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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.

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,

A handwritten signature in cursive script that reads "Kevin Kuhlman".

Kevin Kuhlman
Vice President, Federal Government Relations
NFIB