer. Carrying these additional costs only adds more risk to an already risky business yet is one of the difficult realities that land developers and home builders face. The 2023 rule only adds to the headwinds that our industry faces.

The picture becomes starker when you consider the time and cost to obtain a CWA section 404 permit. A 2002 study found that it takes an average of 788 days and $271,596 to obtain an individual permit and 313 days and $28,915 for a "streamlined" nationwide permit. Over $1.7 billion is spent annually by the private and public sectors obtaining wetlands permits.[25] Importantly, these ranges do not consider the cost of mitigation, which can be exorbitant. When considering these excesses, it becomes clear that we need to find a necessary balance between protecting our nation's water resources and allowing citizens to build and develop on their private land.

The 2023 Rule Inappropriately Expands Federal Jurisdiction, Especially Compared to the Navigable Waters Protection Rule:

In the agencies' press release announcing the rule, they assert it "establishes a clear and reasonable definition of WOTUS and reduces the uncertainty from constantly changing regulatory definitions that have harmed communities and our nations waters."[26] The agencies also claim the 2023 rule is consistent with the agencies' prior practices interpreting the WOTUS definition under a so-called pre-2015 WOTUS definition.[27] Both claims by the agencies are simply inaccurate as the rule significantly differs from the agencies' prior practices under the 2008 Rapanos Guidance when interpreting the concept of "relatively permanent" flow and applying the "significant nexus" test.

The 2023 rule establishes a two-tiered approach to asserting federal jurisdiction by analyzing certain categories of water features under either the relatively permanent standard or the significant nexus standard. By implementing this two-tiered approach to determine a waterbody's jurisdictional status, the agencies are giving themselves two bites at the apple to regulate impoundments, adjacent wetlands, non-navigable intrastate waters, ephemeral streams, and human-made drainage ditches.

The agencies intentionally continue using overly broad and undefined terms so they have the maximum discretion to interpret them as they see fit in the field, including stepping in where they may think a state has not gone far enough. The regulatory text lacks a clear definition of "significantly affect." Furthermore, key regulatory terms within the 2023 rule remain completely undefined including terms such as what constitutes a "tributary," "relatively permanent" flow, "neighboring," and "similarly situated waters in the region," giving federal regulators in the field full and unfettered discretion to interpret and re-interpret these important and yet undefined terms in a manner that enables the

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[25] Sunding, D. and Zilberman, D., (2002), The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process. Retrieved on March 6, 2023, from *https://www.epa.gov/system/files/documents/2022-01/2022-cgp-final-appendix-f-buffer-reqs.pdf.*

[26] U.S. Environmental Protection Agency Press Office, (December 30, 2022), EPA and Army Finalize Rule Establishing Definition of WOTUS and Restoring Fundamental Water Protections. Retrieved on March 6, 2023, from *https://www.epa.gov/newsreleases/epa-and-army-finalize-rule-establishing-definition-wotus-and-restoring-fundamental.*

[27] 88 Fed. Reg. §3005 (January 18, 2023).

broadest of federal jurisdiction over otherwise non-navigable, isolated, and ephemeral waterbodies and landscape features.

Instead of providing clear regulatory definitions, the agencies rely upon an array of confusing and often conflicting statements buried within the 2023 rule's preamble of 140 pages of regulatory text as well as an additional 250 pages of varying interpretations of these undefined terms contained within the agencies' Technical Support Document for the 2023 rule.[28] The Corps has acknowledged it will rely on the conflicting preamble to implement the rule. Small businesses desperately need clear regulatory definitions for regulatory concepts contained within the 2023 rule, as well as equally clear regulatory exclusions for when these regulatory concepts do not apply.

Rule Expands the Concept of "Relatively Permanent":

The agencies inaccurately claim the 2023 rule's interpretation of the undefined term "relatively permanent" flow is consistent with the agencies' pre-2015 practice. The importance of the concept of "relatively permanent" under the 2023 rule is difficult to overstate since the agencies will automatically assert federal jurisdiction over all tributaries, streams, or drainage ditches that meet the 2023 rule's concept of "relatively permanent" flow, along with all wetlands "adjacent" to relatively permanent tributaries as well as all other waterbody features (including interstate lakes, ponds, streams, and wetlands) that maintain a "continuous surface water connection" to a "relatively permanent" tributary.[29, 30] Under the 2023 rule, the agencies claim they will determine whether a waterbody or landscape feature meets the "relatively permanent" concept on a case-by-case basis.

Notably, the prior WOTUS definition established under the NWPR included a categorical exclusion from CWA jurisdiction over all ephemeral features, along with a regulatory definition of the term ephemeral that included all features that contained water only in response to a rainfall event.[31] The NWPR's categorical exclusions for all ephemeral features were consistent with the agencies' approach under the Rapanos Guidance, which explained the agencies' interpretation of the concept that relatively permanent waters "do not include ephemeral tributaries which flow only in response to precipitation [events]."[32] However, in finalizing the 2023 rule, the agencies have revoked both interpretations of the concept for "relatively permanent" under the Rapanos Guidance as well as the categorical exclusion for all ephemeral features under the NWPR.

Under the 2023 rule, instead of providing small businesses with clear definitions for what constitutes "relatively permanent," "intermittent," or "ephemeral" flow when assessing the jurisdictional status of a tributary or ditch, it offers no clear definitions of what might constitute a "relatively permanent" versus "ephemeral" flow. Instead, under the 2023 rule, the agencies offer in the preamble conflicting guidance.

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[28] U.S. Environmental Protection Agency, (December 7, 2021), Technical Support Document for the Proposed, Revised Definition of Waters of the United States Rule. Retrieved March 6, 2023, from *https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0081.*

[29] 33 C.F.R. §328.3(a)(3)(i).

[30] 33 C.F.R. §328.3(a)(4)(ii).

[31] 33 C.F.R. §328.3(c)(3).

[32] U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, (December 2, 2008), Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States. Retrieved March 6, 2023, from *https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.*

For example, under the Rapanos Guidance, ephemeral tributaries which contain water and provide flow only during short durations and in response to rainfall events were not considered jurisdictional "relatively permanent" tributaries.[33] However, under the 2023 rule's preamble, the agencies contradict that notion by claiming instances where non-relatively permanent and ephemeral tributaries contain flow from back-to-back rainfall events and could be considered jurisdictional as relatively permanent tributaries.[34] For any small business trying to comply with the CWA, the last thing these firms need is a rule that rescinds a prior regulation's definitions, reserves agency regulatory guidance, and offers confusing and conflicting interpretations of undefined concepts within an all-encompassing regulatory preamble. Such an approach by the agencies ensures confusion and uncertainty for small businesses seeking to comply with the law.

Rule's Reliance on the Significant Nexus Test:

Through the significant nexus test, federal regulators using a case-by-case approach must determine the jurisdictional status of numerous types of waterbodies or landscape features based on several vague functions and factors. Ultimately, the significant nexus process culminates with a federal regulator making a jurisdictional determination that a waterbody or landscape feature, either alone or in combination with similarly situated features in the region, has a material influence upon the chemical, physical, or biological integrity of a traditional navigable water (TNW). Under the 2023 rule, the significant nexus test will be applied to three out of the five jurisdictional categories, e.g., tributaries, adjacent wetlands, and intrastate waters. These categories include isolated lakes, ponds, streams, human-made drainage ditches and isolated wetlands.

In her testimony submitted before the Subcommittee on Water Resources and Environment of the House Committee on Transportation and Infrastructure, during the Subcommittee's hearing titled "Stakeholder Perspectives on the Impacts of the Biden Administration's Waters of the United States Rule," Ms. Susan Parker Bodine, Esq. highlighted how the agencies could interpret the scope of a significant nexus test even broader under the 2023 rule than under previous WOTUS definitions, particularly when assessing potential biological connections between otherwise non-navigable, isolated, intrastate waters covered under the final rule's (a)(5) intrastate lakes, ponds, streams, and wetlands category.[35] As Ms. Bodine explains in her testimony, while the agencies repeatedly acknowledge in the rule's preamble that following the U.S. Supreme Court's SWANCC ruling, the agencies can no longer assert federal jurisdiction over isolated waters simply by asserting those features serve as habitat for migratory birds. However, her testimony outlines how the agencies will instead rely upon speculative theories of possible biological connections contained within the agencies' Technical Support Document to nevertheless assert jurisdiction over an isolated water. One example from the agencies' Technical Support Document that Ms. Bodine highlights is the agencies could find a biological connection exists between a migratory bird and an isolated water if a bird flies from an isolated water to a navigable water and leaves bird droppings containing seeds of aquatic plants.[36] Under another example, the agencies state they can claim jurisdiction during a significant nexus test using the requisite biological connection that exists when amphibians, reptiles, invertebrates, or mammals migrate from an otherwise

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[33] *Id.*

[34] 88 Fed. Reg. §3086 (January 18, 2023).

[35] *Stakeholder Perspective on the Impacts of the Biden Administration's WOTUS Rule:* Hearing before Subcommittee on Water Resources and Environment of the House Committee on Transportation and Infrastructure, 118th Cong. (2023) (testimony of Susan Parker Bodine)

[36] *Id.*

isolated pond or wetland to a tributary of a navigable water and leave scat or larva of aquatic insects.[37] Therefore, Ms. Bodine's testimony demonstrates that although the agencies will not base federal jurisdiction over isolated features due to the use of migratory birds as habitat, she explains how the agencies repeated assertions are disingenuous because the agencies will instead assert jurisdiction based upon the *dispersal of insects, seeds, or even scat by a bird into a jurisdictional feature* to assert jurisdiction over the isolated feature.[38] The examples Ms. Bodine includes in her testimony demonstrate how difficult this rule will be for small businesses to comply.

In the rule's preamble, the agencies outline that they will provide useful tools to the public with step-by-step information needed for the agencies to make informed and consistent determinations of federal jurisdiction. That information should be part of the regulations, and the public should have had the opportunity to comment. Furthermore, the rule goes into effect on March 20, 2023, and the public has yet to weigh in on any of these guidance documents.

One such regulatory guidance the agencies recently released is entitled, "Joint Coordination Memorandum to the Field Between the U.S. Department of the Army, U.S. Army of Engineers and the U.S. Environmental Protection Agency."[39] This joint Corps/EPA regulatory guidance document creates a required interagency review process for all draft approved jurisdictional determinations (AJDs) utilizing the significant nexus test under the 2023 rule. Under this guidance document, the Corps' districts must wait a minimum of five days to allow staff within the EPA's Regional Office to review and request additional information from the Corps' District concerning the draft JD. Under the guidance document, if the staff within the EPA Regional Office has any comment or questions about the Corps district's draft JD, an additional 14-day waiting period is triggered to allow EPA Regional Office staff time to review, comment, or even hold a meeting with Corps district staff to discuss its findings under the draft JD. If agreement cannot be reached on a draft JD between Corps district staff and staff within the EPA Regional Office, or if the draft JD concerns a "significantly affects" determination for any feature covered under the 2023 rule's intrastate water jurisdictional category, then a headquarters review by the agencies is triggered. Any headquarters review of a draft JD triggers an additional 14-day delay but can be extended beyond 14 days provided staff from both agencies agree (in writing) to an unspecified longer timeframe to complete their review of the draft JD.

Importantly, nowhere within this joint regulatory guidance must the federal agencies either notify or seek the consent of the landowner seeking the JD from the Corps district. Nor under the joint guidance does a failure on the part of the agencies to adhere to the guidance's deadlines result in the issuance of the requested draft JD. Ultimately, this joint guidance illustrates the unnecessary complexity and bureaucratic delays that have become the hallmarks of the significant nexus test.

The Supreme Court heard oral arguments in *Sackett v. EPA* on Monday, October 3, 2022. The question presented in *Sackett* is "Should *Rapanos* be revisited to adopt the plurality's test for wetlands jurisdiction under the Clean Water Act?" If the Court answers this question affirmatively, it will reject that the significant nexus test is the proper test for determining CWA jurisdiction. While the public waits

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[37] *Id.*

[38] *Id.*

[39] U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, (2022), Joint Coordination Memorandum to the Field Between the Army and EPA. Retrieved March 6, 2023, from *https://www.epa.gov/system/files/documents/2022-12/Waters%20of%20the%20United%20States_Coordination%20Memorandum.pdf.*

for the Court's decision, the agencies rushed to finalize this rule. It is especially shortsighted and a waste of federal resources, given that the Supreme Court's upcoming ruling under *Sackett v. EPA* is squarely focused on the legality of the significant nexus test.

Aggregation of Waterbodies to Claim More Land:

The agencies' two-tiered approach of relying on the relatively permanent standard and the significant nexus standard gives them two opportunities to claim jurisdiction under the impoundments, tributaries, wetlands, and intrastate water categories under the 2023 rule. While implementing the significant nexus test, the agencies acknowledge that "stream and wetland connectivity to downstream waters ... is best understood and assessed when considered cumulatively."[40] Furthermore, the agencies explain that "in the region" means the catchment of the tributary. The agencies state that "the catchment of the tributary of interest may contain not just the tributary of interest, but also lower order tributaries that are aggregated together with any adjacent wetlands as part of a significant nexus analysis."[41] The agencies outline that for practical administrative purposes, the 2023 rule does not require evaluating all similarly situated waters when concluding that certain waters have a significant nexus with a TNW.[42]

Based on the preamble, the significant nexus test will require the evaluation of property outside the boundaries of the tract being considered for development. Usually, builders and developers have no control over these adjacent properties. If the neighboring landowner does not grant access or significantly delays access to consultants or agencies to evaluate features on their land, this poses a major risk to small businesses. Home builders and small businesses will struggle to understand the limitations of the 2023 rule when they acquire property when the agencies place such a heavy reliance on the aggregation of waters in the region.

Preliminary Jurisdictional Determinations:

After the issuance and implementation of the Clean Water Rule in 2015, many home builders across the country felt helpless while waiting for the agencies to process their jurisdictional determinations. Instead, many within the industry turned to preliminary jurisdictional determinations (PJDs) to advance the permitting process.

As the Philadelphia District of the Corps explains it, "a landowner, permit applicant or other affected party may elect to use a preliminary JD to voluntarily waive or set aside questions regarding CWA jurisdiction over a particular site, usually in the interest of allowing the landowner to move ahead expeditiously to obtain a Corps' permit authorization where the party determines that it is in his or her best interest to do so."[43] Importantly, PJDs cannot be appealed.

When a small business files for a PJD, it essentially gives up its legal right under the CWA to have the federal agencies tell them whether a jurisdictional wetland or waterbody feature is on its property. NAHB members need this information from the agencies before commencing land development or home building activities requiring federal wetlands permits before dredge and fill activities can occur

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[40] 88 Fed. Reg. §3127 (January 18, 2023).
[41] *Id.*
[42] 88 Fed. Reg. §3128 (January 18, 2023).
[43] U.S. Army Corps of Engineers, Army Corps Jurisdictional Determination Overview. Retrieved March 6, 2023, from *https://www.nap.usace.army.mil/Missions/Regulatory/Jurisdictional-Determinations/.*

with jurisdictional features. This is especially true for features jurisdictional under the significant nexus test, such as isolated wetlands, ephemeral streams, and drainage ditches.

NAHB members have consistently reported experiencing significant delays awaiting requested AJDs even under prior iterations of the WOTUS regulatory definition (i.e., pre-2015 regulatory regime), particularly when the landscape feature awaiting a jurisdictional determination by the Corps required the completion of a significant nexus test such as non-adjacent, isolated wetland or ephemeral streams, and roadside drainage ditches. Since these features required the agencies to complete a significant nexus test before asserting CWA jurisdiction, NAHB members initially hesitated to proceed to the CWA section 404 permitting process until they knew those features were jurisdictional.

However, NAHB members and Corps' districts reported experiencing considerable backlogs, over a year or longer, awaiting requested JDs, particularly for landscape features requiring a significant nexus test. For many NAHB members and their homebuying clients, waiting for an AJD was delaying the land development and homebuying process, resulting in many NAHB members simply giving up and instead filing for a PJD so their planned projects could advance to the permitting process. A landowner, permit applicant, or other "affected party" may elect to use a PJD to voluntarily waive or set aside questions regarding CWA jurisdiction over a particular site, usually in the interest of allowing the landowner or other "affected party" to move ahead expeditiously to obtain a Corps' permit authorization where the party determines that is in his or her best interest to do so.[44] The Corps explains in Regulatory Guidance Letter 16-01, that a PJD will treat all aquatic resources that would be affected in any way by the permitted activity on the parcel as jurisdictional.[45]

The Corps' Operation and Maintenance Business Information Link, Regulatory Module (ORM2) shows a dramatic increase in the number of PJDs issued by the Corps when the agency implemented a WOTUS definition that relied upon a significant nexus approach. By comparison, the Corps' ORM2 showed an extraordinary decline in the number of requested PJDs when implementing the NWPR. The precipitous decline in requested PJDs was because the NWPR did not rely on the significant nexus test and categorically excluded all ephemeral features. NAHB is concerned that the 2023 rule's reliance on the significant nexus test will increase the delays our members will experience. Under the 2023 rule, we are likely to see the return of over 75% of projects requesting PJDs; in comparison, under the NWPR, the number of requested PJDs decreased to 34% of projects.[46] Many of our members will be stuck in permit backlogs and JD reviews so they will opt for a PJD instead. Through this, many small businesses and home builders recognize that they are giving authority to the federal government to regulate the water that it does not have the authority to regulate – but to speed along the process, our members often accept this.

Agencies' Refusal to Honor AJDs under the NWPR Causes Substantial Disruption to Small Businesses:

NAHB members obtain AJDs from the Corps primarily for two reasons - first to discern whether a feature found on a property slated for residential development is a CWA jurisdictional feature and the second reason is to document the agencies' determination that no CWA jurisdictional features are found on a property. Importantly, as the U.S. Supreme Court affirmed under *Army Corps of Engineers v. Hawkes*

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[44] *Id.*

[45] Jackson, Donald, (October 31, 2016). U.S. Army Corps of Engineers Regulatory Guidance Letter 16-01. Retrieved March 6, 2023, from *https://www.nap.usace.army.mil/Missions/Regulatory/Jurisdictional-Determinations/.*

[46] *Id.*

Co., AJDs are final agency actions judicially reviewable under the Administrative Procedures Act.[47] An AJD is the only document that notes the presence or absence of CWA jurisdictional features on a particular property. Furthermore, the agencies' policy on AJDs clearly states that jurisdictional determinations are final agency actions that landowners can rely upon them for a period of time no less than five years.[48] NAHB members rely upon these determinations when appraising properties and securing financing for planned residential land development and construction activities.

Therefore, NAHB members were shocked in January 2022 when the Corps abruptly announced via a statement on the agency's website that it would no longer honor AJDs issued under the NWPR. The agencies pointed to a federal district court's vacatur ruling of the NWPR as their rationale for not honoring AJDs under that rule.[49] The Corps' announcement caught landowners completely by surprise because it did not attempt to notify individuals with AJDs issued under the NWPR. Instead, the Corps would require landowners seeking a CWA section 404 permit to request and wait for a new jurisdictional determination from the Corps. However, the Corps' announcement that the agency would not issue CWA section 404 permits based upon AJDs issued under the NWPR, leaves developers and builders with AJDs finding no jurisdictional features under the NWPR uncertain whether they face the prospect of a CWA enforcement action by the Corps if they proceeded with land clearing, grading, or construction activities. Ultimately, the agencies' refusal to honor AJDs issued under the NWPR leaves developers, builders, and other private landowners with a high degree of uncertainty and the prospect of additional costs and regulatory delays as they await new jurisdictional determinations by the Corps.

Intrastate Waters:

The rule also provides a catchall "intrastate waters" category for areas that may not fit neatly into a specific water category but for which the agencies, on a case-by-case basis, have retained complete discretion to find a significant nexus. Importantly, this includes the ability to make blanket jurisdictional determinations by considering all similarly situated waters in the region to determine if they, individually or taken together, have a significant nexus to a TNW. The ability to aggregate waters, even within a catchment area, further illustrates that there is no limit to federal jurisdiction under this rule.

The preamble of the rule contradicts the regulatory text. The preamble states "in implementing the significant nexus standard, the agencies generally intend to analyze waters under paragraph (a)(5) individually to determine if they significantly affect the chemical, physical, or biological integrity of a paragraph (a)(1) water."[50] However, the regulatory text clearly states that (a)(5) waters, "that are either alone or in combination with similarly situated waters in the region" are jurisdictional.[51]

As a small business, it is unclear how the agencies will perform a significant nexus test when the preamble and regulatory text contradict each other. This unpredictability will make it difficult for small businesses to comply and grow. The agencies suggest that the rule and preamble provide clarity; however, they only produce more questions. Unfortunately, small businesses and builders will need to

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[47] *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 597 (2016).
[48] Supra. note 45U.S. Army, Regulatory Guilder Letter 16-01, *Jurisdictional Determinations* (Oct. 2016), 33 C.F.R § 331 (Appendix C).
[49] *Pascua Yaqui Tribe v. U.S. Envtl. Protection Agency,* 557 F.Supp.3d 949 (D. Ariz. 2021).
[50] 88 Fed. Reg. §3102 (January 18, 2023).
[51] 88 Fed. Reg. §3142 (January 18, 2023).

rely on the agencies for answers or be required to pay tens of thousands of dollars to consultants to help us comply with the CWA.

Under CWA Section 101(b), Congress explicitly recognizes the primary responsibilities and rights of states in helping to prevent, reduce and eliminate pollution in our waterbodies. Intrastate waterbodies that do not impact interstate commerce or have a continuous connection to TNWs should not be federally regulated. These waterbodies should be expressly excluded in any definition of WOTUS moving forward.

Conclusion:

The 2023 rule does not add new protections for our nation's water resources but rather, inappropriately shifts the jurisdictional authority of many drier-end features and non-navigable isolated wetlands, streams, and drainage ditches to the federal government. As a small business serving the affordable housing market, I am concerned about additional government regulations and the continued uncertainty this rule ensures. Builders cannot continue to provide affordable housing to those in need while weighed down by additional regulatory burdens and requirements like the 2023 rule.

In addition, the rule allows the agencies to illegally take the easy way out by sweeping everything under federal authority. If the agencies want to develop a meaningful and balanced rule, they must take a more methodical and sensible approach. I have significant concerns with the 2023 rule, and I encourage Congress to swiftly pass H.J. Res 27, providing for congressional disapproval of the Revised Definition of the waters of the United States. Lastly, I urge Congress to require the agencies to delay the implementation of the 2023 rule until the Supreme Court issues a ruling under *Sackett v. EPA*.

I appreciate the opportunity to discuss these important issues.

Testimony of Ms. Katherine English

on behalf of The American Farm Bureau Federation

Before the House Small Business Committee

March 8, 2023

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Chairman Williams and Ranking Member Velázquez, thank you for the opportunity to testify today. My name is Katherine English and I am a farmer, rancher, small business owner and an environmental lawyer from Fort Myers, Florida. My family farms and ranches property on the banks of the Caloosahatchee River in Alva, Florida, that my great-great grandmother homesteaded in 1870. Agriculture runs deep in our extended family and presently includes a cow/calf operation and citrus production. It is an honor to be here representing the thousands of hard-working farm and ranch families who produce the abundant food, fiber, and renewable fuel that our nation and the world depend on.

The American Farm Bureau Federation (AFBF) is the Voice of Agriculture® and our members—millions of farm and ranch families from across the country--care deeply about the health of our environment. The success of our lives and businesses depends on healthy soils and clean water, as most farmers live on the land we farm and ranch. We support the objectives of federal environmental statutes such as the Clean Water Act (CWA). What we cannot support is the continuing ambiguity of the location of the line between federal and state jurisdiction that has created confusion for landowners for decades. We have lived in a world of regulatory uncertainty for decades due to near constant rulemakings that bounce back and forth, redefining the scope of the CWA. We have seen WOTUS definitions change with each new Administration, guidance documents offered and then rescinded, and confusing court orders that generate more questions than answers. Landowners, small businesses, and American families are the ones who suffer the most.

Once again, the Environmental Protection Agency and the U.S. Army Corps of Engineers (the Agencies) have finalized a new regulatory definition of "waters of the United States" (WOTUS) that greatly expands the federal government's role in regulating land use. I am pleased to share my perspective as a farmer on this rule and its potential impact on agricultural producers across the nation.

The new WOTUS Rule Will Profoundly Affect Everyday Farming and Ranching Activities.

The definition of WOTUS is critically important to farmers and ranchers across the country, which is why AFBF and state Farm Bureaus have participated in numerous rulemakings, legislative proceedings and litigation on this issue for decades. Farming and ranching are water-dependent enterprises. Whether we are growing plants or raising animals, farmers and ranchers need clean water. For this reason, so many of us grow our crops and raise our animals on lands where there is either plentiful rainfall or adequate water available for irrigation. There are many features on those lands, however, that may only be wet when it rains and that may be miles from the nearest "navigable" water. Farmers and ranchers managing their lands need clarity about whether these features constitute a regulated water body. We cannot afford a mistake or

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misunderstanding. The consequences can be financially devastating if a violation is determined to exist.

Additionally, many farms and ranches rely on ponds used for purposes such as livestock watering, providing or recycling irrigation water, and settling and filtering farm runoff prior to discharge. Irrigation ditches also carry flowing water to fields throughout the growing season as farmers and ranchers open and close irrigation gates to allow water to reach particular fields. These irrigation ditches are typically close to larger sources of water, irrigation canals, or actual navigable waters that are the source of irrigation water—and they channel return flows back to these source waters. In short, America's farm and ranch lands are an intricate maze of ditches, ponds, wetlands, and so-called "ephemeral" drainages.

Considering these water management features, whether used for irrigation, drainage, or water quality improvement, as jurisdictional "waters" opens up the potential for regulating any activity on those lands that moves dirt or applies fertilizer or pesticides to treat crops. Everyday activities such as tillage, planting, or fence building in or near ephemeral drainages, ditches, or low spots could trigger the CWA's harsh civil or even criminal penalties unless a permit is obtained. Farmers need to apply weed, insect, and disease control products to protect their crops. They do so carefully and following the strict guidelines already in place to ensure safe use. Fertilizer application is another necessary and beneficial aspect of many farming operations that is nonetheless swept into the CWA's broad scope (even organic fertilizer or manures) of "pollutants" (40 C.F.R. § 122.2, defining "pollutant"). On most of our productive farmlands (i.e., areas with plenty of rain), using the new definition of WOTUS would make it almost impossible to understand what portions of the property, that have historically been farmable, are now subject to regulation as WOTUS. This could affect planting, land management, or using crop protection products and fertilizer. Those features would now require federal oversight, either through a wetlands jurisdictional determination or a permit, for farmers and ranchers to avoid liability for violations of the CWA, as it would be impossible for a farmer or rancher or even their consultants to objectively determine what portions of their farms or ranches are subject to jurisdiction, regardless of their distance from any navigable water body.

The costs associated with a jurisdictional determination or a federal permit range from the tens of thousands to hundreds of thousands dollars to authorize ordinary farming and ranching activities are beyond the means of many small business farmers and ranchers. And even those farmers and ranchers who may be able to afford the costs of permitting cannot afford the cost of lost opportunities and delays caused by the months, or even years, waiting for a federal permit to till, plant, fertilize, or carry out any of the other ordinary farming and ranching activities. For all these reasons, farmers and ranchers have a keen interest in how WOTUS is defined.

Despite our efforts to inform the Agencies about these concerns, our members are disappointed by the Agencies' final rule. We feel strongly that the Navigable Waters Protection Rule (NWPR) was a clear, defensible rule that appropriately balanced the objective, goals, and policies of the CWA for farms and ranches. The Agencies should have kept the NWPR in place, rather than revert to definitions of WOTUS that test the limits of federal authority under the Commerce

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Clause and are not necessary to protect the nation's water. The Agencies can ensure clean water for all Americans through a blend of the CWA's regulatory and non-regulatory approaches, and state and federal action just as Congress intended. It is unnecessary (and unlawful) to define non-navigable, intrastate, mostly dry features that are far removed from navigable waters as "waters of the United States."

The Rule Thrusts Farmers and Ranchers Back Into a World of Costly Uncertainty and Inconsistency.

The 2015 WOTUS Rule dramatically expanded the scope of CWA jurisdiction over land used for normal farming and ranching activities. The 2022 Rule is different only in degree and timing, not kind. The Agencies' aggregation policy potentially allows them to assert jurisdiction over any sometimes-wet feature which, taken together with other sometimes-wet features in the region (broadly defined), have what the Agencies consider to be a "significant nexus" on a "foundational water." But the term "significant nexus" generated significant confusion and inconsistent results under the pre-2015 regime, and this rule makes things worse. Furthermore, the process to arrive at a jurisdictional determination is tortuous and costly. A jurisdictional determination could take between six months and a year to receive, at best, and in the meantime a farmer or rancher cannot proceed with any activity or risk being found to have violated the CWA. Adding insult to injury, the use of case-by-case determinations using highly subjective criteria, threatens to create a seriously unequal playing field, where identical features may be viewed as jurisdictional or not depending upon where the property is located, the season in which it is inspected, and the staff person to which the request is assigned. These are not hallmarks of a dependable, durable, or clear rule. Rather, the Agencies have crafted a rule that that generates arbitrary decision-making as a matter of course due to its lack of clarity.

Furthermore, field experiences suggest that the Agencies are not equipped and staffed to respond to these determinations in a timely manner, increasing the potential for long wait times as farmers and ranchers are forced to seek federal clearance or permits for their ordinary farming activities. Prior to the implementation of the NWPR, a farmer in Florida sought authorization to insert blocks, totaling less than an ½ acre of fill, into existing upland cut ditches on a farm that had been operated for decades. The ditch blocks were needed to improve hydration to a wetland mitigation area. The farmer waited more than a year for a Nationwide Permit before being informed that an archeological study of the farm would be required to comply with federal historical preservation requirements. An archeological study had already been performed and accepted by the state's historical preservation agency, but that study was not acceptable, and a new study would require tens of thousands of dollars and more delays. Shortly thereafter, the NWPR went into effect and staff determined that a permit was no longer required since the project was in upland cut ditches and upstream of the outfall structure for the entire project.

As described above, the Agencies' broad assertion of jurisdiction will make it more difficult for farmers and ranchers to engage in soil conservation and water quality protection activities.

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Farmers and ranchers have more incentive than most to preserve topsoil on their land; as such, where land is at risk of erosion, they may want to engage in mitigation activities. Farmers and ranchers also take on projects that provide irrigation support, stormwater management, wildlife habitat, flood control, and nutrient processing that improve overall water quality. But, if they cannot do this without applying for a federal permit, it becomes time- and cost-prohibitive, resulting in environmental degradation, not protection.

This rule threatens to impede farmers' and ranchers' ability to provide safe, affordable, and abundant food, renewable fuel, and fiber to our nation and the world. Their concerns are not hyperbolic, nor are they isolated occurrences. They are lived experiences illustrating the pitfalls of returning to an overly expansive definition of "waters of the United States" and, specifically, an outsized view of what it means for a water to have a "significant nexus."

The Significant Nexus Standard May Lead To Potentially Unlimited Jurisdiction.

While the Agencies have resisted the urge to categorically regulate all tributaries and adjacent waters like they did in the 2015 Rule, the case-by-case approach that they use in this WOTUS rule is no less of an overreach. The Agencies once again resurrect the same broad and confusing significant nexus standard that was the foundation for the 2015 Rule. It is clear the Agencies will just expand their jurisdiction one watershed at a time, instead of by general fiat—but it is only a matter of time until the Agencies will find a significant nexus. This domino effect illustrates the almost limitless jurisdiction that the Agencies will have over private property.

The significant nexus test can be used to assert jurisdiction over tributaries, adjacent wetlands, and basically any "other water" because the rule uses undefined, amorphous terms like "similarly situated," "in the region" and "material influence" that will leave farmers and ranchers guessing about whether there are "waters" on their lands and whether those "waters" are WOTUS. This ambiguity suggests that regulators can exercise subjective judgement in their use of the standard to reach whatever outcomes they believe best serves the public purpose and that farmers and ranchers may not know the outcomes until they are already exposed to civil and criminal liability, including devastating penalties.

Because of the subjective nature of the significant nexus test, regulators' assessments are bound to vary from field office to field office and from case to case. This approach does not give farmers and ranchers fair notice of when the CWA actually applies to their lands or conduct, nor does it provide any assurance against arbitrary or discriminatory enforcement. For these reasons, this rulemaking is unconstitutionally vague.

The Case-By-Case Regulation of Ephemeral Drainages Is Unnecessary.

Much of where we disagree comes down to one classification of "waters": ephemeral drainage features. As previously mentioned, ephemeral drainages are dry land—they are not flowing

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rivers or streams. It is simply shocking to property owners to hear that a "tributary" can be interpreted to reach ephemerals and sweep in many features that are part of the area's natural topography. The NWPR provided important clarification regarding the status of ephemeral streams that flowed only in response to precipitation by correctly concluding that they were not WOTUS. The Agencies' rapid about-face in this rulemaking is disappointing, to say the least.

The Agencies failed to define tributary in the first place. The lack of a definition of tributary with measurable, objective criteria sanctions subjective, inconsistent decision-making where lands with similar features and uses will be subject to very different regulatory burdens. This failure means that a determination that a particular feature is a "tributary" could substantially expand or limit the scope of jurisdiction under the CWA over lands, without objective justification for the decision, the very essence of an arbitrary and capricious decision that takes a landowner's property rights without compensation or a proper public purpose.

By failing to provide clarity, the Agencies are forcing farmers to guess which features on their land might be jurisdictional and each potential guess carries substantial risk. Farmers and ranchers may: (1) presume that some portion of their property that carries water only when it rains is a jurisdictional tributary, regardless of its history of use; (2) seek a formal jurisdictional determination from the Corps which will require the assistance of consultants to submit the application for a determination and which may result in an agency decision that requires obtaining a nationwide or an individual permit depending on the agency decision; or (3) take a chance that their normal activities near or in such features may result in unlawful discharges to a WOTUS resulting in civil penalties of nearly $60,000 a day.[1] Even worse, a farmer could face criminal liability with jail time and up to $100,000 a day in fines. With such stiff statutory penalties at stake—including the loss of one's own personal liberty—farmers and ranchers deserve more clarity.

Ultimately, the question is not whether tributaries or ephemeral streams are "important" or may as a scientific matter have some connection with downstream navigable waters; rather, the question is whether they should be considered as waters so integrally important and connected to navigable waters that they should fall within the bounds of federal jurisdiction. As with so many other categories in the rulemaking, the Agencies collapse that distinction. The NWPR was correct to exclude ephemeral streams categorically, and the Agencies are wrong to dismiss that approach.

The Adjacency Category Should Be Limited to Wetlands that Directly Abut Other WOTUS.

The adjacency category is also rife with confusion. First, the rule's approach to "relatively permanent" is not consistent with the plurality's opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), because the Agencies deprive the Court's requirement for a "continuous" connection

[1] See 87 Fed. Reg. 1,676, 1,678 (Jan. 12, 2022).

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of all meaning by turning it into a mere "physical connection or ecological connection" test. Further, the criteria for establishing whether a wetland is "adjacent"—such as whether a "shallow" subsurface connection exists or whether wetlands are in reasonably close proximity to a jurisdictional water—stray too far from the plurality's test in *Rapanos* and raise vagueness and fair notice concerns.

We also oppose the significant nexus approach to adjacent wetlands used in this rule. The Agencies' approach of all wetlands as subject to federal regulation = is flatly contrary to Justice Kennedy's requirement that each wetland be judged in its own right to determine whether it (and it alone) bears a significant nexus to traditional navigable waters. This approach expands the reach of the significant nexus test even farther and is even less clearly implementable.

We believe that the Agencies should assert jurisdiction over only those wetlands that are directly abutting and continuous to "waters of the United States," which would provide much needed clarity and be easily interpreted in the field. Only those wetlands that directly touch "waters of the United States" should be considered "adjacent."

The Broad Sweep of the "Other Waters" Category is Problematic

The most obvious example of the rule's expansion of regulatory reach lies in the "other waters" category. This new category would reach many intrastate, non-navigable water features that would previously have been considered "isolated" and not subject to federal jurisdiction.

The rule's application of the significant nexus standard to "other waters," is highly problematic because, if that standard is ever to be applied, it should be to wetlands, and wetlands only. Applying the significant nexus standard elsewhere allows the Agencies to aggregate all similarly situated "other waters" (e.g., prairie potholes or ponds that are not part of a tributary system) across an entire watershed and claim jurisdiction over all such features based on a finding that they collectively perform a single important function for a downstream "foundational" water. This plainly is not what Congress intended in the CWA and seems to be outside what the Supreme Court would allow. Through this rule, countless small wetlands or other small waters that are far removed from traditional navigable waters (including ephemeral tributaries and ditches) or coasts, nevertheless, will be potentially within the scope of federal jurisdiction. These are the features that were previously considered to be subject to individual states' regulations and requirements. This language usurps state authority to areas that are not within federal jurisdiction. This flies in the face of the CWA's legislatively designed concept of cooperative federalism that allows space for both the concerns of the federal government and that of state governments within the same regulatory space.

The Agencies should have withdrawn the "other waters" category. Their ability to aggregate waters together expands the federal reach to every water feature within the United States regardless of the quality of its connection to navigable waters and adjacent wetlands that are clearly within the CWA's jurisdiction. It is absolutely impossible for any farmer or rancher to

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know if a jurisdictional "other water" is located on their property even with the assistance of consultants and even with a jurisdictional determination. Jurisdictional determinations are time limited and not perpetual so a farm or ranch that was previously outside federal jurisdiction may be determined to be subject to federal jurisdiction at a later date.

The Biden Administration's Rule is Broader than the 2008 Guidance

The Agencies insist that this rulemaking is not an expansion of federal authority and is no broader than the 2008 Bush Guidance that was released after the Supreme Court decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* and *Rapanos*. Here are a few examples from the preamble that indicate that this is an expansion in scope.

Interpretation of the Relatively Permanent Test: The final rule makes the relatively permanent standard more expansive compared to the post *Rapanos* Guidance, which used the concept of continuous flow for at least one season (typically three months) as a benchmark. The final rule abandons the seasonal concept and does not use any bright line tests (days, weeks, or months). Relatively permanent tributaries have flowing or standing water year-round or continuously during certain times of the year. Relatively permanent waters should not include tributaries with flowing or standing water of short durations in direct response to precipitation. This subtle change to the relatively permanent test greatly expands the areas subject to federal jurisdiction, within every category.

Conversely, because the relatively permanent standard is broader than the approach described in the 2008 guidance some of the exemptions will become narrower. For example, the ditch exclusion appears identical to the exclusion in the 2008 guidance however, as it is applied under this new interpretation of the relatively permanent test—the exclusion becomes far harder to apply and in areas with little to no topographical change, a guarantee that those properties with such ditches will now be subject to federal jurisdiction even if those ditches were originally constructed through uplands.

Adjacent Wetlands Category: The Agencies interpret continuous surface connection to mean a physical connection that does not need to be a continuous hydrologic connection.

Under the relatively permanent standard for adjacent wetlands, wetlands meet the continuous surface connection requirement if they are separated from a relatively permanent impoundment or tributary by a natural berm, bank, dune, or similar natural landform so long as that break does not sever a continuous surface connection and provides evidence of a continuous surface connection. This is broader than the 2008 guidance, which used to equate continuous surface connection with directly abutting and not separated by a berm, dike, or similar feature.

Scope of significant nexus test: Under the 2008 guidance, the Agencies applied the test to a specific reach of a tributary plus wetlands adjacent to that reach. The new rule applies a broader catchment approach. The Agencies will start by identifying where a specific reach flows into a

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higher order stream. But rather than looking just at that reach and its adjacent wetlands, the Agencies will look at the combined effect of all lower order tributaries upstream of that point plus all wetlands adjacent to those lower order tributaries.

(A)(5) Category: This category was not even mentioned in the 2008 guidance. The 2008 guidance focuses only on applying the significant nexus test to a specific tributary reach plus its adjacent wetlands, and it says nothing about how to apply the test to waters outside of the tributary system. The new rule applies the significant nexus test to this category, and even though the Agencies say they will "generally" evaluate whether such waters meet the test on an individual basis, the rule on its face allows the Agencies to consider whether waters "alone or in combination with similarly situated [(a)(5)] waters in the region" meet the significant nexus test.

The Exemptions Are Challenging to Use

Ditch Exclusion:

Ditches and similar water features commonly found on farms that are used to collect, convey, or retain water should be excluded from the definition of "waters of the United States." Without adequate drainage, farmlands remain saturated after rain events damaging crops by limiting adequate aeration for crop root development. Drainage ditches and other water management structures can help increase crop yields and ensure better field conditions for timely planting and harvesting. Even in areas without sufficient rainfall, irrigation ditches and canals are needed to connect fields to water supplies and to collect and convey water that leaves fields after irrigation. Put simply, ditches are essential infrastructure for both the irrigation and drainage needed to support American agriculture and ultimately, to feed the United States and the world.

While this rule does provide a ditch exclusion, it is not particularly meaningful or useful because it is limited to features constructed on dry land or upland. Because these features are constructed to convey and sometimes store water, it is typically useful for them to be constructed on naturally higher areas of a property. Historically, ditches and ponds were constructed in the places where water naturally flowed. Most drainage and irrigation systems rely on some passive water movement, powered by gravity, that allows waters to flow from higher to lower ground, whether that is a ditch, farm pond, stock pond, or a tailwater pond. Stormwater moves into these kinds of infrastructure through sheet flow and ephemeral drainages. Depending on the topography of a property, ditch or pond construction sometimes requires excavation to be effective. Such normal farming and ranching activities should not require a federal permit to manage stormwater and irrigation.

***Prior Converted Cropland Exclusion*:**

America's farmers and ranchers strongly support the 2023 Rule's maintaining of the decades-old exclusion for prior converted croplands (PCC), of which there are approximately 53 million

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acres in the United States. Farmers and ranchers across the country rely on this critical exclusion which establishes that PCC may be used for any purposes, so long as wetland conditions have not returned. In practice, however, numerous issues have arisen regarding the interpretation and application of the PCC exclusion. For this reason, we have long advocated for a clear, commonsense definition and clarification of PCC in the Agencies' regulations. We welcomed the NWPR's approach to PCC and are disappointed to see that this rule fails to carry forward the NWPR's definition of PCC, which was designed to improve clarity and consistency. For example, the lack of a clear definition of PCC has presented problems in the past regarding when PCC can be "recaptured" and treated as jurisdictional.

The Agencies failed to acknowledge our strong opposition to the application of USDA's "change in use" principle. Additionally, they have failed to clearly convey if PCC that is shifted to non-agricultural use becomes subject to CWA jurisdiction. We have presented these questions to both EPA and Corps officials and have received completely different answers. Incorporating a "change in use" policy into the PCC exclusion would upend nearly 30 years of largely consistent implementation in accordance with the 1993 Rule. While we acknowledge that the Agencies have attempted to make constructive changes, the result fell well short of that goal.

Real World Impacts of an Expansive WOTUS Rule

The Agencies claim that the costs associated with this rule are de minimis. This conclusion can only be reached by failing to consider the entire gamut of costs that landowners will incur. One must consider not only the cost of the permit, but also the expenses for experts needed to navigate the permitting process—such as environmental consultants, attorneys, and engineers. You must also consider the cost of mitigation, which can be exorbitant, and project delays of months and, more likely, years, which makes the process simply untenable for all but the largest and most well-funded of businesses. These costs can amount to a $500/acre or greater decrease in value of the land. Mitigation costs to proceed with development could reach thousands of dollars per linear foot. Additionally, permitting under the CWA triggers review under other federal environmental statutes, such as the Endangered Species Act and the National Historic Preservation Act. Many small businesses are unable to take on these additional costs and farmers and ranchers cannot pass these costs on to their customers as agricultural commodities compete in global markets. Expansive regulatory actions like this new WOTUS definition will exacerbate the affordability challenges that plague many American farm and ranch families. This rule puts us further away from the goal of providing affordable and accessible food and energy. The financial and logistical challenges of compliance with WOTUS adds to the burden of multi-generational farm and ranch families who seek to continue their stewardship of family lands. Many families, faced with the costs of succession and seemingly insurmountable regulatory challenges, make the decision to sell the property, sometimes into public lands programs, but more frequently to real estate investors, both here and abroad, whose long term plans do not include farming and ranching. Rural lands within an hour drive of developing urban and suburban areas are particularly at risk.

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Agencies Improperly Certified the WOTUS Rule

In 1996, Congress amended the Regulatory Flexibility Act to include the Small Business Regulatory Enforcement Fairness Act (SBREFA). This action was in direct response to concerns expressed by the small business community that federal regulations were too numerous, too complex, and too expensive to implement. SBREFA was designed to give small businesses assistance in understanding and complying with regulations and more of a voice in the development of new regulations. The law sets up the infrastructure to require specific engagement with small businesses to discuss the impacts major regulations will have on them. When crafting the WOTUS rule, the Agencies must either certify that the rule "will not, if promulgated, have a significant economic impact on a substantial number of small entities" or prepare a Regulatory Flexibility analysis that would include SBREFA requirements.

Since the impact of this rule will be felt by industry sectors that represent large segments of our national economy, we expected the Agencies to comply with the law and hold formal review panels. Unfortunately, the Agencies failed to do that and improperly certified that the rule would have "de minimis" impacts on any business, let alone small businesses, while vastly expanding the number of businesses that must incur costs of determining whether their activities are subject to regulation through jurisdictional determinations and obtaining permits.

The Small Business Administration's (SBA) Office of Advocacy recognized that the Agencies were going to bypass this important engagement requirement and stepped in to hold meetings for small businesses members. There were several farmers and ranchers, as well as representatives from many other industry sectors, who participated in these meetings. Unfortunately, this was the only opportunity devoted to small businesses and the information collected during these discussions was not included in the regulatory docket—since these were not formal SBREFA panels. The Agencies are required to consider only the information that has been entered into the docket when crafting their rulemaking, so these meetings did nothing to inform the rule.

It is important to note that in the weeks after the SBA hosted these meetings, they sent a letter to the Agencies expressing their disagreement with the certification of the rule. The SBA letter states that they "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 letter is very critical of the Agencies' economic analysis, highlighting their failure to use an appropriate baseline and to quantify the full direct costs to small entities. The letter concluded that the proposed WOTUS rule will have a direct and potentially costly impact on small entities and advised the Agencies to hold the proposed rule in abeyance until they hold a small business review panel. The regulated community was pleased that the SBA, a department within the Biden Administration, came forward to defend small business owners, but it was disheartening to see this effort ignored.

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The Rule Fails to Respect the States' Role in Protecting Waters

Additionally, the rule completely usurps the states' role in protecting our nation's waters. While many aspects of the CWA are unclear, one area of certainty is that Congress intended for the states to play an important role in regulating lands and waters within their borders. The objective of the CWA detailed in section 101B explains that environmental protections are a shared responsibility between the federal government and state governments. This language only solidifies the notion that there is a point where federal jurisdiction ends and state jurisdiction begins. However, this newly finalized WOTUS rule would greatly expand the federal government's role, effectively cutting against Congressional intent under the CWA. It is our belief that the states should retain the authority to protect ephemeral features, not the federal government. This division of responsibility would respect a state's specific knowledge of the waters within that state that are outside federal jurisdiction, but of importance to that state and its people and environment.

No WOTUS Before SCOTUS

One of the most important factors in the WOTUS debate centers around a highly consequential legal case that is currently before the Supreme Court: *Sackett v. EPA*. It is undeniable that this case has the potential to inject greater clarity and certainty into the new WOTUS definition. The question before the High Court is whether the Army Corps can use the significant nexus test to assert jurisdiction. Given all the legitimate legal concerns associated with this regulatory test, there is a strong likelihood that the Court's decision will substantially impact the Agencies' use of the significant nexus test. It defies logic that the Agencies would go ahead with the development and adoption of this rule, knowing that the Supreme Court will hand down a decision, in its current session, which will have significant impact on the law on which the Agencies' based their "durable" rule. Considerable government resources have been expended to craft and adopt this rule, knowing that the work will very likely be revisited when the Agencies have to return to the rule after a decision is handed down. Additionally, introducing a new regulatory definition, which is highly subjective, into an already convoluted and time consuming compliance process, is harmful to the regulated community. As farmers and ranchers plan for each season, we must factor in the costs and delays of the continuing uncertainty caused by this rule and its revisions. Simply put, the Agencies should have waited until a decision was handed down before finalizing this rule.

Conclusion

Our nation's farmers and ranchers are very frustrated that our concerns were not recognized in the finalized rule. Retaining the NWPR would have been a far preferable alternative, given the

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certainty and clarity it provided. This new rule only creates more confusion for landowners and will inevitably slow down many of the important decisions driving our economic and environmental sustainability and benefitting our rural communities. This unnecessary regulatory red-tape places a burden on our nation's farmers and ranchers while stripping the states of their historic regulatory role over waters outside federal jurisdiction. Farmers and ranchers want clean water and clear rules, so we can remain focused on what we do best: providing food, fiber and renewable fuel for our nation and the world.

Testimony of Rick Baumann
Founder, Murrells Inlet Seafood
Board of Directors, South Carolina Small Business Chamber of Commerce
House Committee on Small Business
"Small Business Perspectives on the Impacts of the Biden Administration's Waters of the United States (WOTUS) Rule"
March 8, 2023
2:00 p.m. EST

Good afternoon Chairman Williams, Miss Velazquez and distinguished committee members. I am Rick Baumann, from the fishing village of Murrells Inlet, the Seafood Capital of South Carolina.

Thank you for this opportunity to speak to you today.

I would like to begin with a very short dedication for the testimony I am about to give to my late friend and mentor, Doctor Ian W. Marceau, PhD.

Ian was from Australia but spent many years of his life here in America, both in Washington and as an advisor to the Governor of New York – before he retired to South Carolina.

In his lifetime, Dr. Marceau did a lot of great work, both for the environment and agriculture, all over the world. But his proudest days were spent here in DC helping to write and negotiate the Clean Water Act (CWA) into law – to fulfill President Nixon's vision of 'Clean air, land and water for ALL Americans.'

During our many days spent together enjoying the outdoors, Ian and I talked a lot about clean water. Ian's pride in the CWA was often tempered. While lamenting the fact that so much more had been learned since the Act was written, he believed that the Act desperately needed to address the new information.

So many new "chemicals of convenience" had come into existence – pesticides, fertilizers and so many others – and we were just beginning to understand their negative impacts on land, water, wildlife and human beings. We were starting to learn the profound impacts of non-point source pollution – how toxic man-made compounds and chemicals spread on the land were ending up in wetlands, streams and rivers – and how they were being found in our drinking water.

In 2004, when I was appointed to my county's Stormwater Advisory Committee, I was fortunate to have two geniuses advising me at every meeting, Dr. Marceau and Dr. Hobart Kraner, formerly of the Brookhaven National Laboratory.

Together, using only the facts, we were able to make a very strong case that our fast-developing area was threatening our small business economy by failing to address non-point source pollution and its effects on that economy – which so specifically requires clean water to survive and thrive.

As those meetings progressed, we received a great deal of pushback from the exact same special interests that we have heard from today. I have often seen this scenario play out in many areas of our country.

When I was young, I worked on a Black Angus farm in upstate New York. I have also been a waterfowl hunting guide – from the agricultural Eastern Shore of Maryland to the Rice Belt in Texas. I am keenly aware of the challenges facing today's farmers – and I am a member of the South Carolina Farm Bureau.

Like farmers, I am in the business of feeding people. Since 1967 I have fed many millions of folks a fresh seafood dinner.

I know from firsthand experience why the rule we are talking about today is important.

It is essential for my business to have fresh local seafood. If I can't get it, I don't have customers. If I don't have customers, by business suffers.

This is exactly the scenario that takes place when the State of South Carolina closes our shellfish beds of clams and oysters for up to two weeks. When we have three inches of rainfall resulting in measurably high pollution and bacteria in our state's shellfish beds, they are shut down.

The contaminants in these shellfish beds are not all coming from local sources. All the rivers in my state run to our coast. Those rivers get pollution from non-navigable water sources, pollution that finds its way into the flowing waters upstate which then find its way into our coastal shellfish beds.

There are no other sources of roasting oysters for me than locally. I might be able to get clams from North Carolina but that's assuming their shellfish beds are closed for these reasons.

Yes, my business suffers and, honestly, my customers suffer, all because some businesses that are nowhere near our coast want to be free of regulations regarding how they handle pollution on their property. They might want to keep their costs down but those of us along the coast pay the price. These businesses are outsourcing the cost of addressing their pollution issues to me and others in the seafood industry.

But I am not just speaking for the seafood industry – I am speaking for ALL the small business economy which exists in the vicinity of watersheds, all across America.

When we think of a recreational and commercial fishery, we need to realize that there is a very large group of small businesses which are intertwined with that fishery; we have ice companies, boat mechanics, dry docks, marinas – plus their associated rental businesses. We have boat companies, fiberglass works, tour guides, bait shops and bait catchers, rig and tackle shops, crabbers, oystermen, clammers, wholesale seafood processors, charter fishing guides, commercial fishermen, retail seafood stores like mine.

In the secondary market are the restaurants that purvey fresh seafood and all of their employees, right down to the dishwashers. Then you have the gift shops, cafés, breakfast houses, Airbnb's, rental cottages and condos, convenience stores and more.

Also, in the secondary market requiring clean water are the campers, hunters, birders and recreational anglers who are part of the $887 billion outdoor recreation economy. On and on I could go here.

I can assure you folks, without a doubt, that anywhere in our great country where there is navigable water, there is another plethora of small businesses which relies on clean water for those businesses to thrive.

I can also assure you that wherever there is navigable water, there are wetlands – sometimes isolated; there are ditches, creeks and ephemeral streams flowing into those navigable waters, which constantly affect water quality.

The credible science here speaks much louder than fallacious disinformation. These waters ABSOLUTELY need to be protected IF we are to ensure "clean air, land and water for ALL Americans."

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NFIB.com

March 8, 2023

The Honorable Roger Williams
Chairman
Committee on Small Business
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Nydia Velázquez
Ranking Member
Committee on Small Business
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Williams and Ranking Member Velázquez,

On behalf of NFIB, the nation's leading small business advocacy organization, I write concerning today's hearing entitled, "Small Business Perspectives on the Impacts of the Biden Administration's Waters of the United States (WOTUS) Rule."

On behalf of small businesses across the United States, thank you for holding today's hearing. Small business owners appreciate the opportunity to discuss the impacts of the Environmental Protection Agency's (EPA) and the Department of the Army's final rule, which significantly expanded the federal government's regulatory authority over wetlands, farms, and private property. This regulatory overreach will increase the regulatory burdens and uncertainty facing America's small farmers, ranchers, developers, contractors, and other small businesses.

For many years, NFIB members have ranked "unreasonable government regulation" as one of the top problems facing small businesses.[1] Unfortunately, the red tape added by the Biden Administration's regulatory onslaught is unprecedented. In 2021, the Biden Administration finalized 283 regulations and imposed more than $200 billion in regulatory costs, the largest total in the first year of a presidency.[2] The Biden Administration has proposed an additional 311 rules that could add another $191 billion in regulatory costs for businesses.[3]

These added regulatory costs will fall disproportionately on small businesses, which do not have lawyers or compliance officers to navigate complex regulatory issues. Unfortunately, the

[1] Holly Wade & Andrew Heritage, *Small Business Problems & Priorities*, NFIB Research Center, August 2020, https://assets.nfib.com/nfibcom/NFIB-Problems-and-Priorities-2020.pdf.
[2] Dan Bosch, *2022: The Year in Regulation*, American Action Forum, January 2023, https://www.americanactionforum.org/research/2022-the-year-in-regulation/.
[3] *Id.*

regulatory cost estimates of the finalized and proposed rules will likely understate the regulatory burdens imposed on small businesses. For example, when the EPA and the Department of the Army certified the final WOTUS rule, the agencies stated the rule "will not have a significant economic impact on a substantial number of small businesses."[4] To small business owners, this conclusion by the EPA and Department of the Army is farcical. America's small farmers, ranchers, developers, contractors, and other small business owners believe the final rule will significantly increase their regulatory costs at a time when many face high inflation, supply chain disruptions, and labor shortages.

It is deeply troubling that the EPA and Department of the Army could gloss over requirements to examine the economic impact of the rule on small businesses. However, WOTUS is just one example of the unfortunate deficiencies with the *Regulatory Flexibility Act,* that have been highlighted by the U.S. Small Business Administration Office of Advocacy.[5] In fact, the WOTUS final rule goes so far as to say the "rule does not directly apply to specific entities and therefore it does not 'subject' any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory term 'navigable waters,' defined as 'waters of the United States,' which defines the scope of Clean Water Act jurisdiction."[6] Is it the EPA's and Department of the Army's contention that the regulatory changes in the final rule do not apply to specific entities, like farmers or developers, or "subject" these small businesses to a regulatory burden? Once again, small businesses across the United States would beg to differ.

Additionally, the often vague and arbitrary terms of the WOTUS final rule increase uncertainty for many small businesses. According to one estimate by the Attorney General of Iowa, as much as 97% of land in Iowa could now be subject to federal regulation under the Biden Administration's final rule.[7] Under this rule, a farmer in Iowa will be forced to hire expensive consultants to determine whether their land is subject to the EPA and Department of the Army's expanded regulatory authority. These increased cost burdens and the added layers of red tape disincentivize farming, development, production, and economic growth.

The disappointing reality is that this regulatory uncertainty facing small businesses did not have to occur. The Biden Administration could have simply waited for the Supreme Court decision in the *Sackett v. EPA* case, which is anticipated in the coming months. However, by finalizing the rule before the Supreme Court decision, the Biden Administration threw caution to the wind and ignored the calls of small businesses. This inexplicable decision increased the regulatory uncertainty for small businesses as the federal authority under the *Clean Water Act* could once again change following the court decision.

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[4] 88 *Fed. Reg.* 3139, col. 3. https://www.epa.gov/system/files/documents/2023-01/Revised%20Definition%20of%20Waters%20of%20the%20United%20States%20FRN%20January%202023.pdf.

[5] SBA OFFICE OF ADVOCACY, REPORT ON THE REGULATORY FLEXIBILITY ACT, FY2021 3 (2022).

[6] *Id.*

[7] Donnelle Eller, *Iowa joins states fighting Biden's EPA 'power grab' to regulate waters of the US*, Yahoo! News, February 18, 2023, https://news.yahoo.com/iowa-joins-states-fighting-bidens-114024507.html.

The current regulatory path is not sustainable and WOTUS demonstrates that reality. Small businesses cannot invest and grow in an environment where goalposts constantly shift with every election. We urge Congress to clarify the federal authorities granted under the *Clean Water Act* to provide certainty for regulated entities. NFIB supports Congressional efforts to repeal this burdensome rule through the WOTUS resolution of disapproval (H.J.Res. 27).

NFIB also believes Congress must amend the *Regulatory Flexibility Act* to add teeth to the Small Business Administration Office of Advocacy, require all agencies to conduct Small Business Advocacy Review (SBAR) Panels, and strengthen the requirements and transparency of Regulatory Flexibility Analyses. These minor modernizations should be a starting point for any potential SBA reauthorization or small business legislation.

Congress must provide certainty to America's farmers, ranchers, developers, contractors, and other small businesses. Small businesses across America appreciate your attention to this critical issue and look forward to working with you to reduce the regulatory and compliance burdens faced by small businesses.

Sincerely,

Kevin Kuhlman

Kevin Kuhlman
Vice President, Federal Government Relations
NFIB

Written Testimony of Clean Water-Dependent Businesses

House Committee on Small Business Hearing: "Small Business Perspectives on the Impacts of the Biden Administration's Waters of the United States (WOTUS) Rule"

March 8, 2023

Dear Chairman Williams, Ranking Member Velásquez, and members of the committee,

Businesses throughout the United States depend on the Clean Water Act's protection of streams, wetlands, and other waterways for their economic success and the health of their communities. From breweries to ecological restoration, real estate and lodging to shellfish harvesters and sustainable farmers, the businesses that power our economy and support our communities need the same thing as our own families do – strong safeguards for clean water and our health.

This is why we, the undersigned businesses and business associations of all sizes and from across industries, write in support of the "waters of the United States" final rule. We oppose any efforts to repeal the Environmental Protection Agency's (EPA) and the United States Army Corps of Engineers' (Corps) final rule or attack the longstanding federal clean water protections which Congress demanded for critical tributaries, wetlands, and other water bodies.

The rule formally reinstates a familiar approach for EPA and the Corps, and for regulated entities like many of us. In the rule, EPA and the Corps identify waters that qualify as "waters of the United States" in a way that tracks with the agencies' long-standing practice and framework. In virtually every respect, the rule is a codification of the approach outlined by the Bush administration, which has been the basis for agency decisions for most of the past 15 years.

The science is clear: downstream waterways are only as clean as their upstream tributaries and wetlands. Allowing pollution of those waters would threaten our businesses and economic health. For example, companies in the food and beverage industry play vital roles in local economies and rely on a steady supply of clean water to create their products. They are increasingly concerned over risks to clean water. "As of 2021, 71% of [the largest food and beverage companies] consider water risks as part of their major business planning activities and investment decisions, up from 58% in 2019."[1]

Brewers similarly rely upon the Clean Water Act to protect their water supply and their business operations, and they rely on uniform federal protections to ensure predictability of controls against toxics and pollutants. In 2020 alone, the craft brewing industry contributed over $60 billion to the United States economy, and over 400,000 jobs.[2] To safeguard the upstream sources that provide their most critical ingredient, craft brewers seek robust federal protections.

There are more breweries today than at any other point in American history. Florida, Texas, Pennsylvania, and California—all downstream states—comprise 4 out of the top 5 states in terms of

[1] Ceres, Feeding Ourselves Thirsty: Tracking Food Company Progress Toward a Water-Smart Future, Executive Summary at 3 (2021), https://perma.cc/LUV6-WTLG.
[2] Brewers Ass'n, Economic Impact, https://perma.cc/HR72-RN8C.

dollar value for the industry. The industry cannot exist without a reliable clean water supply—for which wetlands eligible for protection under the rule are crucial.

The ecological restoration industry, including mitigation bankers, likewise relies on robust enforcement of the Clean Water Act. The industry is estimated to contribute $25 billion in annual output and 225,000 jobs to the United States economy.[3]

Clean water is also important for the real estate industry—home values can erode by as much as $85,000 each on land near water with high nutrient pollution levels.[4] Wetlands play a critical role in preserving property values—particularly on waterfront properties—because they filter pollutants, store water, and provide flood control. In fact, during Hurricane Sandy in 2012, wetlands prevented $625 million in flood damage by shielding property in twelve states.[5]

For these and many other reasons, small business owners overwhelmingly support robust federal water regulation. According to polling, more than 67% of small business owners—including majorities of self-identified Republicans, Democrats, and Independents—are concerned that water pollution could hurt their business. 80% favor federal rules to protect upstream headwaters and wetlands. And over 70% of small business owners believe clean water protections help spur economic growth, compared to only six percent who believe they are too burdensome. From recreation to tourism, brewing to aquaculture, clean, unpolluted water matters.

We therefore call on you to recognize the benefits of the "waters of the United States" rule and reject any attacks on the Clean Water Act.

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[3] Todd K. BenDor et al., Defining and evaluating the ecological restoration economy, Restoration Ecology 23(3): 209-219 (2015).

[4] Am. Sustainable Bus. Council, Comment letter on Proposed Revised Definition of "Waters of the United States" Docket ID No. EPA-HQ-OW-2018-0149 (Apr. 15, 2019), https://perma.cc/R3Z7-LLGV.

[5] Siddharth Narayan et al., The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA, 7 Sci. Reps. 9463 (2017), https://perma.cc/UGJ5-RCP5.

Sincerely,

Name of Business	State
Fox One Solutions	AL
Herbaliz LLC	AL
Sedona Beer Company	AZ
Wren House Brewing	AZ
Mark's Bookmark Bookseller	AZ
Junxion Strategy	BC
9 Ten Design	CA
A Hundred Years	CA
A.R. Marketing House	CA
Aclaria Partners Inc	CA
Alter Images	CA
AlterEco, inc.	CA
Avocado Mattresses, LLC	CA
B Lab U.S. & Canada	CA
BSR, Sustainable Business Network	CA
C. Wolfe Software Engineering	CA
Caspian Agency	CA
Cheryl L. Elkins Jewelry	CA
DIESEL, A Bookstore	CA
Divine Sage Collective	CA
Dogpatch Biofuels	CA
Dr. Bronner's	CA
EC Sales Co	CA
ECOS/Earth Friendly Products	CA
Ecosia	CA
Eleek Incorporated	CA
Encore Editorial Services	CA
Enigmatics	CA
Financial Alternatives	CA
Green Retirement, Inc.	CA
Green2Gold	CA

greentv.com	CA
Healthy Oceans, Healthy People	CA
HigherRing, Inc.	CA
Impact Coaching & Consulting, LLC	CA
Impact Grove	CA
inNative	CA
Intex Solutions, Inc	CA
James' Solar	CA
Kahl Consultants	CA
KW Botanicals Inc.	CA
Landscape Consultant	CA
Lawrence R. Jensen & Associates	CA
Leadership & Strategy for Sustainable Systems	CA
Marin Sunshine Realty	CA
Marlene Puaoi, CSR	CA
Matt Sheridan Dog Walking	CA
Meaningful Organization Design, Inc	CA
National Stewardship Action Council	CA
Net Impact	CA
Otherwild	CA
Quest	CA
Remarkable Ventures Corp.	CA
Rincon-Vitova Insectaries, Inc.	CA
Santa Cruz Climate Action Network	CA
SFT Mgmt, LLC	CA
Sol Economics	CA
STOKE	CA
Tendaji LLC	CA
The Commons	CA
The Rosebud Agency	CA
Thinkshift Communications	CA
Torrey Project	CA
Unical Aviation	CA
Uplift Accounting	CA
Urban Machine	CA

Wallin Mental Medical	CA
We All Rise	CA
Weil Aquatronics, Inc	CA
AREI, Inc.	CO
Box Canyon Lodge and Hot Springs	CO
Business for Water Stewardship	CO
Dreamweaver Yoga	CO
Durango Compost Company	CO
Equinox Consultancy LLC	CO
Ever Better, PBC	CO
GoodLight Natural Candles	CO
Horse & Dragon Brewing Company	CO
Interiors by Design	CO
Mind-iN-Spire.org	CO
New Belgium Brewing	CO
PSEC	CO
Relish Studio	CO
Solar Energy Consulting US, Inc.	CO
Spector and Associates	CO
Suite Sleep, Inc.	CO
SunJuice Solar	CO
Sustainable Food Trade Association	CO
The Denver Business Journal	CO
Unite North Metro Denver	CO
Venner Consulting	CO
New Belgium Brewing	CO
American Impact Capital Foundation	CT
Responsible Leader Group, LLC	CT
Winston Eco-Strategies, LLC	CT
4P Foods	DC
Eighty2degrees LLC	DC
Jim Schulman, Architect	DC
National Latino Farmers and Ranchers Trade Assocation	DC
Shifting Patterns Consulting	DC
Advanced Pavement Group	DE

BrightFields, Inc.	DE
Brown Advisory	DE
Drone Workforce Solutions, LLC	DE
Equality Delaware Foundation	DE
Hatzel and Buehler, Inc.	DE
Ultra Solar and Wind	DE
Wilmington Rowing Center	DE
World Trade Center Delaware	DE
DayQuest Life Counseling	FL
Ethical Markets Media	FL
Florida For Good	FL
Global Cooling Productions	FL
Jarmusz & Associates	FL
Legacy Club Holdings, LLC	FL
Legacy Hospitality Holdings, Inc.	FL
Legacy Vacation Club Management, LLC	FL
Legacy Vacation Club Services, LLC	FL
Legacy Vacation Club, LLC	FL
Legacy Vacation Resorts	FL
LVC Holding Co., LLC	FL
LVC Timeshare Developer, LLC	FL
LVC Timeshare Management, LLC	FL
LVR Assets, LLC	FL
Nancy Deren Financial Coaching	FL
Salt Palm Development	FL
The Global Cooling Project	FL
Vacation Benefits, LLC	FL
Ocaquatics Swim School	FL
"The Paula Gordon Show"	GA
Chicory Wealth	GA
Owens Business & Cnsltg. Llc	GA
Tai Chi 4 LIFE	GA
The Paula Gordon Show'	GA
Barzman Consulting	HI
Front Street Financial	HI
Maui ESG Project	HI

Proof Maui Photography	HI
Ideal Energy Inc	IA
Sisters of Charity, BVM	IA
Toppling Goliath Inc dba Toppling Goliath Brewing Co.	IA
Airetage	IL
Chlorinefree Products Assocation	IL
Engrained Brewing Company	IL
Eye Love Nature	IL
HJKessler Associates	IL
Human being	IL
Just in Time Direction	IL
NJH Sustainability Consulting	IL
Open Water	IL
Purpose Sustainability Strategy	IL
RetGlore Mill Center for Biodiversity	IL
Ringspann Corp.	IL
Solutions Through Dialogue, LLC	IL
Uncommon Ground & Greenstar Brewing	IL
Sodrel Photography	IN
Maryann Miller- Urban Conservancy	LA
Broadside Bookshop Inc.	MA
Climate Action Business Association/ Climate XChange	MA
DiMatteo Consulting	MA
HealthLink	MA
Irving House at Harvard	MA
Perfect Supplements	MA
Stakeholders Capital	MA
Tech Networks of Boston	MA
The Basil Tree Inc	MA
Topia Inn	MA
Vanderbilt Financial Group	MA
Wild Oats Health Food Store	MA
Amicus Green Buiilding Center, LLC	MD
Biohabitats, Inc.	MD
CEM Design, Architects	MD

CRK properties Inc	MD
Forward Brewing	MD
Harbor West Design	MD
HarborWest Design	MD
Jax Photography	MD
PaverGuide, Inc.	MD
RoundPeg	MD
Tierra Vista Consulting	MD
Allagash Brewing Company	ME
Homarus Strategies LLC	ME
Lamey-Wellehan	ME
ReVision Energy	ME
Zero Energy Homes	ME
Brewery Vivant, Broad Leaf Brewery & Spirits	MI
Humanoid Digital	MI
Right Brain Brewery	MI
Social Good Promotions	MI
Wiltse Kitchen	MI
Bang Brewing	MN
CONTEMPL8 T-SHIRTS LLC	MN
Inclusivi-tee	MN
Iroquois Valley Farmland REIT	MN
Sustainability Associates	MN
Thousand Hills Lifetime Grazed	MN
True North Research	MN
SC Small Business Chamber of Commerce	MO
TriplePundit	MO
Southern Energy Development	MS
Bioroot Energy, Inc.	MT
Kent Mollohan Designs	MT
Natural Upholstery	MT
A Sustainable Design of the Americas. LLC	NC
Bull City Burger and Brewery	NC
Fireplace Editions	NC
Values2Action LLC	NC
Ware, LLC	NC

A.K. A Coach and Company	ND
LeBel Marketing	NH
Megafood	NH
NH Businesses for Social Responsibility	NH
Your Movement Mentor	NH
ANJEC	NJ
Avocado Green	NJ
Bayshore Council	NJ
Bio-Gist Ventures, LLC	NJ
Camden Fireworks	NJ
Camden Print Works	NJ
CASE MEDICAL	NJ
Ciel Power LLC	NJ
Comeback Farm Organic Produce	NJ
Common Interests, LLC	NJ
Cottage Dweller Productions	NJ
Cronheim Consulting LLC	NJ
Ecco Bella	NJ
Middletown for Clean Energy	NJ
Natural Systems Utilities	NJ
Newport Metals, LLC	NJ
NJ Sustainable Business Council	NJ
Offshore Power LLC	NJ
Princeton Hydro, LLC	NJ
Professional Paperwork Services	NJ
Sustainable Business Partners LLC	NJ
The Wei LLC	NJ
Triple Ethos LLC	NJ
Zed's Beer/Bado Brewing	NJ
Beyond BlueGreen	NM
Canyonlights	NM
EnergyWorks	NM
Equiterra Regenerative Design Inc	NM
Law Office of Lara Pearson Ltd, PBC	NV
Reno Acupuncture & Integrative Medicine	NV

Simple Impact LLC	NV
Transition Services, Inc.	NV
A Stone's Throw B&B/Village of Interlaken	NY
A thru G Music	NY
Advanced Telecommunications Company	NY
American Council to Advance Medicare for All	NY
Becket, Inc.	NY
CLC Consulting LLC	NY
Collaborative Solutions	NY
Culture Shift Agency	NY
Dobbs & Bishop Fine Cheese	NY
EcoPlum	NY
Environmental Support	NY
Farmland Preservation NY LLC	NY
Fred F. French Investing LLC	NY
Future Nexus	NY
Garnant Computer Services	NY
Global Women 4 Wellbeing (GW4W)	NY
GlobalReach	NY
Good for Business	NY
Green Circle Accounting	NY
Green Map System	NY
GREENPLAN Inc.	NY
InStep Consulting LLC	NY
Interfaith Center on Corporate Responsibility	NY
JSA Sustainable Properties	NY
Kostis Kosmos Inc.	NY
Krystan Doyle (Farmer)	NY
Laurie Allan & Associates LLC	NY
LIBECO	NY
Longwave Financial	NY
Middlesex Water Company	NY
Miller Howard Investments	NY
Ministry of Maat	NY
My Home Assistsnt, LLC	NY

New Earth Mushrooms	NY
New York State Sustainable Business Council	NY
Octagon Builders	NY
Perlman and Perlman	NY
Pizzigati Designs	NY
Possible Rochester	NY
Seneca Lake Guardian	NY
Sisters of St. Dominic of Blauvelt, New York	NY
Slow Money NYC	NY
Stonetree Productions	NY
Strategic-Creative Consulting	NY
Strugatz Ventures Inc.	NY
SULA NYC	NY
SustainableBusiness.com	NY
The CommonSpot	NY
The Paper Straw Girl LLC	NY
The Sustainable Coop Store	NY
What's Good	NY
WWB Asset Management	NY
Naturepedic Organic Mattresses	OH
Schmidt Family Farms	OH
Trammell Consulting Co.	OH
Evergreen Sustainability, LLC	OR
Maracuja Solutions	OR
Oregon PeaceWorks	OR
Please Select	OR
Silver Oak Advisory Group	OR
Southern Oregon Field Mowing	OR
The OlFactory LLC	OR
Urban Ordhards	OR
All Together Now PA	PA
Andropogon Associates	PA
Bar Hygge	PA

Benari LTD	PA
Biohabitats	PA
Birchtree Catering	PA
Cedar Run Landscapes	PA
Cerulean, LLC	PA
Collins Nursery	PA
Community Energy Solar	PA
Community Impact Consulting	PA
Crime & Punishment Brewing Co.	PA
David Brothers	PA
Exact Solar	PA
Green Rush Advisors	PA
GreenTreks Network	PA
GreenWeaver Landscapes	PA
Ground Plan Studio	PA
Gryphon Solutions, LLC	PA
Happy Happy Cleaning	PA
Hillside Equity	PA
ImpactED	PA
Interpret Green	PA
JustLaws	PA
Key Medium	PA
Kind Earth Growers LLC	PA
LG Health	PA
Lynch Music, Inc	PA
Meliora Design	PA
National Foundry Products	PA
Native Scapes Design	PA
New Wave Audio and Video	PA
North Creek Nurseries	PA
OptiRTC, Inc.	PA

PEER Environmental, LLC	PA
Philadelphia Area Co-op Alliance	PA
Phildelphia Green Roofs LLC	PA
Philly Electric Wheels	PA
Power Corps PHC	PA
Progressive Business Services	PA
Redbud Native Plant Nursery	PA
Relaxing into Wellness Reflexology	PA
Remark Glass	PA
Riverbend Nursery	PA
RM Green Environmental Services, LLC	PA
Rodale Institute	PA
Roofmeadow	PA
Sanderson Sustainable Design	PA
Soap Alchemy	PA
Sustainable Solar Systems	PA
The H Trust	PA
ThinkGreen LLC	PA
Triple Bottom Brewing Company	PA
Understand Your Brand	PA
USA Environmental Management, Inc.	PA
Story Walking Radio Hour	RI
Coalition of Large Tribes	Rosebud Sioux Indian Reservation
Midlands Entertainment llc	SC
Murells Inlett Seafood	SC
Murrells Inlet Seafood	SC
South Carolina Business Council	SC
Cumberland Recycling, LLC	TN
Ibis Communications	TN

ID2MP	TN
2050 and Beyond LLC	TX
Austin Local Business Alliance	TX
EIS Lighting	TX
Feraway Capital	TX
McDonald Sanders, P.C.	TX
Suraksha	TX
Sustainable Concepts, LLC	TX
Bloomberg BNA	VA
Coherence Collaborative LLC	VA
Greenvest	VA
Revisioning Strategies	VA
Savage Acres LLC	VA
Agrilab Technologies Inc.	VT
Ben&Jerry's	VT
Cx Associates	VT
Marketing Partners Inc	VT
Seventh Generation	VT
Arlington Investments, LLC	WA
Calyx	WA
Clean & Prosperous Institute	WA
Conscious Talk Radio	WA
Crista	WA
Gardow Consulting, LLC	WA
Georgetown Brewing Company	WA
Grounds for Change	WA
JLFG Communications	WA
LolitaMoon Productions	WA
Mone Natural Plant Design	WA
Namu Baru Inc.	WA
Seattle Good Business Network	WA
Share the Wealth Productions	WA

SunOxSyndicate	WA
We Are Well, Charlotte Watts	WA
BoxLatch Products	WI
Dana Investment Advisors	WI
GMB Rentals, LLC	WI
Healthy Mamas	WI
Kickapoo Peace Circle	WI
Lakefront Brewery, Inc.	WI
Quality Cleaning	WI
Seventh Generation Interfaith Coalition for Responsible Investment	WI
Vista Global Coaching & Consulting	WI

U.S. Chamber of Commerce

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March 7, 2023

The Honorable Roger Williams
Chairman
Committee on Small Business
U.S. House of Representatives
Washington, DC 20515

The Honorable Nydia Velázquez
Ranking Member
Committee on Small Business
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Williams and Ranking Member Velázquez:

Thank you for holding a hearing on the rule finalized in January 2023 by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) that defines "waters of the United States" (WOTUS). This regulation is an example of how federal agencies ignore their obligation to consider and act on recommendations and information from small businesses when issuing federal regulations. It is my hope that Congress and the courts will invalidate this rule, and I am including recommendations on how to prevent federal agencies from ignoring small business in future rulemakings.

I am Natalie Kaddas, CEO of Kaddas Enterprises in Salt Lake City, Utah. My manufacturing company specializes in manufacturing thermoform plastic products for the energy, transportation, and aerospace industries. I serve as the Chair of the U.S. Chamber of Commerce's Small Business Council. 96% of Chamber member companies have fewer than 100 employees and 75% have fewer than 10. The Small Business Council works to ensure the views of small businesses are integrated into the Chamber's policy-making process.

The Chamber is part of the Waters Advocacy Coalition that includes dozens of associations representing thousands of small businesses and commented on the WOTUS rule.[1] While you are holding this hearing, the Chamber's legal counsel is preparing for a preliminary injunction hearing that is scheduled to take place on Friday, March 10, in the U.S. District Court in the Eastern District of Kentucky. The Chamber, along with co-plaintiffs Kentucky Chamber of Commerce, Associated General Contractors of Kentucky, Home Builders Association of Kentucky, Portland Cement Association, and the Georgia Chamber of Commerce, as well as the Commonwealth of Kentucky, are challenging the WOTUS rule in that litigation. The rule is also being challenged in a number of other lawsuits brought by states, farmers and landowners, and business groups. The Chamber is firmly of the view that the rule is unlawful, and the Chamber supports the Congressional Review Act resolution that was recently introduced to invalidate the rule.

[1] Waters Advocacy Coalition, Comments of the Waters Advocacy Coalition on the U.S. Environmental Protection Agency's and the U.S. Army Corps of Engineers' Proposed Revised Definition of "Waters of the United States", (February 7, 2022).

Small Business and the Regulatory Flexibility Act

Small businesses have long been understood as America's economic engine. The roughly 32.5 million small businesses make up over 99% of all U.S. firms, represent 43.5% of America's GDP, innovate at more than 12 times the rate of larger competitors, and account for 62% of net job creation since 1995.[2] Despite small businesses' strength in economic contributions, they are at a disadvantage when it comes to dealing with regulation. The Chamber's work with the Bradley Foundation showed that U.S. businesses shoulder $1.9 trillion in annual regulatory compliance costs.[3] For small businesses with 50 or fewer employees, the costs are nearly 20% higher than the average for all firms.

The Regulatory Flexibility Act (RFA), amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), was intended to rectify the disproportionate regulatory burden faced by small business by incorporating their concerns into the regulatory process and insisting that federal agencies find ways to meet their regulatory objectives while at the same time minimizing costs on small businesses.[4] The Office of Advocacy at the U.S. Small Business Administration (SBA) is responsible for overseeing agency compliance with the RFA and acts as an independent voice within the Administration to ensure that agencies are sensitive to how their regulations impact small businesses.

Waters of the United States Rulemakings, SBA's Office of Advocacy, and Small Business Input

Unfortunately, one way for federal agencies to avoid small business input is to incorrectly certify that a rulemaking would not have a significant economic impact on a substantial number of small entities. Rather than seek input from small businesses on how to manage wetlands permitting in a way that would be both environmentally protective and sensitive to impacts on small businesses, EPA and the Corps have repeatedly insisted - in 2014, 2019, and in 2023 – that their proposed WOTUS rules do not impose additional costs on small businesses.

When each of these proposals was issued, SBA's Office of Advocacy faulted EPA and the Corps for "certifying" that their rulemaking would not harm small businesses. On each occasion, SBA's Office of Advocacy faulted the agencies for not convening a panel of small businesses that is required under SBREFA to ensure that the agencies consider small business recommendations for less burdensome alternatives.[5] In this regard, it is worth

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[2] U.S. Small Business Administration, Office of Advocacy, *Frequently Asked Questions About Small Business*, (December 2021).

[3] U.S. Chamber of Commerce Foundation, *The Regulatory Impact on Small Business: Complex.Cumbersome.Costly*, (March 2017)

[4] Regulatory Flexibility Act, 501 U.S.C. Sec. 601 et seq (1980).

[5] *See, SBA Office of Advocacy letter to Administrator Gina McCarthy and Maj. Gen. John Peabody re: Definition of "Waters of the United States" Under the Clean Water Act*, (October 1, 2014) and *SBA Office of Advocacy letter to Administrator Andrew Wheeler and Lieutenant General Todd T. Semonite re: Revised Definition of "Waters of the United States" (Docket No. EPA-HQ-OW-2018-0149)*, (April 11, 2019) and *SBA Office of Advocacy Letter to*

noting that the Chamber's lawsuit challenging the 2023 WOTUS rule, which is pending in the U.S. District Court for the Eastern District of Kentucky specifically challenges EPA's and the Corp's "certification" that the rule "will not have a significant economic impact on a substantial number of small entities under the RFA." As the Chamber's compliant notes, this certification "is based on a description of the Final Rule that does not reflect reality," as "the Final Rule will impose significant costs on small businesses."

It is truly unfortunate that EPA and the Corps have gone to such great lengths to avoid ensuring appropriate small business input. The purpose of the RFA and SBREFA is to ensure that agencies receive constructive small business input that can help regulators meet their regulatory objectives while at the same time minimizing the burden on small firms like mine. The concept of regulating while being sensitive to small business compliance costs makes sense and it is something I am personally passionate about. I am an advocate for protecting birds of prey and their environment. Our largest source of revenue at Kaddas Enterprises is our patented designs of BirdguarD™ products. They are designed to protect birds and other animals from electrocution. I take pride in the fact that our manufacturing contributes to energy resiliency by preventing wildlife caused power outages. My company is a good example of how industry, environmental protection, and small business growth can work together to provide economic growth and conservation. These ideals are not exclusive.

Legislative Recommendations

The Chamber applauds your recent letter to President Biden calling for a nominee who can effectively oversee the RFA as Chief Counsel for Advocacy and as the Small Business Committee considers modernizing SBA, I hope you consider updating the RFA.[6]

In addition to a strong and effective Chief Counsel who can be confirmed by the Senate, I ask that you consider the following updates to improve the RFA:

1. When a promulgating agency makes a "certification" under Regulatory Flexibility Act and SBA's Office of Advocacy disagrees with the "certification," there should be a process that prompts a transparent exchange of data between the Office of Advocacy and the promulgating agency. The Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) should act as a referee and issue a public decision as to the accuracy of the "certification" before the rulemaking can proceed. That is the approach Senator Joni Ernst took when she introduced the Prove It Act in 2016. I would urge the Committee to consider a similar approach to close the RFA loophole that has allowed such a flagrant disregard for small business input when agencies craft rulemakings.

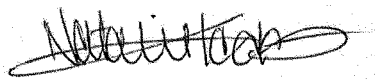
Administrator Michael S. Regan and Michael L. Connor re: Comments on EPA and Army's proposed rule defining "Waters of the United States" under the Clean Water Act (EPA Docket EPA-HQ-OW-2021-0602 and Army Docket COE-2021-0001-0016), (February 7, 2022).

[6] U.S. House of Representatives Committee on Small Business, *letter to President Biden urging him to nominate a Chief Counsel for Advocacy at the U.S. Small Business Administration (SBA) Office of Advocacy*, (February 16, 2023).

II. There is a question whether all provisions of the RFA should be made expressly subject to judicial review. Modernizing the RFA should avail small businesses with a court review of whether agencies are meeting their legal obligations to adequately consider small business in the development of federal rulemaking. Making it clear that the judicial branch is the ultimate arbiter of the legal requirements governing how agencies treat small business will help convince regulators to seek out, receive, and follow the recommendations of the small business community when there is constructive input on how to meet regulatory objectives while at the same time minimizing the negative impact on small businesses.

Thank you again for holding this important hearing on a topic that not only needs the attention of Congress, but also warrants action by America's courts to reverse EPA's and the Corps' lack of consideration for America's small businesses. Please do not hesitate to contact Tom Sullivan, the Chamber's Vice President for Small Business Policy if you have questions or comments regarding the content of this letter.

Sincerely,



Natalie Kaddas
CEO, Kaddas Enterprises, Inc.
Chair
Small Business Council
U.S. Chamber of Commerce

cc: Members of the House Committee on Small Business

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