September 27, 2017

U.S. Environmental Protection Agency
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

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Re: Docket No. EPA-HQ-OW-2017-0203
Comments on the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Definition of "Waters of the United States" – Recodification of Pre-existing Rules 82 Fed. Reg. Vol.82, No. 143/Thursday July 27, 2017

The undersigned agricultural organizations appreciate the opportunity to comment on the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' (Corps) (together, "the Agencies") proposed rule: Definition of "Waters of the United States"—Recodification of Pre-existing Rules. 82 Fed. Reg. Vol. 34899 (July 27, 2017) ("Proposed Rule"). The agricultural organizations strongly support the Agencies' proposal to rescind the Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) ("2015 Rule"). We also recommend that the agencies move quickly to re-issue a proposed new "waters of the U.S." definition that is supported by and consistent with the text of the Clean Water Act (CWA), Supreme Court precedent, Constitutional limits and the balance of federal and state rights and responsibilities that Congress intended.

The 2015 Rule Raises Significant Concerns

In enacting the CWA, Congress exercised its commerce power over navigation and granted EPA and the Corps specific, limited powers to regulate navigable waters, defined as "waters of the United States." Congress recognized and sought to preserve the States' traditional primary authority over land and water use. For years, the agencies' regulations and guidance documents have attempted to expand the definition of "waters of the United States" beyond its constitutional and statutory limits. On two occasions, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (*SWANCC*), and *Rapanos v. United States*, 547 U.S.

715 (2006), the Supreme Court recognized the Congressional limits placed on CWA jurisdiction and invalidated the agencies' sweeping assertions of regulatory authority. Despite this history, the 2015 Rule ignores the limits and structure that Congress put in place, as well as the limits recognized by the Supreme Court, and continues the agencies' practice of vague and overbroad assertions of CWA jurisdiction. Such broad overreach violates the Constitutional rights of the regulated public as well as the traditional authority of the States over land and water use and protection, which Congress explicitly sought to preserve.

The Supreme Court has found that the agencies' broad assertions of CWA jurisdiction stretched the outer limits of the Commerce Clause. The Rule the agencies now propose to rescind also asserts expansive jurisdiction that is well beyond the commerce authority Congress exercised in enacting the CWA. Even EPA and the Corps acknowledge in the preamble to the proposed rule that "constitutional concerns . . . led the Supreme Court to decline to defer to agency regulations in *SWANCC* and *Rapanos*." 79 Fed. Reg. at 22,259.

The *SWANCC* Court held that although the term "navigable waters" is to be interpreted broadly, the term "navigable" has meaning and cannot be read out of the statute. *SWANCC*, 531 U.S. at 172. The word "navigable," the Court found, "has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172 (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408 (1940)). In light of Congress's intent to exercise its traditional "commerce power over navigation," *id.* at 168 n.3, the Corps' assertion of jurisdiction over sand and gravel pits based on their use by migratory birds raised "significant constitutional questions," *SWANCC*, 531 U.S. at 174. As such, the Court held that extending CWA jurisdiction to isolated, non-navigable waters like those at issue in *SWANCC* "is a far cry from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *Id.* Similarly, the Supreme Court in *Rapanos* found that the agencies' assertion of jurisdiction under the "any connection" theory over wetlands that were *not* adjacent to traditional navigable waters "stretch[ed] the outer limits of Congress's commerce power." *Rapanos*, 547 U.S. at 738 (plurality). Therefore, according to the Supreme Court, the Constitution allows for the CWA to reach more than "navigable-in-fact" waters, but asserting

jurisdiction over an area based on a mere connection to a non-navigable water raises serious constitutional concerns.[1]

In Summary - The 2015 Rule Is Illegal Because -

1. The Rule is based on sweeping jurisdictional theories that were struck down in *SWANCC* and *Rapanos*. The Rule improperly asserts jurisdiction over non-navigable features, such as isolated wetlands, ephemeral drainages, and isolated ponds, essentially reading the term *navigable* out of the CWA.
2. The Rule expands jurisdiction well beyond what the CWA's text and structure allows. The agencies disregarded statutory checks on their power and distorted relevant Supreme Court precedent.
3. The process by which the rule was developed violated basic tenets of administrative law. The agencies failed to reopen the comment period after making fundamental changes to the Rule, and they withheld the key scientific report on which the Rule rested until after the comment period closed.
4. The agencies refused to undertake required economic and environmental analyses, including a mandatory analysis of small business impacts and consideration of less burdensome alternatives; engaged in an unprecedented propaganda campaign to promote the Rule and rebuke its critics, displaying a closed mind even during the public comment period; and lobbied against legislative efforts to stop the Rule, which the U.S. Government Accountability Office has concluded was illegal.
5. The Rule is Unconstitutional because -
    a. The Rule violates Due Process Clause protections that guard against laws that fail to put the public on notice of what is prohibited or that give government agents unchecked discretion to enforce the law in arbitrary and discriminatory ways. The

[1] Professor Jonathan Adler, a prominent constitutional scholar, has noted that, by defining "navigable waters" to "include all waters and wetlands irrespective of their navigability or relationship to interstate commerce, . . . the federal government may have asserted regulatory authority beyond that authorized by the Commerce Clause." *See*, *Constitutional Considerations: State vs. Federal Environmental Policy Implementation*, Hearing before the House Subcomm. on Environment and the Economy (Testimony of Jonathan H. Adler) at 11 (July 11, 2014), *available at* http://docs.house.gov/meetings/IF/IF18/20140711/102452/HHRG-113-IF18-Wstate-AdlerJ-20140711.pdf.

Rule offends both prongs of the vagueness doctrine. It opens regulated entities to severe civil and criminal penalties that rest on nebulous standards like "more than speculative or insubstantial," "similarly situated," and "in the region," and on ambiguous definitions of terms like "ordinary high water mark." These uncertain standards are impossible for the public to understand or the agencies to apply consistently.

b. The Rule also exceeds the agencies' power under the Commerce Clause and it usurps State authority and the CWA's federalist structure. The Rule regulates countless isolated and non-navigable features that are not channels of commerce and have no substantial effect on interstate commerce. The Rule's sweeping assertion of federal jurisdiction upsets the Congressionally mandated balance between state and federal authority without any warrant in the text or history of the CWA, and in direct contradiction of 33 U.S.C. 1251(b).

The Definition of "Waters of the United States" Is Critically Important to Agriculture

Farmers and ranchers support clean water and work hard to protect our natural resources. But the 2015 Rule has more to do with land than water. It is a land grab, pure and simple, that:

- Creates a huge regulatory burden for farmers, ranchers, and others who depend on their ability to work the land;
- Increases costs for farmers, ranchers and others; and
- Produces confusion and uncertainty.

In particular the so-called Clean Water Rule provided none of the clarity and certainty it promised. Instead, it created confusion and risk by providing the Agencies with almost unlimited authority to regulate, at their discretion, any low spot where rainwater collects, including common farm ditches, ephemeral drainages, agricultural ponds, and isolated wetlands found in and near farms and ranches across the nation. The Rule defines terms like "tributary" and "adjacent" in ways that make it impossible for a typical farmer or rancher to know whether the specific ditches or low areas at his or her farm will be deemed "waters of the U.S." These definitions are certainly broad enough, however, to give regulators (and citizen plaintiffs) plenty

of room to assert that such areas are subject to CWA jurisdiction. The agencies did not argue that they need to regulate farming and ranching to protect navigable waters—and in fact denied that farming and ranching would face any additional regulation under the rule. Yet, the Rule provides sweeping authority to require permits for countless ordinary farming and ranching practices on fields, pastures and ranges nationwide.

The Agencies claimed the Rule was faithful to key Supreme Court decisions, yet the Supreme Court admonished the Agencies not to rely on the OHWM indicator as a basis for identifying jurisdictional features. The plurality opinion in *Rapanos v. United States* criticized the use of the OHWM as an indicator of jurisdiction because it "extended the waters of the United States to virtually any land feature over which rainwater or drainage passes and leaves a visible mark—even if only the presence of litter and debris." 547 U.S. 715, 725 (2006) (internal quotations omitted). Justice Kennedy rejected the OHWM as providing "no such assurance" of a reliable standard for determining a significant nexus. *Id*. at 780-81 (Kennedy. J., concurring in the judgment).

The 2015 Rule Fails to Respect Cooperative Federalism

The Rule was driven by the mistaken view that protection of water resources depends on extending federal jurisdiction to almost all waters—including landscape features that stretch the bounds of the concept of "water," let alone "navigable water." As a result, it defines "waters of the U.S." so broadly as to impermissibly "readjust the federal-state balance" and ignore "Congress['s] cho[ic]e to 'recognize, preserve, and protect the primary responsibilities and rights of States … to plan the development and use … of land and water resources." *SWANCC*, 531 U.S. at 174 (quoting 33 U.S.C. § 1251(b)). The Supreme Court ordinarily expects a "'clear and manifest' statement from Congress" to authorize "an unprecedented intrusion into traditional state authority" over the regulation of land and water use. *Rapanos*, 547 U.S. at 738. The phrase "waters of the United States" hardly qualifies as the "unmistakably clear" statutory language necessary to show that "Congress intend[ed] to alter the usual constitutional balance between the States and the Federal Government." *Vermont Agency of Natural Res. v. United States*, 529 U.S. 765, 787 (2000). And there is no doubt that the regulation of land and water use by the Agencies

would displace a "quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982); see also *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (describing the traditional "authority of state and local governments to engage in land use planning"); *City of Edmonds v. Oxford House*, 514 U.S. 725, 744 (1995) ("land-use regulation is one of the historic powers of the States"). The CWA cannot lawfully be used by the Agencies to achieve what amounts to nationwide land use zoning authority.

The 2015 Rule Should Be Rescinded

We applaud EPA for taking this important first step toward developing a new definition of waters of the United States that will protect water quality while also promoting economic growth, minimizing regulatory uncertainty, and respecting the proper roles of Congress and the states under the Constitution.

The 2015 Rule was stayed by both a federal district court and a federal court of appeals due to its apparent legal flaws and the substantial harm it would cause—particularly to the state agencies forced to implement it. Challengers raised numerous substantive and procedural defects in the Rule, including that the rule exceeds EPA's statutory authority, imposes burdensome regulatory uncertainty, was finalized in violation of mandatory procedural requirements designed to ensure a well-informed result, and is otherwise unlawful. In all, the Rule was challenged in multiple courts by all sides (31 states and 53 non-state parties, including environmental groups, state and local governments, farmers, landowners, developers, businesses, and recreation groups).

The Agencies have valid and numerous justifications to rescind the 2015 Rule because the 2015 Rule's provisions are, in various respects, beyond the Agencies' statutory authority, inconsistent with Supreme Court precedent, and contrary to the goals of the CWA, including the Act's goal to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). The Agencies' failure to seek input from state and local entities during the development of the 2015 Rule contributed to the Rule's legal flaws and lack of clarity.

There are ample reasons to simply rescind the 2015 rule—period—to maintain the status quo indefinitely rather than move forward with such a dangerous and unlawful regulation. However, the agricultural organizations also support the Agencies' plan to undertake a substantive rulemaking to reconsider the definition of "waters of the United States." There are many flaws with the pre-2015 regulations and guidance documents that should be addressed through a new rulemaking. We will continue to support a rulemaking to clearly articulate the extent of federal CWA authority.

In closing, we appreciate this opportunity to support the Agencies' proposal to rescind the Clean Water Rule: Definition of "Waters of the United States and we ask the Agencies to move quickly to propose a new "waters of the U.S." definition.

Respectfully submitted,

Agri-Mark, Inc.
Alabama Cattlemen's Association
American Dairy Coalition
American Farm Bureau Federation
American National Cattlewomen
American Sugarbeet Growers Association
Arizona Pork Council
Association of Equipment Manufacturers (AEM)
California Dairies, Inc.
California Farm Bureau Federation
California Pork Producers Association
California Wool Growers Association
Colorado Cattlemen's Association
Colorado Farm Bureau Federation
Colorado Livestock Association
Colorado Pork Producers Association
Dairy Farmers of America, Inc.

Dairy Producers of Utah
Exotic Wildlife Association
Farm Credit East
FarmFirst Dairy Cooperative
Florida Cattlemen’s Association
Florida Farm Bureau Federation
Florida Fruit & Vegetable Association
Georgia Farm Bureau Federation
Georgia Pork Producers Association
Gulf Citrus Growers Association
Idaho Dairymen’s Association
Idaho Farm Bureau Federation
Idaho Pork Producers Association
Illinois Beef Association
Illinois Pork Producers Association
Indiana Farm Bureau Federation
Indiana Pork Advocacy Coalition
Iowa Farm Bureau Federation
Iowa Pork Producers Association
Kansas Livestock Association
Kentucky Pork Producers Association
Louisiana Farm Bureau Federation
Michigan Cattlemen's Association
Michigan Farm Bureau Federation
Michigan Pork Producers Association
Minnesota Corn Growers Association
Minnesota Farm Bureau Federation
Minnesota Pork Producers Association
Minnesota State Cattlemen's Association
Mississippi Farm Bureau Federation
Mississippi Pork Producers Association

Missouri Dairy Association
Missouri Farm Bureau Federation
Missouri Pork Association
Montana Pork Producers Council
National All-Jersey, Inc.
National Aquaculture Association
National Association of State Departments of Agriculture
National Cattlemen’s Beef Association
National Cotton Council
National Council of Farmer Cooperatives
National Milk Producers Federation
National Pork Producers Council
National Sorghum Producers
National Turkey Federation
National Wheat Growers Association
Nebraska Cattlemen's Association
Nebraska Farm Bureau Federation
Nebraska Pork Producers Association
New Mexico Cattle Growers Association
New Mexico Wool Growers Association
New York Farm Bureau Federation
New York Pork Producers Coop. Inc.
North Carolina Farm Bureau Federation
North Carolina Pork Council
North Dakota Pork Council
North Dakota Stockmen's Association
Northeast Dairy Farmers Cooperatives
Ohio Cattlemen's Association
Ohio Pork Council
Oklahoma Cattlemen's Association
Oklahoma Pork Council

Oregon Dairy Farmers Association
Pacific Seed Association
Panhandle Peanut Growers Association
Professional Dairy Managers Of Pennsylvania
Public Lands Council
South Carolina Peach Association
South Dakota Cattlemen's Association
South Dakota Dairy Producers
South Dakota Pork Producers Council
South East Dairy Farmers Association
Southeast Milk Inc.
Southwest Council of Agribusiness
St. Albans Cooperative Creamery, Inc.
Texas and Southwestern Cattle Raisers Association
Texas Association of Dairymen
Texas Cattle Feeders Association
Texas Pork Producers Association
Upstate Niagara Cooperative, Inc.
U.S. Cattlemen’s Association
Utah Farm Bureau Federation
Virginia Cattlemen's Association
Virginia Poultry Federation
Washington Cattle Feeders
Washington Cattlemen's Association
Washington State Dairy Federation
Western Peanut Growers Association
Western States Dairy Producers Association
Western United Dairymen
Wisconsin Farm Bureau Federation
Wisconsin Pork Association
Wyoming Stock Growers Association