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CLEAN WATER ACT – DEFINITION OF "WATERS OF THE U.S."

Issue:

The U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) finalized a rule significantly expanding the definition of "waters of the United States" under the Clean Water Act (CWA). This regulation expands federal authority beyond the limits approved by Congress and affirmed by the U.S. Supreme Court; the impact on farmers and ranchers will be enormous. Farm Bureau is seeking to require EPA to withdraw this regulation and propose a new rule that reflects not only the limitations imposed by both Congress and the Supreme Court, but the views offered after consultation with states.

Background:

NAVIGABLE WATERS

Two Supreme Court decisions concluded that the term "navigable waters" under the CWA does not include *all* waters. The regulation, which was aggressively pushed by both EPA and environmental groups, allows EPA and the Corps to use the CWA to regulate activities on dry land and in isolated waters. Such an over-reach goes well beyond anything contemplated by the authors of the 1972 law.

Legislative/Regulatory Status:

The final EPA and Corps rule defining the scope of waters protected under the CWA went into effect on Aug. 28, 2015. Litigation challenging the rule is ongoing and will be for years to come. The U.S. Court of Appeals issued a nationwide stay of the rule, but the rule is nonetheless final.

The rule effectively eliminates any constraints the term "navigable" imposes on the Corps' and EPA's CWA jurisdiction. The rule grants regulatory control over virtually all waters, assuming a breadth of authority Congress has not authorized. The list of waters deemed "non-navigable" is exceptionally narrow, providing that few, if any waters, would fall outside federal jurisdiction. Such a shift in policy means that EPA and the Corps can regulate any or all waters found within a state, no matter how small or seemingly unconnected to a federal interest. Congress should not permit the agencies to adopt such an approach.

Farm Bureau opposes this rule, which fails to respect the limits of federal CWA jurisdiction articulated by the U.S. Supreme Court in SWANCC and Rapanos. The Supreme Court rejected the notion that CWA jurisdiction extends to waters with "any" connection to navigable waters (no matter how tenuous) and rejected the agencies' "land is waters" approach.

The final rule provides none of the clarity and certainty it promises. Instead, it creates confusion and risk by granting the agencies 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 ranchers to know whether the specific ditches, ephemeral drains 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 rule will give the agencies sweeping new authority to regulate land use, which they may exercise at will, or at the whim of a citizen plaintiff.

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AFBF Policy:

Farm Bureau has significant concerns with the regulation and believes it expands federal jurisdiction, resulting in the imposition of burdensome requirements on agricultural producers.

Farm Bureau supports congressional efforts to have EPA and the Corps withdraw the rule and limit funding for implementation.

Farm Bureau supports a rule that conforms to the limits approved by Congress and affirmed by the U.S. Supreme Court.

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