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Before the

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Small Business Committee

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On behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I appreciate the opportunity to testify today. My name is Randy Noel, and I am NAHB's Third Vice Chairman. As the president of Reve Inc., a custom home building firm based in La Place, Louisiana, I also own and operate a small business. I have more than 30 years of experience in residential construction, and my company has built more than 1,000 homes in the greater New Orleans area.

NAHB members are involved in home building, remodeling, multifamily construction, land development, property management, and light commercial construction. Our industry is dominated by small businesses, and NAHB's average builder member has 11 employees. Since its 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 choose to buy or rent a home.

Like all Americans, NAHB members understand the need for a clean environment and the benefits that it brings to the nation, its communities and their residents. And as small business owners, NAHB members have a vested interest in preserving and protecting our nation's land and water resources.

As a second-generation home builder, I have first-hand knowledge of how the federal government's regulatory process affects businesses in the real world and of how the federal government's regulatory oversight has expanded and become more complex in recent decades.

Small business owners like myself want a regulatory structure that is consistent, predictable, timely, and, in the case of Waters of the United States, focused on protecting true aquatic resources. As an industry, our goal is to see the implementation of more sensible regulatory programs that include straightforward compliance requirements. Unfortunately, this has proven to be an elusive goal.

Smart regulation needs to strike this balance. And from our perspective, part of striking that balance means recognizing that additional regulations make it more difficult for builders like me to provide homes at a price point that is affordable to working families—a reality that affects both renters and prospective buyers.

According to an NAHB study, government regulations account for up to 25% of the price of a single-family home. Nearly two-thirds of this price impact is due to regulations related to developing the lot. The rest is due to regulations imposed on the builder during construction.[1]

These regulatory requirements aren't limited to those imposed by the federal government. Regulations are imposed on home building by state and local governments as well. And let me be clear, these costs are not absorbed by the builder. They are passed directly to customers in the form of higher housing costs.

The stunning cost of government regulation of home building raises another key point on how to create smarter regulations. I believe a key component of effective regulation is ensuring that local, state and federal agencies cooperate to streamline permitting requirements and respect the appropriate responsibilities of each level of government. The need for cooperation is particularly true for the Clean Water Act, which delegates oversight of the nation's waters to both the federal government and the states.

Since its inception in 1972, the Clean Water Act (CWA) has helped the nation to make significant strides in improving the quality of our water resources and our lives. As environmental stewards, the nation's home builders construct neighborhoods and help create thriving communities while maintaining, protecting, and enhancing our natural resources.

Under the CWA, home builders must obtain and comply with section 402 and 404 permits to complete their projects. A key challenge to compliance is the lack of a clear definition of "waters of the United States." As a result, it is often difficult to determine what is subject to federal jurisdiction, and what types of waters fall under state jurisdiction.

[1] Survey conducted by Paul Emrath, National Association of Home Builders, "How Government Regulation Affects the Price of a New Home," 2011

"Waters of the United States" Proposed Rule:

On April 21, 2014, the Environmental Protection Agency and U.S. Army Corps of Engineers ("the agencies") proposed a rule redefining the scope of waters protected under the CWA. For years, land owners and regulators alike have been frustrated with the ongoing uncertainty over the scope of federal jurisdiction over "Waters of the United States." By improving implementation of the CWA, removing redundancy, and further clarifying jurisdictional authority, the agencies are hoping they can do a better job of facilitating CWA compliance while protecting and improving the aquatic environment.

Unfortunately, the rule falls well short of providing the clarity and certainty the construction industry needs. This rule will increase federal regulatory power over private property and will lead to increased litigation, additional permit requirements, and more 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 that are already regulated at the state level.

Addressing the Impacts on Small Entities

Moreover, the agencies completely ignore the impact this rule will have on small entities. They claim "…(t)hat fewer waters will be subject to the CWA under the rule than are subject to regulation under the existing regulations; this action will not affect small entities to a greater degree than the existing regulations."

This is not accurate. In reality, the rule establishes broader definitions of existing regulatory categories, such as tributaries, and it regulates new areas that are not jurisdictional under current regulations, such as adjacent non-wetlands, riparian areas, floodplains, and other waters.

The agencies intentionally created overly broad terms so they have the authority to interpret them as they see fit in the field. These new definitions will include substantial additions, such as a first time inclusion of ditches, conveyances and other water features that may flow, if at all, only after a heavy rainfall. Unless proper mapping is provided by the agencies, it may be impossible for a home builder to independently identify what is jurisdictional. That means a home builder would have to go through an expensive and lengthy process just to get the agencies to identify what is covered.

In addition, the proposal suggests that "neighboring" could include any wet feature within a "floodplain." Since floodplains can extend for miles from traditional navigable waters, the agencies can now claim that those features, miles away, can be considered neighboring. This is a far cry from what Congress intended to be covered by the CWA. The last thing any small

business trying to comply with the law needs is a set of new, vague and convoluted definitions that only provide another layer of uncertainty.

These definitions will result in ongoing uncertainty for home builders. This unpredictability will make it difficult for a small builder's business to comply and grow. The agencies suggest that the rule provides clarity; however, all it does is produce more questions. These changes have far reaching implications and will negatively alter the way we conduct business but will not improve environmental protections.

Regulatory Flexibility Act

More than three decades ago, Congress acknowledged that small businesses are often disproportionately impacted by federal regulations and enacted the *Regulatory Flexibility Act* (RFA). It requires federal agencies to assess the true impacts a rule will have on small businesses.

Specifically, the RFA requires federal agencies to consider the effect of their actions on small entities, including small businesses, small non-profit enterprises, and small local governments. [2] 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. Such analysis shall describe the impact of the proposed rule on small entities."[3]

The RFA states that an initial regulatory flexibility analysis (IRFA) shall address the reasons that 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, recordkeeping, and other compliance requirements of the proposed rule; and all federal rules that may duplicate, overlap, or conflict with the proposed rule. The agency must also provide a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes which minimize any significant economic impact of the proposed rule on small entities.[4]

Section 605 of the RFA allows the agency proposing a new rule, 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 the certification in the Federal Register along with a statement providing the factual basis for the certification.[5]

[2] 5 U.S.C. 601-612
[3] 5 U.S.C. 603(a).
[4] 5 U.S.C. 603(c).
[5] 5 U.S.C. 605.

While the original congressional intent and subsequent additions and enhancements to the RFA are praiseworthy, the reality is that far too often agencies either view compliance with the Act as little more than a procedural "check-the-box" exercise, or they artfully avoid compliance.

In this instance, the agencies have bypassed the safeguards of the RFA by certifying the proposed rule. NAHB believes that the agencies should have conducted an IRFA to assess the impact this rule will have on small business entities. A more thorough analysis of the proposed requirements would have revealed the disproportionate burdens that this rule imposes on small residential home builders.

As a small business owner, I take issue with the fact that the agencies have ignored me. I urge the Committee to closely examine the process that led the agencies to determine that this rule would have no significant impact on small entities and to increase the level of oversight into how federal agencies comply with the *Regulatory Flexibility Act*.

Small Businesses Regulatory Enforcement Fairness Act Requirements

Under the 1996 amendments to the RFA, known as the Small Businesses Regulatory Enforcement Fairness Act (SBREFA),[6] if the Occupational Safety and Health Administration (OSHA) or Environmental Protection Agency (EPA) prepares an IRFA, they must first notify the Chief Counsel for Advocacy of the Small Business Administration ("Advocacy") and provide Advocacy with information on the potential impacts of the proposed regulation on small entities. Advocacy must then identify individual representatives of affected small entities in order to obtain advice and recommendations about the potential impacts of the proposed rule. The agency must convene a review panel made up of representatives from the agency, Advocacy, and the Office of Management and Budget to review the materials the agency has prepared, collect advice and recommendations from the small entity representatives (SERs), and issue a report of the panel's findings. Following this process, the agency shall modify the proposed rule, the IRFA, or the decision on whether an IRFA is required if the panel report warrants any changes.[7]

In the 19 years since the RFA was amended by SBREFA to include the panel requirement, EPA has convened approximately 47 panels, according to information on EPA's web site. In 2014, EPA reviewed 51 significant rules. It defies belief that in one year EPA reviewed more regulations than the total number of SBREFA panels over 19 years. This illustrates how reluctant the EPA is to comply with the law.

[6] 5 U.S.C. 609.
[7] 5 U.S.C. 609(b) (1) through (6).

It was very surprising to me that the agencies decided to certify the rule, thereby completely bypassing the RFA process. It was also surprising to Advocacy. In a letter dated October 1, 2014, they publicly admonished the agencies because they "improperly certified this rule" and stated that the rule "will have a direct impact on small businesses."

Clearly, the agencies are not interested in hearing from the regulated community. Their only objective is to move this regulation closer to the finish line. For a rule of this magnitude, the small business voice must be heard, and the agencies have failed to provide that platform. Again, this is another area where I encourage the Committee to increase oversight into whether federal agencies are improperly avoiding their SBREFA mandates.

Ensuring Compliance with Small Entity Feedback Requirements

While section 611 of the RFA provides for judicial review of some of the act's provisions, it does not require permit judicial review of section 609(b), which contains the panel requirement.[8] NAHB believes that the RFA should be amended to include judicial review of the panel requirement to ensure that the agencies adhere to the law. If the RFA allowed judicial review of section 609(b), agencies would feel more pressure to comply by convening a meaningful panel of Small Entity Representatives (SER) that can thoughtfully and substantively advise the agency, as Congress intended. Knowing that its decision on whether or not to convene a panel could result in a judicial remand of a regulation would present a strong incentive to agencies to conduct a panel at the early stages in rule development. Without a judicial backstop or other enforcement mechanism, there is no way to compel the agency to implement a clear congressional directive. When agencies evade their responsibility to convene review panels, they remove small business input entirely from the process.

The Agencies' Flawed Cost-Benefit Analysis

Not only did the agencies fail to perform the required RFA analysis to determine the proposal's economic impacts on small businesses, the agencies' economic analysis of the proposal is fatally flawed.

The Environmental Protection Agency's (EPA) *Economic Analysis of Proposed Revised Definition of Waters of the United States* fails to provide a reasonable assessment of costs and benefits as required by Executive Order 12866. Economist Dr. David Sunding, the Thomas J. Graff Professor

[8] Section 611(a)(1)states: "For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604."

at the University of California-Berkeley's College of Natural Resources, has identified several major flaws with the analysis.

According to Dr. Sunding, the analysis relies on a flawed methodology for estimating the extent of newly jurisdictional waters and thereby underestimates the incremental wetland acreage that will be impacted, excludes several important types of costs, and uses a flawed benefits methodology. In fact, he stated that "the errors and omissions in EPA's study are so severe as to render it virtually meaningless."[9] For example, one of the many problems that he acknowledged was the unreliable data sample the EPA used in the analysis:

> "The analysis uses FY 2009/2010 as the baseline year to estimate impacts. FY 2009/2010 was a period of significant contraction in the housing market due to the financial crisis. Construction spending during these two fiscal years was 24% below that of the previous two-year period. In statistical terms, this is an issue of sample selection, where due to exogenous events the sample selected for the analysis is not representative of the overall population. The report bases its finding on a period of extremely low construction activity, which will result in an artificially-low number of applications and affected acreage. Even if the percent increase in added permits is correct, using the number or permits issued in 2010 as a baseline is very likely a significant underestimation of the affected acreage in years not subject to a crisis in the building sector."[10]

In addition, EPA's calculation of incremental costs is deficient. EPA's analysis excludes several important types of costs, such as costs associated with permitting delays, impact avoidance and minimization. Also, EPA's analysis of Section 404 costs relies on permitting cost data that are nearly 20 years old and are not adjusted for inflation.

Finally, EPA uses a flawed methodology for its calculation of benefits. EPA's analysis adopts an all or nothing approach to assessing benefits by assuming that all wetlands affected by the rule's definitional change would be filled. On the flip side, they assume that the rule would preserve or mitigate land if federal jurisdiction is extended by the rule. These unrealistic assumptions contribute to an inflated benefits calculation.

It is clear that the EPA should withdraw the economic analysis and prepare an adequate analysis of this major change to the CWA. Yet again, the agencies are painting an inaccurate picture of how this regulation will affect small businesses.

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[9] David Sunding, "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States," 2014

[10] Id at Page 2

Costs to 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 a majority of the industry must adapt. This can include paying higher prices for land, purchasing smaller parcels, redrawing development or house plans, and/or completing mitigation. All of these adaptations must be financed by the builder, and ultimately result in higher prices for consumers and lower production for the industry. As production declines and jobs are lost, other sectors that buy from or sell to the construction industry also contract and lose jobs. Builders and developers, still struggling to emerge from the economic downturn, cannot depend upon the future home buying public to absorb the multitude of costs associated with overregulation.

Compliance costs for regulations are often incurred prior to home sales, so builders and developers have to finance these additional carrying costs until the property is sold. Because of the increased price, it may take longer for the home to be sold. Carrying these additional costs only adds more risk to an already risky business, yet is one of the difficult realities that home builders face every day. This rule, had it actually clarified what is a federally-jurisdictional water, would have reduced our regulatory burden; instead, it adds to the headwinds that our industry faces.

Home buyers are extremely price sensitive, and 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. As the price of the home increases, those who are on the verge of qualifying for a new home will no longer be able to afford this purchase. NAHB has estimated the number of households priced out of the market for a median priced new home due to a $1,000 price increase. Nationwide, if the cost of a median priced new home were to increase from $225,000 to $226,000, a total of 232,447 households would no longer be able to afford that home.

The picture becomes dire 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 each year by the private and public sectors obtaining wetlands permits.[11] Importantly, these ranges do not take into account the cost of mitigation, which can be exorbitant. In a number of instances, my business has been the victim of these exorbitant costs. My company has been forced to walk away from building projects simply due to the excessive

[11] David Sunding and David Zilberman, "The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," 2002

permitting and mitigation costs. It is evidently clear that we need to find a better balance between protecting our nation's water resources and allowing small businesses to survive.

Delays Will Lead to More Delays

Construction projects rely on efficient, timely, and consistent permitting procedures and review processes under CWA programs. Builders and developers are generally ill-equipped to make their own jurisdictional determinations and must hire outside consultants to secure necessary permits and approval. This takes time and money. Delays often lead to greater risks and higher costs, which many developers would rather avoid given tight budgets and timeframes. Onerous permitting liabilities could delay or eventually kill a real estate project. If the rule is finalized in its current form, a home builder's ability to sell, build, expand, or retrofit structures or properties will suffer notable setbacks, including added costs and delays for development and investment.

This will rule will leave home builders at the mercy of the agencies. Builders will have to request a jurisdictional determination from the agencies to ensure they are not disturbing land near an aggregated water. Consequently, an increase in the number of jurisdictional determination requests, across all industries, will result in greater permitting delays as the agencies are flooded with paperwork.

In addition, many federal statutes tie their approval/consultation requirements to those of the CWA, i.e. if one has to obtain a CWA permit, he/she must also obtain other permits. More federal permitting actions will trigger additional statutory reviews – by agencies other than the permitting agency – under laws including the Endangered Species Act, the National Historic Preservation Act, and the National Environmental Policy Act. Project proponents do not have a seat at the table during these additional reviews, nor are consulting agencies bound by a specific time limit. These federal consultations are just another layer of red tape that the federal government has placed on small businesses, and it is doubtful the agencies will be equipped to handle this inflow.

Impacts on State and Local Governments

While many aspects of the CWA are vague, it is clear that Congress intended to create a partnership between the federal agencies and state governments to protect our nation's water resources. Congress states in section 101 of the CWA that "[f]ederal agencies shall cooperate with state and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." Under this mandate, there clearly must be a point where federal authority ends and state authority begins. The rule proposed by the agencies blatantly ignores this history of partnership and fails to acknowledge that there are limits on federal authority.

States have adequately regulated their own waters and wetlands for years. States take their responsibilities to protect their natural resources seriously, and do not need the federal government to assert jurisdiction. In fact, my home state of Louisiana has a robust mitigation program that requires a 1:1 replacement of impacted wetlands for all mitigation projects in order to achieve a goal of "no-net-loss" of wetland acreage. In addition, there are already three Louisiana laws that establish wetlands protection and restoration efforts throughout the state. This illustrates that Louisiana takes its responsibility to protect its natural resources seriously and does not need the federal government to regulate every minor pond or ditch. Louisiana's is not unique; most states are protecting their natural resources more aggressively than when the CWA was enacted.

In addition, if this rule is finalized it will slow housing production, which will have an adverse effect on state and local economies. Buyers of new homes and investors in rental properties add to the local tax base through business, income and real estate taxes, and new residents buy goods and services in the community.

NAHB estimates the first-year economic impact of building 100 typical single-family homes includes $28 million in wages and business profits, $11.1 million in federal, state and local taxes, and 297 jobs.

In the multifamily sector, the impact of building 100 typical rental apartments includes $10.8 million in wages and business profits, $4.2 million in federal, state and local taxes and 113 jobs.

Conclusion:

In crafting the Regulatory Flexibility Act, Congress clearly intended for federal agencies to carefully consider the proportional impacts of federal regulations on small businesses:

> It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulations. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.[12]

Unfortunately, the EPA has completely skirted these requirements all too often. EPA clearly views RFA compliance as a step best ignored in the rulemaking process. This rule will have a significant impact on small businesses nationwide, which the agencies choose to ignore.

[12] U.S.C., sections 601–612

I am at a loss as to why the agencies refuse to give small businesses a seat at the table to discuss these impacts. I request that the agencies start over and develop a more meaningful and balanced rule that respects the spirit of the RFA.

Fortunately, there are solutions. Last week, the House of Representatives passed legislation that will force the agencies to withdraw this rule, go back and consult with state and local governments, conduct meaningful discussions with small business stakeholders, and produce an accurate cost-benefit analysis.

The agencies could then re-propose an updated rule. And in the Senate, recently introduced legislation (S. 1140) by Senators John Barrasso (R-WY), Joe Donnelly (D-IN), Jim Inhofe (R-OK), Heidi Heitkamp (D-ND), Pat Roberts (R-KS) and Joe Manchin (D-WV) accomplishes this same goal while also providing the agencies with some guidance on how to identify a jurisdictional water.

We strongly urge the Senate to act quickly to prevent the agencies from finalizing this flawed rule. Enacting the Senate bill gets us back on track to where we need to be, which is establishing a workable and constitutional definition of Waters of the United States.

Thank you again for the opportunity to testify today.