



March 7, 2023

The Honorable Roger Williams  
Chairman  
Committee on Small Business  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Nydia Velázquez  
Ranking Member  
Committee on Small Business  
U.S. House of Representatives  
Washington, DC 20515

Dear Chairman Williams and Ranking Member Velázquez:

Thank you for holding a hearing on the rule finalized in January 2023 by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) that defines “waters of the United States” (WOTUS). This regulation is an example of how federal agencies ignore their obligation to consider and act on recommendations and information from small businesses when issuing federal regulations. It is my hope that Congress and the courts will invalidate this rule, and I am including recommendations on how to prevent federal agencies from ignoring small business in future rulemakings.

I am Natalie Kaddas, CEO of Kaddas Enterprises in Salt Lake City, Utah. My manufacturing company specializes in manufacturing thermoform plastic products for the energy, transportation, and aerospace industries. I serve as the Chair of the U.S. Chamber of Commerce’s Small Business Council. 96% of Chamber member companies have fewer than 100 employees and 75% have fewer than 10. The Small Business Council works to ensure the views of small businesses are integrated into the Chamber’s policy-making process.

The Chamber is part of the Waters Advocacy Coalition that includes dozens of associations representing thousands of small businesses and commented on the WOTUS rule.<sup>1</sup> While you are holding this hearing, the Chamber’s legal counsel is preparing for a preliminary injunction hearing that is scheduled to take place on Friday, March 10, in the U.S. District Court in the Eastern District of Kentucky. The Chamber, along with co-plaintiffs Kentucky Chamber of Commerce, Associated General Contractors of Kentucky, Home Builders Association of Kentucky, Portland Cement Association, and the Georgia Chamber of Commerce, as well as the Commonwealth of Kentucky, are challenging the WOTUS rule in that litigation. The rule is also being challenged in a number of other lawsuits brought by states, farmers and landowners, and business groups. The Chamber is firmly of the view that the rule is unlawful, and the Chamber supports the Congressional Review Act resolution that was recently introduced to invalidate the rule.

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<sup>1</sup> Waters Advocacy Coalition, Comments of the Waters Advocacy Coalition on the U.S. Environmental Protection Agency’s and the U.S. Army Corps of Engineers’ Proposed Revised Definition of “Waters of the United States”, (February 7, 2022).

## **Small Business and the Regulatory Flexibility Act**

Small businesses have long been understood as America's economic engine. The roughly 32.5 million small businesses make up over 99% of all U.S. firms, represent 43.5% of America's GDP, innovate at more than 12 times the rate of larger competitors, and account for 62% of net job creation since 1995.<sup>2</sup> Despite small businesses' strength in economic contributions, they are at a disadvantage when it comes to dealing with regulation. The Chamber's work with the Bradley Foundation showed that U.S. businesses shoulder \$1.9 trillion in annual regulatory compliance costs.<sup>3</sup> For small businesses with 50 or fewer employees, the costs are nearly 20% higher than the average for all firms.

The Regulatory Flexibility Act (RFA), amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), was intended to rectify the disproportionate regulatory burden faced by small business by incorporating their concerns into the regulatory process and insisting that federal agencies find ways to meet their regulatory objectives while at the same time minimizing costs on small businesses.<sup>4</sup> The Office of Advocacy at the U.S. Small Business Administration (SBA) is responsible for overseeing agency compliance with the RFA and acts as an independent voice within the Administration to ensure that agencies are sensitive to how their regulations impact small businesses.

## **Waters of the United States Rulemakings, SBA's Office of Advocacy, and Small Business Input**

Unfortunately, one way for federal agencies to avoid small business input is to incorrectly certify that a rulemaking would not have a significant economic impact on a substantial number of small entities. Rather than seek input from small businesses on how to manage wetlands permitting in a way that would be both environmentally protective and sensitive to impacts on small businesses, EPA and the Corps have repeatedly insisted - in 2014, 2019, and in 2023 - that their proposed WOTUS rules do not impose additional costs on small businesses.

When each of these proposals was issued, SBA's Office of Advocacy faulted EPA and the Corps for "certifying" that their rulemaking would not harm small businesses. On each occasion, SBA's Office of Advocacy faulted the agencies for not convening a panel of small businesses that is required under SBREFA to ensure that the agencies consider small business recommendations for less burdensome alternatives.<sup>5</sup> In this regard, it is worth

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<sup>2</sup> U.S. Small Business Administration, Office of Advocacy, *Frequently Asked Questions About Small Business*, (December 2021).

<sup>3</sup> U.S. Chamber of Commerce Foundation, *The Regulatory Impact on Small Business: Complex.Cumbersome.Costly*, (March 2017)

<sup>4</sup> Regulatory Flexibility Act, 501 U.S.C. Sec. 601 et seq (1980).

<sup>5</sup> See, SBA Office of Advocacy letter to Administrator Gina McCarthy and Maj. Gen. John Peabody re: Definition of "Waters of the United States" Under the Clean Water Act, (October 1, 2014) and SBA Office of Advocacy letter to Administrator Andrew Wheeler and Lieutenant General Todd T. Semonite re: Revised Definition of "Waters of the United States" (Docket No. EPA-HQ-OW-2018-0149), (April 11, 2019) and SBA Office of Advocacy Letter to

noting that the Chamber’s lawsuit challenging the 2023 WOTUS rule, which is pending in the U.S. District Court for the Eastern District of Kentucky specifically challenges EPA’s and the Corp’s “certification” that the rule “will not have a significant economic impact on a substantial number of small entities under the RFA.” As the Chamber’s compliant notes, this certification “is based on a description of the Final Rule that does not reflect reality,” as “the Final Rule will impose significant costs on small businesses.”

It is truly unfortunate that EPA and the Corps have gone to such great lengths to avoid ensuring appropriate small business input. The purpose of the RFA and SBREFA is to ensure that agencies receive constructive small business input that can help regulators meet their regulatory objectives while at the same time minimizing the burden on small firms like mine. The concept of regulating while being sensitive to small business compliance costs makes sense and it is something I am personally passionate about. I am an advocate for protecting birds of prey and their environment. Our largest source of revenue at Kaddas Enterprises is our patented designs of Birdguard™ products. They are designed to protect birds and other animals from electrocution. I take pride in the fact that our manufacturing contributes to energy resiliency by preventing wildlife caused power outages. My company is a good example of how industry, environmental protection, and small business growth can work together to provide economic growth and conservation. These ideals are not exclusive.

## **Legislative Recommendations**

The Chamber applauds your recent letter to President Biden calling for a nominee who can effectively oversee the RFA as Chief Counsel for Advocacy and as the Small Business Committee considers modernizing SBA, I hope you consider updating the RFA.<sup>6</sup>

In addition to a strong and effective Chief Counsel who can be confirmed by the Senate, I ask that you consider the following updates to improve the RFA:

1. When a promulgating agency makes a “certification” under Regulatory Flexibility Act and SBA’s Office of Advocacy disagrees with the “certification,” there should be a process that prompts a transparent exchange of data between the Office of Advocacy and the promulgating agency. The Office of Management and Budget’s (OMB) Office of Information and Regulatory Affairs (OIRA) should act as a referee and issue a public decision as to the accuracy of the “certification” before the rulemaking can proceed. That is the approach Senator Joni Ernst took when she introduced the Prove It Act in 2016. I would urge the Committee to consider a similar approach to close the RFA loophole that has allowed such a flagrant disregard for small business input when agencies craft rulemakings.

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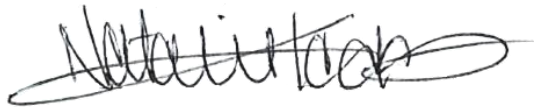
*Administrator Michael S. Regan and Michael L. Connor re: Comments on EPA and Army’s proposed rule defining “Waters of the United States” under the Clean Water Act (EPA Docket EPA-HQ-OW-2021-0602 and Army Docket COE-2021-0001-0016), (February 7, 2022).*

<sup>6</sup> U.S. House of Representatives Committee on Small Business, *letter to President Biden urging him to nominate a Chief Counsel for Advocacy at the U.S. Small Business Administration (SBA) Office of Advocacy*, (February 16, 2023).

- II. There is a question whether all provisions of the RFA should be made expressly subject to judicial review. Modernizing the RFA should avail small businesses with a court review of whether agencies are meeting their legal obligations to adequately consider small business in the development of federal rulemaking. Making it clear that the judicial branch is the ultimate arbiter of the legal requirements governing how agencies treat small business will help convince regulators to seek out, receive, and follow the recommendations of the small business community when there is constructive input on how to meet regulatory objectives while at the same time minimizing the negative impact on small businesses.

Thank you again for holding this important hearing on a topic that not only needs the attention of Congress, but also warrants action by America's courts to reverse EPA's and the Corps' lack of consideration for America's small businesses. Please do not hesitate to contact Tom Sullivan, the Chamber's Vice President for Small Business Policy if you have questions or comments regarding the content of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Natalie Kaddas", with a long horizontal flourish extending to the right.

Natalie Kaddas  
CEO, Kaddas Enterprises, Inc.  
Chair  
Small Business Council  
U.S. Chamber of Commerce

cc: Members of the House Committee on Small Business