Testimony of Tom Woods

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Before the

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Small Business Committee

Hearing on "Will EPA's 'Waters of the United States' Rule Drown Small Businesses?"

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Chairman Graves, Ranking Member Velazquez, members of the subcommittee, 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 Tom Woods and I am the president of Woods Custom Homes, a building company based in Blue Springs, Missouri, and NAHB's 2014 First Vice Chairman of the Board.

NAHB members are involved in the home building, remodeling, multifamily construction, land development, property management, and light commercial construction industries. Our industry is largely 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 choose to buy or rent a home.

Recognizing the need for a clean environment and the benefits that it brings to communities, residents, and potential home buyers, NAHB members have a vested interest in preserving and protecting our nation's land and water resources. Since its inception in 1972, the Clean Water Act (CWA) has helped 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 often obtain and comply with section 402 and 404 permits to complete their projects. For businesses navigating federal bureaucracies, what is most important to our compliance efforts is a regulatory scheme that is consistent, predictable, timely, and focused on protecting true aquatic resources. Unfortunately, this is becoming a more elusive goal.

As a leader of my industry, I have a unique understanding of how the federal government's regulatory process impacts businesses in the real-world. Additional regulations make it more difficult for me to provide homes at a price point that is affordable to working families – a reality that affects both renters and prospective buyers.

The home building industry would benefit from smarter and more sensible regulation. According to a study completed by NAHB, government regulations accounts for up to 25% of the price of a single-family home. Nearly two-thirds of this impact is due to regulations that affect the developer of the lot, with the rest due to regulations that are imposed on the builder during construction.[1] The regulatory requirements we face as builders do not just come from the federal government. As the former Mayor of Blue Springs, Missouri, I believe a key component of effective regulation is ensuring that local, state and federal agencies are cooperating, where possible, to streamline permitting requirements and are respecting the appropriate responsibilities of each level of government. Importantly, more sensible regulation will translate into job growth in the construction industry.

"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, landowners and regulators alike have been frustrated with the continued uncertainty over the scope of federal jurisdiction over "Waters of the United States." By improving the CWA's implementation, removing redundancy, and further clarifying jurisdictional authority, the agencies are hoping they can do an even better job at facilitating compliance while protecting and improving the aquatic environment.

Unfortunately, the proposed rule falls well short of providing the clarity and certainty the construction industry seeks. This rule will increase federal regulatory power over private property and will lead to increased litigation, permit requirements, and 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.

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

Addressing the Impacts on Small Entities

The agencies completely ignore the impact this proposed rule will have on small entities. They claim "…(t)hat fewer waters will be subject to the CWA under the proposed 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 proposed rule establishes broader definitions of existing regulatory categories, such as tributaries, and 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, including stepping in where they may think a state has not gone far enough. 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.

In addition, the proposal suggests that "neighboring" could include any wet feature within a "floodplain." As I am sure you are aware, floodplains can extend for miles from traditional navigable waters, yet 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. For any small business trying to comply with the law, the last thing it needs is a set of new, vague and convoluted definitions that only provide another layer of uncertainty.

These definitions will leave home builders in a constant state of confusion. As a small business owner, this unpredictability will make it difficult for my business to comply and grow. The agencies suggest that the rule provides clarity; however all it does is produce more questions. Unfortunately, we have to rely on the agencies and costly consultants for answers.

Regulatory Flexibility Act

These changes have far reaching implications and will alter the way we conduct business. Recognizing that small businesses are frequently disproportionately impacted by federal regulations, Congress enacted, more than 30 years ago, the Regulatory Flexibility Act (RFA). The agencies are legally required to assess the true impacts this rule will have on small businesses under the RFA.

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 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 the certification in the Federal Register along with a statement providing the factual basis for the certification.[5]

While the original Congressional intent and subsequent additions and enhancements to the RFA are to be lauded, 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 by other means.

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 truly 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 places on small residential home builders. I take issue with the fact that the agencies have not considered these consequences.

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

[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.
[6] 5 U.S.C. 609.

(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 for the purpose of obtaining 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 18 years since the RFA was amended by SBREFA to include the panel requirement, EPA has convened approximately 43 panels. According to a report issued by the Congressional Research Service (CRS), EPA issued nearly the same number of significant regulations during the first Obama Administration.[8] It defies belief that so few EPA regulations have met the threshold under SBREFA and these numbers illustrate how reluctant some agencies are to comply with the law.

It was very surprising to me that the agencies decided to certify the rule, thereby completely bypassing the RFA process. 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.

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 permit judicial review of section 609(b), which contains the panel requirement.[9] NAHB believes that the RFA should be amended to include judicial review of the panel requirement to ensure 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 SERs that can

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

[8] The Congressional Research Service examined 45 regulations it characterized as satisfying OMB's "significance" threshold of $100 million annual effect on the U.S. economy in a report addressing the rate of issuing regulations during the first Obama Administration. *Regulations: Too Much, Too Little, or On Track?*, http://www.fas.org/sgp/crs/misc/R41561.pdf (last visited Mar. 5, 2013).

[9] 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."

thoughtfully and substantively advise the agency, as Congress intended. Knowing that its decision whether to convene a panel could result in a judicial remand of a regulation presents 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 equation.

Acknowledging the True Costs to Small Entities

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 Agencies' Flawed Cost-Benefit Analysis

The Environmental Protection Agency's (EPA) *Economic Analysis of Proposed Revised Definition of Waters of the United States* (analysis) 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 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 underestimating 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." 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 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 make the assumption 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 study of this major change to the CWA. Yet again, the agencies are painting an inaccurate picture of how this regulation will impact small businesses.

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 or purchasing smaller parcels, redrawing development or house plans, and/or completing mitigation. All of 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 construction 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 multitude of costs associated with overregulation.

Because compliance costs for regulations are often incurred prior to home sales, builders and developers have to essentially 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 proposed rule only adds to the headwinds that our industry faces.

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

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

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 who are on the verge of qualifying for a new home will no longer be able to afford this purchase. An analysis done by NAHB illustrates the number of households priced out of the market for a median priced new home due to a $1,000 price increase. Nationally, this price difference means that when a median new home price increases from $225,000 to $226,000, 232,447 households can no longer afford that home.

The picture becomes more stark 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. 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 their land.

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 deal. If the rule is finalized in its current form, the ability to sell, build, expand, or retrofit structures or properties will suffer notable setbacks, including added cost and delays for development and investment.

Oftentimes, home builders will be 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. My business has already been the victim of permitting delay. For one of my building projects, I was entangled in the Army Corps permitting process for over two years. These delays will only increase as the agencies work to extend federal protections to smaller waters.

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. If more

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

areas are considered jurisdictional, more CWA permits will be required. More federal permitting actions will trigger additional statutory reviews – by agencies other than the permitting agency – under laws including the Endangered Species Act, National Historic Preservation Act, and 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. Lengthened permitting times will include an increased number of meetings, formal and informal hearings, and appeals. 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.

While my industry is complex and multifaceted, it is not beyond the agencies' ability to adequately study and estimate realistic costs and burdens resulting from this proposal.

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 resource." Under this notion, there is 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 recognize that there are limits on federal authority.

States have adequately regulated their own waters and wetlands for years. States take their responsibilities to protect its natural resources seriously and do not need the federal government to assert jurisdiction. In fact, every state has the authority to exceed federal law, so long as there is a compelling reason. If you looked around the country you would find that many states are protecting their natural resources more aggressively than when the CWA was enacted. As a former Mayor, I am aware of this impact. I have a firsthand understanding of the lengths that state and local governments go to in order to protect their waters.

In addition, if this rule is finalized it will slow down housing production which will have an adverse affect 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 impacts of building 100 typical single family homes to 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.

Conclusion:

Congress, in crafting the RFA, 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 principal, 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.

Unfortunately, all too often the EPA has completely skirted these requirements. They clearly view RFA compliance as an optional step in the rulemaking process. This proposed rule will have a significant impact on small businesses nationwide, an important notion that the agencies choose to ignore. 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.

Thank you again for the opportunity to testify today.