

Statement by Frank Knapp, Jr.

Before the Committee on Small Business & Entrepreneurship
United States Senate

"Drowning in Regulations: The Waters of the U.S. Rule and the Case for Reforming the RFA"

April 27, 2016

Thank you, Chairman Vitter, Ranking Member Shaheen and members of the committee. My name is Frank Knapp, Jr. I am the President and CEO of the South Carolina Small Business Chamber of Commerce, a statewide, 5,000+ member advocacy organization working to make state government more small business friendly. I am also the board co-chair of the American Sustainable Business Council which through its network represents 200,000 businesses. ASBC advocates for policy change at the federal and state level that supports a more sustainable economy.

We are here today to talk about the Waters of the United States rule and its impact on small businesses, the process that the Environmental Protection Agency undertook to promulgate that rule and whether WOTUS makes the case for reforming the Regulatory Flexibility Act.

Let's start with clean water. Everyone in this room wants it. Small business owners want it and they understand that the way we protect it is through regulations. Regulations aren't put in place to punish some businesses but to protect all of them, and the public, from the behavior of some that can negatively impact everyone else.

Ask the small businesses of Charleston, West Virginia, what happened to them after the 2014 chemical spill in the Elk River that shut down their water supply and their businesses costing the local economy \$19 million a day. Ask the small business owners in Wisconsin along Six Mile Creek and Lake Mendota what happened when 300,000 gallons of manure spilled in 2013 contributing to algae blooms, unpleasant odors and bacteria-tainted water that forced beach closings.

That is the type of water pollution that worries Benjamin Bulis, President and CEO of the American Fly Fishing Trade Association, who testified before this committee almost a year ago in support of the Clean Water Act. His association supports protecting the headwaters of our nation and the fishing industry, which is made up of manufacturers, retailers, outfitters and guides to the tune of approximately 828,000 jobs with about an \$115 billion economic impact every year.

And national, scientific pollingⁱ commissioned by American Sustainable Business Council found plenty of support by small businesses with fewer than 100 employees to protect our waters. The survey showed that 80 percent supported the Waters of the U.S. rule. Sixty-two percent agreed that government regulations are needed to prevent water pollution and 61% believe that government

safeguards for water are good for businesses and local communities. Support for the clarification of federal rules under the Waters of the U.S. crossed political lines, with 78 percent of self-identified Republicans and 91 percent of self-described Democrats supporting the rule.

Now there is no denying that any regulation will be a burden on the small businesses directly impacted by the regulation. In the case of the Waters of the U.S. this burden is felt mostly by land owners and the agriculture, real estate, home builders, cattlemen, farmers and mining industries. While we all want clean water, we want to achieve the goal of the Clean Water Act with as little burden as possible on small businesses.

In 1946 Congress passed the Administrative Procedure Act to address this issue. Then in 1980 Congress passed the bi-partisan Regulatory Flexibility Act, which was supposed to solve the problem of excessive burden on small businesses while allowing for needed regulations.

The RFA worked and we in South Carolina passed our own Regulatory Flexibility Act with the support of my organization and our state chamber and NFIB. That was twelve years ago and our all-volunteer South Carolina Small Business Regulatory Review Committee looks at every promulgated regulation to see how it might be amended to be less burdensome on small businesses. Very few problems are found and when they are the Committee has worked well with state agencies to resolve the issues.

Which brings us to the issue of the RFA and the Waters of the U.S. rule. A rule that everyone apparently from the Court, to units of government, to the business community were calling for clarification on what waters are and are not covered under the Clean Water Act.

The Environmental Protection Agency believed that it complied with the RFA when it certified that the new WOTUS rule would not have a significant negative impact on a substantial number of small businesses and therefore it did not conduct a Small Business Regulatory Enforcement Fairness Act, or SBREFA, panel.

The Office of Advocacy, which is responsible for implementing the RFA and working with regulatory agencies to reduce the burden on small businesses, disagrees with EPA's decision and has asked the agency to withdraw the rule and conduct the SBREFA panels prior to promulgating the final rule.

There are no bad federal agency actors here, only a significant disagreement that will be settled by the court.

But to both agencies' credit, even without the formal panels they reached out for comments from the small business community. The EPA personnel in Washington and around the nation have participated in over 400 meetings with numerous impacted industries, individual businesses, local government, NGOs, and other associations before promulgating

WOTUS in April of 2014. The agency did take into consideration the comments and made adjustments to the final rule as a result.

This significant outreach by EPA probably exceeded most regulatory outreach efforts. Even the Office of Advocacy might acknowledge this.

In addition, on October 15, 2015 the EPA convened a meeting of small entities for reviewing the new rule. The agency acknowledged that it was not intended to serve as a review panel under the RFA but stated in a summary report of the meeting that the “EPA is prepared to consider additional changes to the proposed rule in response to public comments, including any comments from small entities.” It is important to point out that the organizations critical of the WOTUS rule do not have to wait for a SBREFA panel in order to achieve one of its objectives—offering alternative ways to lessen the burden on small businesses while meeting the goals of WOTUS.

For its part, the Office of Advocacy has been active in the rulemaking process leading up to and after the release of the WOTUS rule. Since 2011 it has worked with the EPA and the Corps of Engineers in holding small entity roundtables and meeting small businesses. Advocacy’s outreach has included almost 150 small businesses and their representatives. Based on the concerns it heard and its own analysis of the rule’s expected impact, Advocacy, as previously noted, would like formal SBREFA panel conducted.

Should the EPA have submitted to the RFA and conducted a SBREFA panel? The court will decide that.

However, had it done so several outcomes might have occurred. WOTUS wouldn’t be tied up in court at least on this issue so the process might have gone smoother and faster. There might have been some more mitigation in the rules to further reduce the burden on small businesses. Advocacy might have ended up supporting the rule. And we wouldn’t be here today making the incorrect conclusion that WOTUS is the poster child for significant changes to the RFA.

The reality is that the Clean Water Act is a very complex law making the regulations to implement it very complicated and controversial. While the promulgation of almost all other regulations is managed with little problem, WOTUS is unique.

The Waters of the United States rule is an anomaly among all regulations. Therefore it certainly doesn’t justify significant changes to the RFA—and certainly not the changes of which I have seen proposed in the House or Senate.

In his testimony last year to this committee, the Senior Executive Counsel of the NFIB Small Business Legal Center acknowledged that the purpose of the new WOTUS rule was to clarify the jurisdiction of the Clean Water Act. He stated that the “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 (Clean Water Act).”

Just last week, the U.S. Chamber’s Senior Vice President for Environment, Technology and Regulatory Affairs, in testimony to the Senate Committee on Homeland Security and Governmental Affairs concluded that the EPA is “the primary lawmaker on environmental issues, not Congress. This is a travesty and Congress must regain its role as the primary legislative body.”

But the regulatory reforms being offered are not designed to put Congress in charge of clarifying past laws or recapturing its primacy over the intent of regulations.

Instead they either add more federal agencies to be subject to the RFA or add more administrative duties and requirements to those agencies already covered by the RFA without any additional resources.

The result is not going to benefit small businesses which need fair, well-crafted regulations produced in a timely fashion. Instead the results will better be described as “deregulatory chaos”.

- Federal agencies will take even longer than the current years or even decades to promulgate regulations,
- There will be even more avenues for opponents of regulations to delay regulations through litigation,
- Businesses will face even more uncertainty due to the longer time needed to promulgate regulations and increased litigation.

The reality is that there is nothing wrong with the RFA as enacted in 1980. Some of the members of Congress that supported it at that time are still here today. They crafted a very good rulemaking process that worked well for a long time. Here is what needs to be done to allow it to work in today’s more complex and fast-moving nation and government.

Balance the Balance Sheet

We have created a public impression that all regulations are evil and if we would just get rid of them the economy will thrive. That’s the message the public hears but everyone here knows that regulations are needed for the benefits they yield.

So why do we never see the benefits of regulations in any agency analysis? For example the EPA and the Corps estimate that permitting costs under the WOTUS rule will increase over \$19 million annually and mitigation costs will rise over \$59 million. These are direct costs and some believe that indirect costs should also be reported. But there is no analysis showing how these direct costs are also direct benefits to the local economy because most of this money will be go to local small businesses for goods and services. The money doesn’t just disappear. It flows through the local economy directly and indirectly.

Even the U.S Chamber in its testimony to a Senate committee last week said that agencies are to analyze costs and benefits in the rulemaking process. The NFIB made a similar statement in its testimony last year.

However, the positive side of the ledger is always blank when the potential impacts of regulations are analyzed. The economic, health and social benefits of rules put in terms of dollars is not considered by the Office of Advocacy and the regulatory agencies. Whether this is by statute or custom, this must change if we are to get a truly accurate data to make rulemaking decisions and give the public complete information about the value of regulations.

Invest in Better Outreach and Analysis

Everyone, including the critics of the rulemaking process, wants more outreach and better analysis of regulatory impact in promulgating a rule. So let's invest in that. We have essentially starved the regulatory agencies and Advocacy while at the same time wanting both to do more. And then when the machine gets clogged up and controversial we want to fix the wrong problem and make more problems. The RFA process we have today simply needs more resources so it can run more effectively and efficiently. If you want agencies to cross every T and dot every I in the RFA process, give them the resources to do it so they can both perform their everyday tasks and conduct the quality rulemaking analysis and outreach we all want.

Help Small Businesses Understand the Rules and Provide Compliance Assistance

Once a rule has been promulgated and hopefully the burden on small businesses has been reduced as much as possible, the job of the federal government is not done. Small businesses need to be educated about the new rule and, when necessary, provided regulatory compliance assistance. Congress has also set up a process for this, not only within every regulatory agency, but also through the SBA Office of the National Ombudsman. Where the Office of Advocacy works on the front end of the development of significant regulations, the Office of the National Ombudsman is charged with helping small businesses on all regulation compliance on the back end. It serves as the conduit for small businesses to have their grievances about compliance problems or other issues with federal agencies heard directly by the agencies in question in an effort for successful resolution. In this way the Office of the National Ombudsman and the agencies can detect patterns of compliance problems so that the agency can revisit the rule.

This important component of the rulemaking process is woefully underfunded and thus underutilized. If Congress really wants to help small businesses deal with needed federal regulations, invest more in this small business outreach, support and feedback loop.

In conclusion, the current regulation promulgating process can produce good rules while protecting small businesses from unnecessary burdens if we provide the adequate resources

for agencies to expeditiously carry out the requirements Congress has already put in place on the front end and back end of the process. The WOTUS experience is an outlier not justifying all the regulatory reform proposals which, while achieving the agenda of some seeking to delay and stop some regulations, will inevitably fail to help the vast majority of small businesses.

Thank you for the opportunity to speak before you today and I welcome any questions the committee may have.

ⁱ “Small Business Owners Favor Regulations to Protect Clean Water” results from a scientific national phone poll of small business owners, July 2014, <http://asbcouncil.org/poll-small-business-owners#Water>