BACKGROUNDER – ERA Policy Group
July 1, 2021

Please note: all ERA Policy Group meetings are video conferences via RingCentral. **Click here to log-on.*

1. **Welcome** ***(3 minutes: 11:00 a.m. – 11:03 a.m.)***

2. **Discussion: EPA & Army Corps Revise Definition of "Waters of the United States" (WOTUS) Rule** ***(15 minutes: 11:03 a.m. – 11:18 a.m.)***

On June 9, the U.S. Environmental Protection Agency and Department of the Army announced their intention to once again revise the "Waters of the United States" (WOTUS) rule, a regulation by which they jointly define the scope of federal jurisdiction under the Clean Water Act.

During the comment period in 2017, NSBA stated we have long opposed the WOTUS rule and have remained concerned that it does not really clarify for small businesses what waters will fall under the jurisdiction of the EPA and Army Corps of Engineers. Clarity and predictability in the regulatory system are essential for small businesses to operate and grow. Without an idea of what its obligations will be, it is very difficult for a small business to make plans to expand operations or even make long term plans for ongoing operations. A more transparent and predictable regulatory environment would allow small businesses to grow and expand knowing what will be required of them.

At the time, the rule raised concerns with many, including NSBA, that the rule did not clarify the jurisdictional questions but would instead lead to greater uncertainty. The primary concern was that several portions of the rule seemed to grant EPA more discretion, and therefore would increase uncertainty and could potentially greatly expand the jurisdiction of the water protection statutes to previously unregulated small water bodies like puddles and ditches. NSBA believed that the WOTUS rule has far-reaching implications for project developers across the energy, water, agricultural, construction, and transportation sectors.

On June 9, the U.S. Environmental Protection Agency (EPA) and the Department of the Army announced that the definition of "Waters of the United States" (WOTUS) will again be revised. How WOTUS is defined determines the geographical scope of federal jurisdiction under the Clean Water Act (CWA). Any body of water defined as WOTUS requires a permit for dredging, dirt fill, or discharges.

The definition of WOTUS is one of the most fiercely contested and misunderstood rules under the EPA's jurisdiction. And, to make it even more confusing, that jurisdiction is shared with the Army Corps of Engineers.

One aspect of the WOTUS definition has always been clear: It applies to U.S. oceans, major navigable rivers, lakes, and any connected waterways. What is not so clear is how to handle wetlands and loosely connected waterways such as streams that are dry for part of the year.

The agencies' new regulatory effort will be guided by the following considerations:

- Protecting water resources and our communities consistent with the Clean Water Act.
- The latest science and the effects of climate change on our waters.
- Emphasizing a rule with a practical implementation approach for state and Tribal partners.
- Reflecting the experience of and input received from landowners, the agricultural community that fuels and feeds the world, states, Tribes, local governments, community organizations, environmental groups, and disadvantaged communities with environmental justice concerns.

The agencies are committed to meaningful stakeholder engagement to ensure that a revised definition of WOTUS considers essential clean water protections, as well as how the use of water supports key economic sectors. Further details of the agencies' plans, including opportunity for public participation, will be conveyed in a forthcoming action. To learn more about the definition of waters of the United States, visit: https://www.epa.gov/wotus.

The Obama WOTUS Definition

In June 2015, the Obama administration attempted to define WOTUS by expanding its definition to clarify which bodies of water are automatically covered by the CWA and which must still be dealt with on a case-by-case basis.

That rule defined automatically protected waterways as any that have a bed, a bank, and a high-water mark. This included many streams that remain dry part of the year. That automatic protection was also extended to wetlands and ponds located within 100 feet of or within the 100-year floodplain.

It also included "[c]ertain 'isolated' waters that are not connected to navigable waters … if they have a 'significant nexus' to protected waters — like the vernal pools of California." "The rule also explicitly exempted a number of bodies of water often found on farms, such as puddles, ditches, artificial ponds for livestock watering, and irrigation systems that would revert to dry land if irrigation were to stop."

The Trump WOTUS Definition

The Trump administration's definition made a clear distinction between federally protected wetlands and state-protected wetlands.

"The revised definition [identified] four clear categories of waters that are federally regulated under the [CWA]: the territorial seas and traditional navigable waters, like the Atlantic Ocean and the Mississippi River; perennial and intermittent tributaries, such as College Creek, which flows to the James River near Williamsburg, Virginia; certain lakes, ponds, and impoundments,

such as Children's Lake in Boiling Springs, Pennsylvania; and wetlands that are adjacent to jurisdictional waters." "These four categories protect the nation's navigable waters and the core tributary systems that flow into those waters.

"This final action also details what waters are not subject to federal control, including features that only contain water in direct response to rainfall; groundwater; many ditches, including most farm and roadside ditches; prior converted cropland; farm and stock watering ponds; and waste treatment systems."

The Trump administration's definition of WOTUS pulled back federal oversight of at least 51 percent of wetlands and 18 percent of streams — many of which had been protected since the Reagan administration.

Both Obama's and Trump's WOTUS definitions were extremely controversial and the subject of multiple court battles.

The Biden WOTUS Definition

In April, EPA Administrator Michael Regan told Congress it was not his intention to return to the Obama administration's definition of WOTUS.

The current administration's decision to again redefine WOTUS means the "Navigable Waters Protection Rule (NWPR) – the most recent regulatory definition of WOTUS – which was confirmed and put into effect just less than a year ago on June 22, 2020," will also be set aside.

"After reviewing the [NWPR] as directed by President Biden, the EPA and Department of the Army have determined that this rule is leading to significant environmental degradation," Regan says in an EPA press release. "We are committed to establishing a durable definition of [WOTUS] based on Supreme Court precedent and drawing from the lessons learned from the current and previous regulations, as well as input from a wide array of stakeholders, so we can better protect our nation's waters, foster economic growth, and support thriving communities."

"Communities deserve to have our nation's waters protected. However, the [NWPR] has resulted in a 25-percentage point reduction in determinations of waters that would otherwise be afforded protection," says Acting Assistant Secretary of the Army for Civil Works Jaime A. Pinkham in the EPA press release.

The agencies have concluded that the current NWPR has significantly reduced water protections, with damaging environmental impacts.

The lack of protections is particularly drastic in arid states, like New Mexico and Arizona, where nearly every 1 of over 1,500 streams assessed has been found to be non-jurisdictional," according to the EPA press release. "The agencies are also aware of 333 projects that would have required Section 404 permitting prior to the [NWPR], but no longer do.

"As a result of these findings, today, the Department of Justice is filing a motion requesting remand of the rule," the press release adds. "Today's action reflects the agencies' intent to initiate a new rulemaking process that restores the protections in place prior to the 2015 WOTUS implementation, and anticipates developing a new rule that defines WOTUS and is informed by a robust engagement process as well as the experience of implementing the pre-2015 rule, the Obama-era Clean Water Rule, and the Trump-era [NWPR]."

Regan has gone on record to state that "he's trying to strike the delicate balance between conservation and development that both the Trump and Obama administrations failed to reach," according to The Washington Post.

It's hoped that the new rulemaking will stem what many have classified as a "staggering loss of wetlands."

The NWPR remains in effect for now, and both the details and the ultimate fate of the replacement regulation are uncertain, but the new WOTUS rule is expected to increase the bodies of water subject to federal jurisdiction under the Clean Water Act. Thus, it is likely that additional permits will be required under a new rule promulgated pursuant to the Clean Water Act.

The first step is for the Biden administration to repeal the Trump definition, then establish its own WOTUS definition. The fate of the new definition could ultimately reside in the hands of the U.S. Supreme Court. The WOTUS definition has been up for debate since the CWA was passed in 1972.

"In a 2006 decision, Justice Anthony M. Kennedy wrote federal officials could step in when there was a 'significant nexus' between smaller and larger bodies of water. The Obama administration wrote its rule around that standard.

"But after Kennedy's retirement and with the Supreme Court taking an even more conservative turn with the appointments of three justices by Trump, it's unclear what sort of rule could now pass muster."

3. **Legislative Discussion: Define WOTUS Act** ***(15 minutes: 11:03 a.m. – 11:18 a.m.)***

Using the four Issue Filters, the Policy Group will want to discuss the legislation and determine what action, if any, NSBA should take regarding the DEFINE WOTUS Act.

Senators Joni Ernst (R-Iowa) and Chuck Grassley (R-Iowa), both members of the Senate Agriculture Committee, joined Senator Mike Braun (R-Ind.) in introducing the Define WOTUS Act, a bill to legislatively define the "Waters of the United States," (WOTUS) and make a reasonable, workable definition of the term permanent.

The Define WOTUS Act would codify a definition of "Waters of the United States" and reassert Congressional responsibility to define this important term. The definition in the Define WOTUS

Act also makes substantial improvements over various administrative attempts to define the term by clearly outlining what is, and is not, a federally regulated waterway.

According to the bill sponsors, the Define WOTUS Act provides much greater certainty to American farmers, workers, businesses and landowners. It gives landowners clear guidelines by which they can go out on their land and clearly determine what is regulated by the EPA and what is not. Because Congress is not restricted by various rulemaking statutes, the Define WOTUS Act provides a clearer definition with more obvious safeguards to protect against a runaway bureaucracy.

4. **Legislative Discussion: PROVE It Act** ***(10 minutes: 11:28 a.m. – 11:38 a.m.)***

Using the four Issue Filters, the Policy Group will want to discuss the legislation and determine what action, if any, NSBA should take regarding the PROVE It Act.

NSBA has long stated excessive and complex regulatory burdens continue to be a hardship for many small business owners across America. As one of our top priority issues, this legislation will help to strengthen and improve the certification process within the Regulatory Flexibility Act (RFA).

Senator Joni Ernst (R-Iowa), a member of the Senate Small Business Committee, introduced legislation that aims to improve transparency and strengthen the voices of small businesses in the federal rulemaking process.

Specifically, the Prove It Act gives the Small Business Administration's (SBA) Office of Advocacy—the small business watchdog for rules and regulations—the ability to question an agency's analysis if it claims a rule or regulation won't impact small businesses.

"Too often, Washington bureaucrats put forward rules and regulations without considering their impact on small businesses, which are the backbone of our economy. A perfect example is the Obama-Biden WOTUS rule, which would have given the federal government authority to regulate water on 97 percent of land in Iowa and burden our farmers, landowners, and businesses. This bill will give Iowa's small business community the opportunity to send federal agencies back to the drawing board to 'prove' that what they're proposing won't hurt small businesses," said Senator Ernst.

Background

SBA's Office of Advocacy found that the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers improperly certified the Obama-Biden era WOTUS rule, and, despite EPA claiming otherwise, the rule would have indeed had a costly and direct impact on small businesses. Provisions in the Prove It Act would have allowed for a review or reconsideration of the certification that the rule wouldn't have a significant impact on small businesses.

Under the Regulatory Flexibility Act, federal agencies are required to certify whether a rule has a significant economic impact on a substantial number of small businesses. If the rule does, agencies are then required to perform a substantive regulatory analysis. Agencies also have the discretion to certify that the rule would not impact small businesses significantly and can then bypass further analysis requirements.

The Prove It Act gives the Office of Advocacy an opportunity to submit a request to an agency to take a second look and reconsider its certification. If after 30 days of review the agency determines that its certification was incorrect, then the agency would be required to do further analyses on the rule. The request for review must be published in the Federal Register and on the Office of Advocacy's website to ensure transparency.

5. **Comment Period: SBA Proposes Small Business Size Standard Revisions in Two Industrial Sectors to Increase Eligibility for Its Loan Programs** ***(10 minutes: 11:38 a.m. – 11:48 a.m.)***

This Policy Group will want to discuss the proposed rule and determine what action, if any, NSBA should take regarding the size standard revisions. Comments can be submitted on this proposed rule on or before July 26, 2021, at www.regulations.gov, using: RIN 3245-AH10. You may also send comments by mail to Khem R. Sharma, Chief, Size Standards Division, 409 3rd Street SW, Mail Code 6530, Washington, D.C., 20416.

The Small Business Administration is seeking public comments on a proposed rule that would revise the small business size standards for businesses in two North American Industrial Classification System (NAICS) sectors to increase small business eligibility for SBA's loan programs.

The NAICS sectors reviewed in the proposed rule are Wholesale Trade (Sector 42) and Retail Trade (Sector 44-45). SBA proposes to increase size standards for 49 industries in those sectors.

The following table includes the number of industries reviewed and the number of industries with proposed increases in size standards by the NAICS sector.

NAICS Sector	Sector Name	No. of Industries	
		Reviewed	with Proposed Increases in Size Standards
42	Wholesale Trade	71	14
44-45	Retail Trade	66	35
Total		137	49

SBA estimates that about 1,800 additional firms in these two sectors would become eligible for SBA's loan and other federal non-procurement programs under the proposed size standards, if adopted. NAICS codes under Sectors 42 and 44-45 do not apply to federal procurement and

hence size standard revisions in this proposed rule will have no impact on contracting. Wholesalers and retailers can qualify for contracting as small businesses under the 500-employee nonmanufacturer size standard, which is not revised in this proposed rule.

The proposed rule is part of the second five-year comprehensive review of small business size standards, as required under the Small Business Jobs Act of 2010. The proposed revisions reflect changes in industry conditions and SBA's policy position under the current economic situation due to the COVID-19 pandemic. In response to the pandemic, SBA is retaining current size standards where data suggests that size standards should be lowered.

As part of the ongoing review of all size standards, the SBA generally considers the structural characteristics of individual industries, including average firm size, the degree of competition, and federal government contracting trends. This ensures that small business size standards reflect current economic conditions in those industries. The proposed increases to the size standards in those two sectors will enable some mid-sized businesses to regain their small business status and current small businesses to retain their small business status for a longer period, thereby allowing them to benefit from SBA's loan and other non-procurement programs.

Comments can be submitted on this proposed rule on or before July 26, 2021, at www.regulations.gov, using: RIN 3245-AH10. You may also send comments by mail to Khem R. Sharma, Chief, Size Standards Division, 409 3rd Street SW, Mail Code 6530, Washington, D.C., 20416.

An SBA-issued White Paper entitled, "SBA's Size Standards Methodology," which explains how SBA establishes, reviews, and modifies its receipts-based and employee-based small business size standards, can be viewed at http://www.sba.gov/size.

For more information about SBA's revisions to its small business size standards, visit "announcements about updating size standards" at http://www.sba.gov/size.

6. **Reminder: ERA Policy Group Does NOT meet in August – See you in September**

7. **Other Issues**

8. **Adjourn** ***(12:00 p.m.)***