TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE

# NATIONAL FEDERATION OF INDEPENDENT BUSINESS

NFIB
The Voice of Small Business®

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Before the

**U.S. Senate Committee on Small Business and Entrepreneurship**

**An Examination of Proposed Environmental Regulation's Impacts on America's Small Businesses**

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National Federation of Independent Business (NFIB)
1201 F Street, NW Suite 200
Washington, DC 20004

Dear Chairman Vitter and Ranking Member Shaheen:

The National Federation of Independent Business (NFIB) appreciates the opportunity to submit this testimony to the Committee on Small Business and Entrepreneurship for the hearing entitled "An Examination of Proposed Environmental Regulation's Impacts on America's Small Businesses." NFIB is the nation's leading small business advocacy organization representing over 350,000 small business owners across the country, and we thank you for the opportunity to provide our perspective on this issue. NFIB represents small businesses in every region and every industry in the country. Accordingly, NFIB has a unique insight into the concerns of the small business community, and can speak with authority on these concerns.

NFIB applauds the Committee for having this hearing today. We note at the outset that the proposed rule to define "waters of the United States" under the Clean Water Act (CWA) was jointly submitted, by the Environmental Protection Agency and the U.S. Army Corps of Engineers (the Agencies), for publication in the *Federal Register* on April 21, 2014. In that publication, the Agencies certified that the proposed rule will not have a significant adverse impact on the small business community. But as explained in this testimony, this certification is patently false. Moreover, it is contravened by the Agencies' administrative rulemaking record.

Contrary to the Agencies' assertions, the proposed rule will have a tremendous, direct, and immediate effect on many small businesses across all sectors of the economy. NFIB is concerned that the proposed rule represents an unprecedented jurisdictional land-grab, which will affect the rights of private landowners—including many small businesses. As such, NFIB believes that the Agencies have ignored their statutory obligations—under the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement Fairness Act (SBREFA)—requiring the Agencies to seriously consider the economic impact of the proposed rule on the small business community.

**The Agencies Have Failed to Comply with the Regulatory Flexibility Act**

NFIB believes the Agencies have failed to meet their statutory obligations under the RFA and SBREFA. Accordingly, NFIB believes the Agencies should (1) acknowledge that the proposed rule will have a significant economic impact on a substantial number of small businesses; (2) withdraw the proposed rule; and (3) wait to propose a new rule until the Agencies have considered less burdensome alternative interpretations of the pertinent CWA jurisdictional provisions.

*The RFA and SBREFA Require the Agencies to Seriously Consider Economic Impacts*

The RFA and SBREFA were enacted to address an unfortunate reality: regulations usually impose disproportionate costs on small businesses. Accordingly, the RFA and SBREFA require that federal agencies must seriously consider whether a proposed regulation will have a significant economic impact on a substantial number of small businesses before finalizing the rule. If an agency should determine that there will likely be significant adverse impacts, the agency is then required to consider less burdensome alternatives consistent with the language of the statute the agency has been charged with enforcing. Alternatively the agency might certify that there will be no significant adverse impact on the small business community, and forgo any further analysis.

Unfortunately, we note that federal agencies are all too quick to certify that regulatory proposals will not impact small business, or that the impacts will not be significant. This is a serious problem and unfortunately courts typically rubberstamp these certifications so long as they are not "arbitrary or

capricious." This is an extraordinarily low bar for the certifying agency and may explain why federal agencies all too often include conclusive language—with little or no analysis—certifying that proposed rules will not have significant adverse impacts.

For this reason, NFIB submits that Congress should consider measures to put more teeth in the RFA and SBREFA. We believe that strengthening these laws would have prevented the Agencies from ignoring their requirements under the RFA. Specifically, Congress should require agencies to account for both direct and reasonably-foreseeable indirect costs for the purposes of the RFA. This requirement would provide for a fairer analysis of a proposed regulation's costs and benefits.

In any event, NFIB maintains that the current forms of the RFA and SBREFA should be understood as imposing an affirmative requirement to seriously consider the economic impact of the proposed regulation. Unfortunately, the Agencies appear to have given short-shrift to this requirement in the present case. In this instance, the Agencies have proposed a rule that will have clear significant economic impacts on many small businesses throughout the country, but the Agencies have certified that there will be no adverse impact. The Agencies base this certification on the errant assertion that the proposed rule will actually narrow the CWA's jurisdiction—an assertion that the record contradicts.

The proposed regulation will plainly expand the CWA's jurisdictional reach as a matter of law. And as a matter of fact, the Agencies acknowledge elsewhere in the record that the proposed regulation will result in at least a three percent increase in jurisdictional wetlands. NFIB believes the three percent estimate is far too conservative; however, in any event, it patently contradicts the Agencies' RFA certification that the rule will not hurt small business.

*The proposed rule will have direct adverse impacts on many small businesses*

The Agencies are pursuing a significant expansion of federal CWA jurisdiction, which will necessarily exert more government control over private properties—including many owned by small businesses. As a result, the proposed rule will have severe practical and financial implications for many. This is because a business owner cannot make economically beneficial uses of his or her land once it is considered a jurisdictional wetland. And if an owner proceeds with a project on a portion of land that might be considered a wetland, the owner faces the prospect of devastating fines—up to $37,500 per day.

Consequently, most landowners—especially small businesses—will be forced into keeping their properties undeveloped. If the purported jurisdictional wetland covers the entire property, the owner may well be denied the opportunity to make any productive or economically beneficial use of the property. In some cases, it may be possible for the owner to obtain a permit to allow for development; however, there is no guarantee a permit will be issued. Moreover, for small business owners and individuals of modest means, such a permit is usually cost prohibitive. Indeed, the Supreme Court noted, in *Rapanos v. United States*, that the average CWA permit costs more than $270,000.

While multinational corporations with tremendous capital resources might be able to afford such costs, most small businesses are without recourse. Usually, their only option is to swallow their losses and forgo any development plans. Unfortunately, these small businesses suffer greatly because they have usually tied up much of their assets into their real estate investments and can neither afford

necessary permits, nor legal representation to challenge improper jurisdictional assertions—lawsuits challenging these assertions are fact intensive and extremely costly to litigate.

*The proposed rule will also have indirect adverse impacts on many small businesses*

Even in the absence of an affirmative assertion of CWA jurisdiction, landowners will be more hesitant to engage in development projects or to make other economically beneficial uses of their properties if the proposed rule is approved. Landowners are already aware that federal agencies have taken an aggressive posture in making jurisdictional assertions in recent years. And now that the Agencies have proposed this rule, it is apparent that they are taking an even more aggressive approach to jurisdictional issues—a signal that landowners can expect greater enforcement actions in the future.

NFIB already receives questions and concerns from small business owners who are worried about whether the Agencies have jurisdiction over their properties. And we expect to hear from many more concerned individuals if the proposed rule is finalized. Indeed, under the proposed rule a landowner may have legitimate cause for concern if—at any point during the year—any amount of water rests or flows over a property.

And contrary to the Agencies' assertions, the proposed rule will do little or nothing to make CWA jurisdiction clearer for most properties. The reality is that landowners will have to seek out experts and legal counsel—which gets costly quickly—before developing on any segment of land that occasionally has water overflow. And, the only way to have definitive clarity is to seek a formal jurisdictional determination from the Agencies, which costs more money, further delays development plans and may cause financing to disappear.

Of course, in the absence of a formal jurisdictional assessment, property owners proceed at their own risk if they wish to use portions of their property that might be viewed as jurisdictional. Indeed, they face ruinous fines of up to $37,500 per day if they errantly begin filling in—or dredging—land that the Agencies believe is a jurisdictional wetland. And for this reason any property that might be viewed as containing a jurisdictional wetland will be greatly devalued. In addition, even if the property owner is found to be in the right, he or she may use all their assets fighting to prove this fact.

**The Proposed Regulation Radically Expands CWA Jurisdiction**

NFIB views the proposed rule as a jurisdictional land-grab. It should be remembered that the Agencies are not writing on a blank slate here. The Supreme Court has made clear that there are constitutional limits on the jurisdictional reach of the Clean Water Act. The Agencies have been repudiated for overreaching in the past, and will be again if the proposed regulation is understood as reaching beyond the constitutional limitations recognized in *Rapanos*.

There are undoubtedly grounds for disputing how far CWA jurisdiction reaches on a case-by-case basis; however, there is no question that *Rapanos* set the outer-limits. The Agencies cannot exceed those limits any more than Congress could. And for several reasons, NFIB believes the proposed regulation goes beyond what *Rapanos* allows. For the reasons set forth below, we maintain the proposed regulation is inconsistent with *Rapanos* and should be amended or abandoned entirely.

(1) The Proposed Regulation Lowers the Threshold for Proving Navigability

The proposed regulation defines "traditional navigable waters" as any waters that are used for commerce or that could be used for commerce in the future. But the proposed regulation would effectively expand CWA jurisdiction by lowering the threshold for demonstrating the potential for navigable use in commerce. Specifically, the proposed regulation provides that the potential for commercial navigation "can be demonstrated by current boating or canoe trips for recreation or other purposes." While the proposed regulation suggests that the Agencies' assessment must take into account physical characteristics of the waterway, it ultimately provides that the water will be viewed as "traditional navigable waters" if there is any evidence that a watercraft can navigate the waterway. This would seemingly justify the Agencies treating any waterway as "traditional navigable water" if any party can succeed in a single downstream trip—an approach that we think is far too easy to satisfy.

(2) The Proposed Regulation Disregards Whether Interstate Waters are Navigable

The proposed regulation inappropriately treats all interstate waters as "waters of the United States," regardless of whether they are in fact navigable, or even "connect[ed] to such waters." But, the Supreme Court has made clear that jurisdiction may not be assumed in this manner. To assert jurisdiction, an agency must demonstrate that there is a connection to traditional interstate navigable waters. And the potential for commercial navigation must be proven in fact.

(3) The Proposed Regulation Distorts Justice Kennedy's 'Nexus Test'

The proposed regulation expands CWA jurisdiction by distorting Justice Kennedy's "significant nexus test," such that it will liberally justify jurisdictional assertions beyond what the test would allow for if properly applied. The result is an expansion of CWA jurisdiction. It does so in three ways. One way is that the proposed regulation misstates the significant nexus test by replacing the conjunctive word "and" with the disjunctive word "or," when listing the different factors to be considered in determining whether the subject wetland has a sufficient nexus to traditional navigable waters. The proposed regulation also seeks to lower the threshold for satisfying the significant nexus test by stating that the test will be satisfied if it can be demonstrated that the chemical, physical or biological effect on jurisdictional waters is more than "speculative or insubstantial." Finally, the proposed regulation changes the significant nexus test by expanding the definition of "region."

(4) The Proposed Regulation Asserts Jurisdiction Over Anything with a High Water Mark

The proposed regulation provides that any "natural, man-altered, or man-made water body" with an ordinary high water mark will be considered a tributary. This requires the Agencies to assert jurisdiction over practically any land over which water occasionally flows. But, both *Rapanos* tests reject such an expansive interpretation of CWA jurisdiction.

(5) The Proposed Regulation Places the Burden on the Landowner to Disprove Jurisdiction

The most fundamental problem is that the proposed regulation operates so as to create a presumption of jurisdiction—a presumption that may not bear out in practice. This is highly problematic because the burden should not be on the landowner to disprove CWA jurisdiction. The burden should rest on the Agencies to prove the existence of a "significant nexus" in any given case.

**Only Congress can fix the CWA's jurisdictional pitfalls**

As Justice Alito noted in the *Sackett v. EPA*, the "reach of the Clean Water Act is notoriously unclear." This is undoubtedly true. The Supreme Court has addressed CWA jurisdictional questions on three different occasions. But, the exact reach of the CWA remains a murky question—so much so that some legal scholars contend that the CWA is unconstitutionally vague because the regulated community cannot readily determine whether a given property is, or is not, a jurisdictional wetland.

While it is commendable that the Agencies apparently seek to resolve some of the confusion over the jurisdictional reach of the CWA in the proposed regulation, our view is that only Congress can fix this problem. The proposed regulation would resolve the vast majority of jurisdictional disputes by applying categorical rules, which will result in expansive assertions of jurisdiction. But *Rapanos* makes clear that categorical assertions of jurisdiction must be rejected. It is simply beyond the authority of the Agencies to expand CWA jurisdiction through the rulemaking process in a manner that conflicts with the jurisdictional tests set forth in *Rapanos* and her progeny.

Therefore, NFIB believes action by Congress is necessary to ultimately provide the type of clarification that would allow small business owners to operate without fear of unknowingly violating the CWA.

**Conclusion**

NFIB greatly appreciates the efforts of the Committee to hold the Agencies to account on its requirements under the RFA.

Thank you again for the opportunity to provide this testimony. NFIB remains eager to work with members of the Committee to ensure that the Agencies operate within the bounds Congress clearly intended. We also look forward to working with the Committee to help ensure that the Agencies adhere to their responsibilities under the RFA in all of its current and future rulemakings.