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TESTIMONY

Potential Impacts of Proposed Changes to the Clean Water Act Jurisdiction Rule

Before the House Transportation and Infrastructure Committee

Subcommittee on Water Resources and Environment

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President

American Farm Bureau Federation

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I. **Introduction**

The American Farm Bureau Federation thanks the Committee for holding this hearing and welcomes the opportunity to offer its perspective about the impacts of the Environmental Protection Agency's and Army Corps of Engineers' "Waters of the U.S." proposed rule. AFBF has carefully analyzed the proposed rule and has concluded that it poses a serious threat to farmers, ranchers and any other individual or business whose livelihood depends on the ability to use the land.

The proposal published April 21, 2014, in the Federal Register would categorically regulate as "navigable waters" countless ephemeral drains, ditches and other features across the countryside that are wet only when it rains and may be miles from the nearest truly "navigable" water. It would also regulate small, remote "wetlands"—which may be nothing more than low spots on a farm field— just because those areas happen to be adjacent to a ditch or located in a floodplain. EPA says its new rule will reduce uncertainty, and I suppose that much is true. There will not be much uncertainty if the federal government could regulate every place where water flows or stands when it rains.

A picture is worth a thousand words, so I would ask that members of the committee look at some of the images EPA has used to publicize the proposed rule. Compare those images with the types of features commonly found on agricultural land, which we believe would be swept inappropriately into federal jurisdiction.

EPA's images:

Images from Farm Bureau members:

We believe that the proposed categorical regulation of these land features amounts to an attempted end-run around Congress and two Supreme Court rulings. The Supreme Court, in separate decisions in 2001 and 2006, ruled that Congress meant what it said in the Clean Water Act: "navigable waters" does not mean all waters. Yet the proposal will significantly expand the scope of "navigable waters" subject to Clean Water Act jurisdiction by regulating innumerable small and remote "waters"—many of which are not even "waters" under any common understanding of that word. To farmers, ranchers and other landowners, these features look like land, and this proposed rule looks like a land grab.

Contrary to EPA's assurances to farmers and ranchers, this expansion of federal regulatory reach would essentially negate several longstanding statutory exemptions for agriculture. Congress established these exemptions to prevent federal permit requirements—and potential permitting roadblocks—for working the land and growing our nation's food, fiber, and fuel. Under this rule, farmers and ranchers will have to get federal permits for ordinary and essential agricultural activities, just because those activities may cause dirt, fertilizer or crop protection products to fall into a dry ditch or a low spot on the field.

In addition to our concerns about the rule itself, we are concerned that EPA and the Corps have established a 90-day comment period that directly coincides with the planting and growing season, when farmers and ranchers have limited time to learn about the rule and comment on it. We ask the Committee to support an extension of the comment period. We also urge committee members to vigorously oppose the rule as it is currently proposed.

II. The Proposed Rule Significantly Expands the Definition of "Navigable Waters"

The proposed rule adopts three primary definitional changes that result in a significant expansion of federal control over land and water resources across the nation.

- First, the proposed rule regulates **"ephemeral streams" as tributaries.** "Ephemeral streams" are just dry land most of the time. To a farmer, an "ephemeral stream" is often simply a low area across the farm field.

- Second, the proposed rule categorically regulates as "tributaries" ***all* ditches** that *ever* carry *any* amount of water that eventually flows (over any distance and through any number of other ditches) to a navigable water. Ditches are commonplace features prevalent across farmland (and the rest of the nation's landscape).

- Third, the proposed rule would regulate all waters deemed "**adjacent" to other jurisdictional waters (including dry ditches and ephemerals) plus any "other waters" that have a "significant nexus."** These categories have the potential to sweep into federal jurisdiction vast numbers of small, isolated wetlands, ponds and similar features on farmlands nationwide.

These changes, described in more detail below, will trigger substantial new roadblocks and costs for farming, ranching, the construction of homes, businesses and infrastructure, and innumerable other activities across the countryside. EPA's public relations campaign notwithstanding, the

proposed rule expands Clean Water Act jurisdiction beyond its current scope (as properly limited by the Supreme Court) and far beyond the scope intended by Congress in 1972.

A. Ephemeral Drainages Are "Tributaries" Under the Proposed Rule.

The American Heritage Dictionary (1982) defines "tributary" as "a stream or river flowing into a larger stream or river." This common understanding of "tributary" simply does not include so-called "ephemerals"—low areas or ditches that carry water only when it rains.

The proposed rule, however, would define "tributary" to include all areas of dry land where rainwater sometimes flows through an identifiable path or channel, so long as that path or channel ultimately leads (directly or through any number of other paths or channels) to a creek or stream that in turn ultimately flows to navigable waters. **The agencies propose to identify a "tributary" based on the presence of a bed, bank, ordinary high water mark (OHWM) and any minimal amount of flow** that eventually reaches navigable waters.

- The **terms "bed" and "bank"** simply mean land with lower elevation in between lands of higher elevation. All but the flattest terrain will have natural paths of lower elevations that water—obeying the laws of gravity—will follow.

- **"Ordinary high water mark"** is an equally broad term that encompasses any physical sign of water flow, such as changes in the soil, vegetation or debris. When rainwater flows through any path on the land, it tends to leave a mark. The agencies themselves recognize that the definition of OHWM is vague, ambiguous and inconsistently applied.[1] In fact, an official from the Corps' Philadelphia District has observed that, due to inconsistent interpretations of the OHWM concept, as well as inconsistent field indicators and delineation practices, identifying precisely where the OHWM ends is nothing more than a judgment call.[2]

- The agencies make no bones about their view that the **frequency, duration and volume of flow will no longer have any relevance** to determining whether a feature, like the low spot on a farmer's field, is jurisdictional. Low areas where rainwater channels will be "navigable waters" if they carry any rainwater that eventually reaches an actual navigable water.

We all know that water flows downhill, and, at some point, much of that water eventually finds its way into a creek, stream or river. Yet based on nothing more than the flow of rainwater along a natural pathway across the land, the agencies propose to categorize vast areas of otherwise dry land as "tributaries" and therefore "navigable waters." These are areas that the average person would not recognize as a stream, let alone "navigable waters" appropriate for regulation by two federal agencies. It would be funny if it were not so frightening.

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[1] GAO Report "Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, Feb. 2004.

[2] Presentation by Matthew K. Mersel, USACE, "Development of National OHWM Delineation Technical Guidance," March 4, 2014.

The following photos show a farm field in central Michigan over the course of two weeks. The path where rainwater flowed on April 14, 2014, was almost completely dry by April 25. However, demarcations in the vegetation show that water flowed there. If the water that flowed through this field eventually found its way to a creek, stream or ditch that in turn eventually flowed to navigable waters, then this farmer's field could be "navigable water" under the proposed rule.

A bed, bank and OHWM are common features on lands that are perfectly dry, except when it rains. Indeed, in *Rapanos*, Justice Kennedy expressed deep concern that the physical indicators of a bed, bank and OHWM are so broad that they could be used to assert jurisdiction over waters that have *no* significant nexus to traditionally navigable waters. (547 U.S. at 781-82.) That is precisely what the agencies have done. Rather than asserting jurisdiction only where specific

features are found to have a significant effect on navigable waters (accounting for the volume of flow, proximity, etc.), the agencies classify ***all*** **ephemeral features as jurisdictional waters if *any* flow can reach a traditional navigable water**. Such a broad assertion of federal jurisdiction takes "waters of the U.S." far beyond what Congress intended in 1972—and far beyond what this body and the American public should tolerate.

B. Nearly Every Ditch Across the Country Could Be Regulated as a Tributary Under the Proposed Rule.

In its public outreach on the proposal, EPA repeatedly insists the rule "does not expand jurisdiction over ditches." This is simply false.

The proposed rule would **categorically regulate as "tributaries" virtually all ditches that *ever* carry *any* amount of water that eventually flows (over any distance and through any number of other ditches) to a navigable water**.

The only excluded ditches would be a narrowly defined (one might say mythical) category of ditches "excavated wholly in uplands," draining only uplands, and with less than perennial flow.[3] The preamble explains that this exclusion applies only to those ditches that are excavated in uplands (the term uplands is not defined in the proposed rule, but presumably means not waters or wetlands) at *all* points "along their entire length." 79 Fed. Reg. at 22,203.

The exception is essentially meaningless. **One would be hard pressed to find a ditch that *at no point along its entire length* includes waters or wetlands.**

- First, over the last several decades, the agencies have expanded their regulatory footprint by broadening the criteria for classifying land as "wetland" (e.g. expanding the list of wetland vegetation). In many cases, low spots on the landscape that were not considered wetlands in the '70s and '80s would certainly be considered wetlands today. Since the purpose of ditches is to carry water, many ditches will tend to develop "wetland" characteristics and therefore not be "wholly in uplands."

- Second, because the purpose of a ditch is to carry water, few ditches are excavated along the tops of ridges. The most logical places to dig stormwater ditches are at natural low points on the landscape. Clearly, most ditches will have some section that was excavated in a natural ephemeral drain or a low area with wetland characteristics. Such ditches will not qualify for the proposed exclusion for "wholly upland" ditches.

- Third, the "less than perennial flow" requirement will likely disqualify many irrigation ditches from the exclusion. Irrigation ditches do not just carry stormwater; they carry flowing water to fields throughout the growing season as farmers and ranchers open and close irrigation gates to allow the water to reach particular fields. These irrigation ditches

[3] The rule would articulate an additional "exclusion" for ditches that "do not contribute flow" of any amount to actual navigable waters. However, such ditches would not meet the expansive "tributary" definition anyway. Further, such ditches are presumably quite rare, as the primary purpose of most (if not all) ditches is to carry water.

> are typically close to larger sources of water, irrigation canals or actual navigable waters that are the source of irrigation water—and they channel return flows to those source waters. In arid sections of the nation, these irrigation ditches, and the valuable surface water that flows through them, are highly regulated by state authorities that appropriate water based on vested water rights and permit systems. Under the proposed rule, such irrigation ditches will also be federally regulated as "tributaries."

Given the expansive definition of "tributary" and the extremely limited exclusion, the vast majority of ditches in the U.S. will be categorically regulated as "navigable waters" under the proposed rule. The results could be startling. For example, the typical suburban homeowner would likely be surprised to find that EPA and the Corps view the roadside ditch at the edge of her lawn as "navigable water" worthy of the full weight of Clean Water Act protections. She would also likely be surprised to find that landscaping, insect control or even mowing the grass in that ditch are violations of the Clean Water Act. Yet that will be the result of the proposed rule.

Will EPA seek enforcement against a homeowner mowing the lawn? Probably not. But the fact that it *could* illustrates the ridiculous implications of the proposed rule. In addition, if the agencies will have to pick and choose which discharges they *actually* regulate, then the rule hardly provides the certainty that the agencies claim.

C. Virtually Every Other Water Feature Can Be Regulated Under the Proposed Rule as Either an "Adjacent Water" or "Other Waters."

The proposed rule would regulate all waters deemed "adjacent" to other "waters of the U.S."—including "tributaries" (ditches and ephemerals). The agencies broadly define "adjacent" as "neighboring," which includes features located in the "riparian area"[4] or floodplain of any other jurisdictional water, or features with a "shallow subsurface … or confined surface hydrologic connection."[5] Whether any of these characteristics exist will be determined in the agency's "best professional judgment." 79 Fed. Reg. at 22,208. Thus, the exact scope of "adjacent" waters is left to the vagaries of inconsistent regulators.

Long, linear features, such as ditches, will have floodplain and riparian areas around them—and will often have "hydrologic connections" to nearby wetlands or ponds. For this reason, the inclusion of small, isolated wetlands, ponds and similar features that are "adjacent" to ditches would sweep into federal jurisdiction countless small and otherwise remote wetlands and ponds that dot the nation's farmlands.

The following image shows the 100-year and 500-year floodplain of Muddy Creek (a true navigable water) superimposed on a farmer's property in Missouri. Under the proposed rule,

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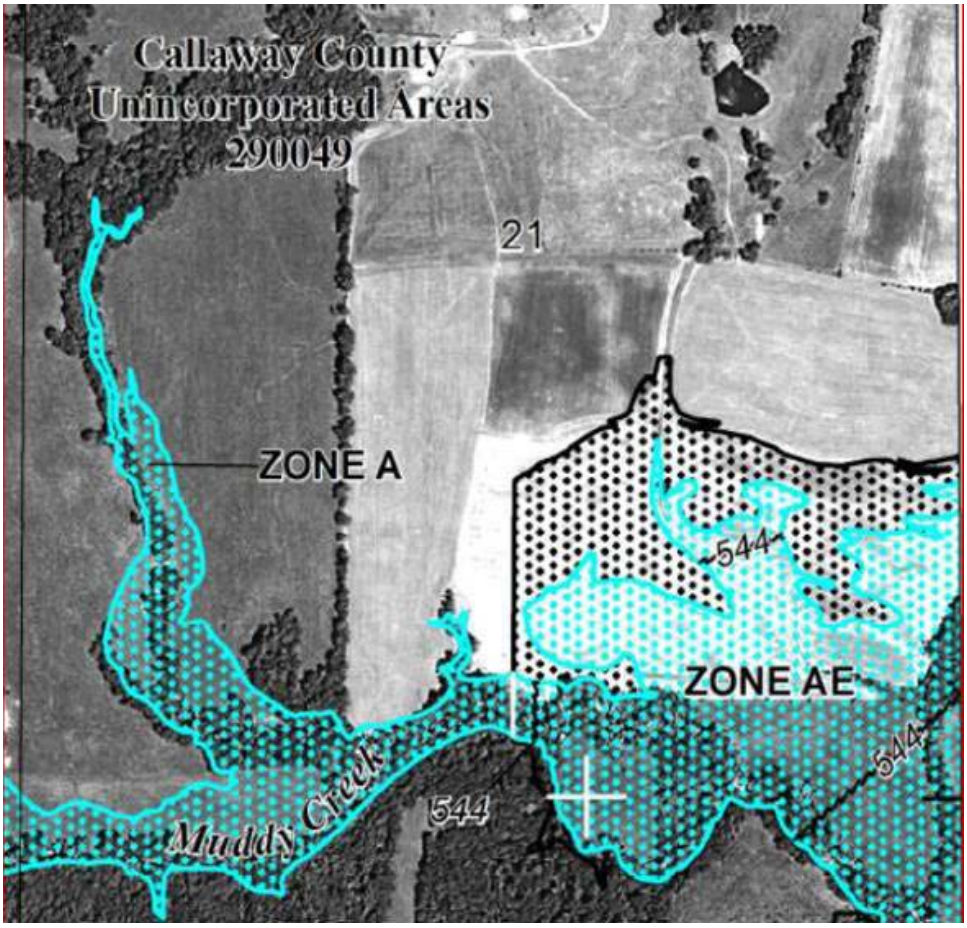
[4] "Riparian areas" are defined in terms useful only to a hydrologist: "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area."

[5] The preamble explains that wetlands or ponds that "fill and spill" to ditches or other ephemeral features during intense rainfall would be viewed as having a confined surface hydrologic connection to those features. 79 Fed. Reg. at 22,208. Such wetlands or ponds would therefore be "navigable waters," no matter how small or remote they are from true navigable waters.

EPA and the Corps could determine any "water" within the shaded areas to be "adjacent" to Muddy Creek. Of course, more "waters" still could be swept in as "adjacent" to the ditches and ephemerals that flow toward Muddy Creek.



For those "other waters" that do not fall within the broad categories of "tributary" or "adjacent" waters (e.g., even more isolated wetlands, ponds and the like), the proposed rule establishes jurisdiction where those waters have a "significant nexus" to another "water of the U.S." "Significant nexus" means "more than speculative or insubstantial effect" that a water, alone or in combination with other similarly situated waters in the region, has on the "chemical, physical or biological integrity" of a navigable water. The same "region" would be interpreted as the "watershed that drains to the nearest traditional navigable water, interstate water or the territorial seas…" 79 Fed. Reg. at 22,212. The preamble provides page after page of potential scientific indicators of physical, biological and chemical connections. *See* 79 Fed. Reg. at 22,213-14. The possibilities are so numerous and broad that regulators will have no difficulty finding a significant nexus for even the most minor features when combined with all similar features in the watershed.[6]

[6] For example, "[f]unctions of waters that might demonstrate a significant nexus include sediment trapping, nutrient recycling, pollutant trapping and filtering, retention or attenuation of flood waters, runoff storage, export of organic matter, export of food resources, and provision of aquatic habitat." 79 Fed. Reg. at 22,213.

D. EPA's Public Statements Regarding the Proposed Rule are Misleading.

The proposed rule and EPA's public statements in support of it are misleading to the public and regulated communities. The proposal is cloaked in scientific-sounding jargon and words that evoke images of rivers, streams and swamps—images that bear no resemblance to the land features the rule would regulate. For example:

- "Waters" (as used in the rule) can be ditches or low spots on a field that are dry except when it rains.

- "Bed, bank and ordinary high water mark" includes land with only subtle changes in elevation—any land where rainwater naturally channels as it flows downhill.

- "Wetland" has come to mean areas where water-tolerant vegetation can be found, even if the land isn't particularly "wet" most of the time.

To the general public, such terms may conjure images of flowing waters or swamps appropriate for Clean Water Act protection and regulation. In reality, they are being used to regulate *land* as if it were *water*—and "navigable water" at that.

EPA has claimed repeatedly that the proposed rule would not assert jurisdiction over "new types of waters" or beyond waters that were "historically covered" and would "not expand jurisdiction over ditches." These statements are misleading, at best—and the last one is simply false.

First, the text and preamble of the current regulations (promulgated in 1986 by the Corps and in 1988 by EPA) contain *no reference* to "ephemeral" streams or drains. Likewise, the regulations say nothing to suggest that ditches can be "tributaries." EPA and the Corps have asserted in *guidance* and in *enforcement actions* that certain ditches and "ephemeral streams" are subject to CWA jurisdiction as "tributaries," but that is ad hoc "regulatory creep," not proper notice-and-comment rulemaking. In other words, the fact that EPA and the Corps have at times asserted jurisdiction over these "types" of features does not make it right—and does not make it lawful to categorically regulate virtually all ditches and ephemerals.

Second, "historically"—i.e. before the Supreme Court's ruling in *SWANCC*—there was no real limit to the scope of CWA jurisdiction as interpreted by EPA and the Corps. The agencies unlawfully asserted jurisdiction over any waters to the full reach of the interstate commerce clause. That interpretation was resoundingly rejected by the Supreme Court in *SWANCC*. Since 2007, however, agency guidance has asserted jurisdiction over "non-navigable tributaries" only after a case-by-case analysis of whether a particular feature has a "significant nexus" to true navigable waters. Key to that analysis is the volume, duration and frequency of flow, as well as proximity to downstream navigable waters. Under the proposed rule, the volume, duration and frequency of flow—as well as distance to navigable waters—are deemed *irrelevant*. *See* 79 Fed. Reg. at 22,206 ("tributaries that are small, flow infrequently, or are a substantial distance from the nearest [navigable water] are essential components of the tributary network…"). All such ditches and ephemeral drains will be *categorically* deemed to be "navigable waters" if they carry *any* flow that *ever* reaches navigable waters. That—whether EPA says so or not—is a substantial expansion of federal jurisdiction.

EPA makes much of the fact that the proposed rule "preserves" existing Clean Water Act exemptions and exclusions for agricultural activities. But under the proposed rule, ordinary farming and ranching activities will require a Clean Water Act permit despite Congress' clear intent to exempt those activities.

According to Administrator McCarthy's March 25 op-ed aimed specifically at the agricultural community:

> The rule keeps intact existing Clean Water Act exemptions for agricultural activities that farmers count on. But it doesn't stop there—it does more for farmers by actually expanding those exemptions. We worked with USDA's Natural Resources Conservation Service and USACE to exempt [56] additional conservation practices.

As explained below, these assurances also are misleading—another attempt to cloak the true impact of this rule.

III. Statutory Exemptions Intended to Prevent Federal Permit Requirements for Common Farming and Ranching Activities Will Be Rendered Almost Meaningless Under the Proposed Rule.

When it adopted the Clean Water Act, Congress specifically included several critical statutory exemptions for agriculture, each of which is severely undermined by the proposed rule.

- Section 404 exemption for "normal" farming and ranching activities
- Section 404 exemption for construction of farm or stock ponds
- Agricultural stormwater discharges

These exemptions demonstrate a clear and consistent determination by Congress NOT to impose Clean Water Act permit requirements on ordinary farming and ranching activities— weather-dependent and time-sensitive activities that are necessary for the production of our nation's food, fiber and fuel. However, the proposed rule's assertion of jurisdiction over ditches and low spots on farm fields will render those exemptions almost meaningless.

A. Section 404(f) Exemption for "Normal" Farming and Ranching Activities

In the mid-1970s, when the Corps began to define "navigable waters" to include certain wetlands—so as to make farming, ranching and forestry practices within those wetlands potentially subject to Clean Water Act regulation—Congress amended the Act to specifically exempt "normal" farming, ranching and forestry from section 404 "dredge and fill" permit requirements. 33 U.S.C. § 1344(f)(1). Thus, "normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices" are generally exempt from section 404 permitting requirements. 33 U.S.C. § 1344(f)(1)(A). Only if the activity's purpose is to convert an area of navigable water into a use to which it was not

previously subject, or where the reach of navigable waters may be reduced, (e.g., to convert wetland to non-wetland) will the activity require a 404 permit. 33 U.S.C. § 1344(f)(2) (the so-called "recapture" provision).

On March 25, 2014, the agencies issued an immediately effective "interpretive rule" concerning the application of "normal" farming exemptions to 56 listed conservation practices. Although EPA claims to have "expanded" agriculture's Clean Water Act exemptions through this interpretive rule, that is not true. Rather, as described below, the interpretive rule provides no meaningful protection from the harmful implications of the expansion of "navigable waters" and, in fact, further narrows the already limited "normal" farming exemption.

1. The normal farming exemption only applies to section 404 "dredge and fill" permitting, not NPDES permitting or other Clean Water Act requirements.

The normal farming exemption only applies to the section 404 "dredge and fill" permit program. It provides no protection from potential liability and requirements of any other part of the Clean Water Act, including section 402 National Pollutant Discharge Elimination System (NPDES) permit requirements for discharges of other "pollutants." The agencies' proposed expansion of jurisdiction means that everyday weed control, fertilizer applications and any number of other commonplace and essential farming activities may trigger Clean Water Act liability and section 402 permit requirements if even small amounts of dust, nutrients or chemicals fall into dry ditches, ephemerals or low spots (small "wetlands") located beside, between or within farm fields.

The normal farming exemption also will not protect farmers from new restrictions (or prohibitions) on farming practices that arise from the establishment of water quality standards and "total maximum daily loads" under Clean Water Act section 303 for the ditches, ephemerals and other features EPA now plans to sweep into federal jurisdiction. These requirements apply to all "navigable waters" under the Act, and thus they will apply to dry ditches, ephemerals and low spots on fields, too, if those features are defined as jurisdictional waters.

2. The normal farming exemption only applies to farming or ranching ongoing since the 1970s.

Since 1977, the agencies have narrowly interpreted the "normal" farming, ranching and silviculture exemption to apply only to "established" operations "ongoing" since 1977 (when the exemption was enacted and the Corps' implementing regulations were adopted). *See, e.g., U.S. v. Cumberland Farms of Connecticut, Inc.*, 647 F. Supp. 1166 (D. Mass. 1986), *affirmed* 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988). Newer farms, or farms where farming ceased since 1977 and later resumed, or sometimes even farms that have switched from one crop to another since 1977, will all fall outside of the exemption. *See, e.g., Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 815 (9th Cir. 2001), *aff'd* 537 U.S. 99 (2002) (finding that conversion of ranch lands to orchards and vineyards falls outside normal farming exemption). Therefore, if the new interpretive rule provides any benefit for any farmers and ranchers, it will only be for those who have been farming or ranching continuously at the same location since 1977. *See* Interpretive Rule at 2.

Reading the preamble to the proposed rule closely, one can see how regulating ephemeral drains as "waters of the U.S." would render the normal farming exemption meaningless. The reason lies in the so-called "recapture" provision of section 404(f)(2). This provision negates the exemption where farming impairs the flow or reduces the reach of navigable waters. In the context of discussing ephemeral "tributaries" in the proposed rule, the agencies reveal that if plowing or discing the soil on farmland eliminates what would otherwise be an identifiable bed, bank and OHWM, that farming requires a section 404 permit because it has reduced the reach of jurisdictional waters. *See* 79 Fed. Reg. at 22,204, fn.8, and accompanying text. Of course, this means that any plowing that has already eliminated a bed, bank or OHWM of an ephemeral drain in a farm field without a 404 permit was (in the view of the agencies) a violation of the Act.

3. The agencies have further narrowed the normal farming exemption by making it contingent on compliance with NRCS standards.

To the extent a farmer or rancher has a long-standing operation that would qualify as "normal" farming and ranching, the new interpretive rule further narrows the existing exemption by requiring compliance with NRCS technical standards for the 56 listed conservation practices. Many of the listed "conservation practices" are extremely common farming and ranching practices—such as fencing, brush management and pruning shrubs and trees—which we believe are already exempt.

The agencies claim to be "clarifying" the exemption for 56 listed activities, but, at the same time, the interpretive rule *requires* compliance with specific NRCS standards—something that was never required before to qualify for the "normal" farming and ranching exemption. Therefore, the practical effect of the interpretive rule is to narrow the existing exemptions, rather than broaden them as EPA claims. The rule explicitly states that farmers who deviate from NRCS standards will not benefit from the exemption.[7] Farmers who could previously undertake these activities (which, again, include things as commonplace as fencing) as part of their "normal" farming or ranching now *must* comply with NRCS standards or risk Clean Water Act enforcement.

The interpretive rule does not clarify which regulatory agency has final authority on compliance with NRCS standards—but the answer appears to be EPA. The rule states that a farmer not enrolled in a USDA cost share program is responsible for ensuring the practice meets all NRCS criteria, and NRCS is responsible for ensuring the practice meets the criteria where there is a USDA contract. Ultimately, however, EPA has reserved its Clean Water Act authority to make all final determinations. Even if a farmer and NRCS believe that the practice meets the appropriate standards, EPA presumably could veto that determination.

The new rule also raises questions about the status of other practices for which NRCS has developed standards, but that are not included in the list of 56 conservation practices. Examples include "Residue and Tillage Management, Reduced Tillage" (practice #345), pond (practice #378), and cover crop (practice #340)." The implication of *not* listing these practices is that they

[7] *See* Interpretive Rule at page 2 ("To qualify for this exemption, the activities must be part of an 'established (i.e. ongoing) farming, silviculture, or ranching operation,' consistent with the statute and regulations. The activities must also be implemented in conformance with NRCS technical standards.").

will require a section 404 permit if any incidental discharge of "dredged or fill" material occurs. This could have a chilling effect on the implementation of conservation practices on farms and ranches.

Further, EPA and the Corps could alter or retract the interpretive rule at any time. Even for those farmers who may perceive value in the "assurances" offered by this new guidance, the fact that it could be changed or eliminated at any time, without advance public notice, robs them of that so-called assurance. For that matter, the standards to which the exemption is now tied can be unilaterally changed by NRCS at any time without rulemaking. We see little value or certainty for farmers under these circumstances.

B. Section 404 exemption for construction or maintenance of farm ponds

Another agriculture-related exemption in section 404 of the Act is the exemption for "construction or maintenance of farm or stock ponds or irrigation ditches." 33 U.S.C. § 1344(f)(1)(C). This provision exempts from 404 "dredge and fill" permit requirements any discharge of dredge or fill materials into waters of the U.S. for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches.

Through guidance and enforcement actions, the Corps has interpreted the farm pond exemption narrowly and applied the so-called "recapture" provision broadly. If construction or maintenance of the pond results in earth-moving activities that reduce the reach or change the hydrology of a water of the U.S., the Corps takes the position that the "recapture" provision applies and the discharge is unlawful without a permit. In the Corps' view, impounding a jurisdictional feature is an unlawful "dredge and fill" discharge, and the resulting impoundment is itself "waters of the U.S." 77 Fed. Reg. 22,188, 22,201 (Apr. 21, 2014). In the experience of many farmers, where wetlands or non-navigable "tributaries" are involved in farm or stock pond construction, the recapture provision essentially swallows the exemption. Farmers have been ensnarled in litigation and enforcement due to the creation of ponds that impound small ephemeral streams. *See, e.g.*, http://agfax.com/2014/03/21/epa-vs-rancher-clean-water-act-battle-dtn/ (EPA asserting jurisdiction over rancher's stock pond used to support ongoing farming activities).

The proposed rule will further limit farmers' and ranchers' ability to build and maintain farm ponds. As explained above, the proposed rule will establish jurisdiction over virtually every ephemeral drain as a "tributary." Thus, any impoundment of those drainage features will be an unlawful discharge absent a section 404 permit, and the resulting farm pond itself will become "waters of the U.S." In addition, any construction of a farm pond in a small low spot ("wetland") swept into Clean Water Act jurisdiction under the "adjacent" or "other waters" provisions of the proposed rule (discussed above) will also require a section 404 permit and will result in a pond that is itself waters of the U.S.

This aspect of the rule will affect countless (maybe most) farm and stock ponds. By expanding jurisdiction to include common ephemeral drains and isolated wetlands, the rule will prohibit the impoundment of these natural drainage or depressional areas that are often the *only* rational way to construct a farm or stock pond. Farm or stock ponds are typically constructed at natural low spots on the farm or ranch property, to capture stormwater that enters the pond through sheet

flow and ephemeral drains. Depending on the topography, pond construction may be infeasible without diking a natural drainage path on a hillside.

The proposal includes an exclusion from the definition of waters of the U.S. for "artificial lakes or ponds created by excavating and/or diking *dry land* and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing." This exclusion is almost meaningless because, as discussed above, "dry land" is interpreted to exclude anything that qualifies as a wetland or any ephemeral feature where stormwater naturally channels. This leaves little "dry" land available for the construction of farm ponds. Put simply, farm and stock ponds are not excavated on hill tops and ridges, they are excavated at low spots where water naturally flows and collects. Thus, the proposed farm pond exclusion will be meaningless for most farmers and ranchers.

C. Exemption for Agricultural Stormwater and Irrigation Return Flows

Another key agricultural exemption in the Clean Water Act applies to "agricultural stormwater discharges" and "irrigation return flows." Under this exemption, precipitation runoff and irrigation water from farms and ranches is specifically excluded from regulation as a "point source" discharge. The exemption applies even if the stormwater or irrigation water contains "pollutants" and is channeled through a ditch or other conveyance that might otherwise qualify as a "point source" subject to Clean Water Act section 402 NPDES permit requirements. The exemption shows Congress' clear intent to exclude farmers and ranchers from Clean Water Act liability and permitting for activities on farm and ranch lands that may result in "pollutants" being carried by precipitation or irrigation flows into navigable waters.

The proposed rule would severely undermine this exemption by regulating as "waters of the U.S." the very ditches and drains that carry stormwater and irrigation water from farms. As drafted, the statutory exemption applies to pollutants discharged to navigable waters *carried by* stormwater or irrigation water, which would typically flow through ditches or ephemeral drains. However, the exemption arguably does not cover the direct addition of pollutants into "navigable waters" by other means (such as materials that fall into or are sprayed into navigable waters).

Because stormwater and irrigation ditches and ephemeral drains are ubiquitous on farm and ranch lands—running alongside and even within farm fields and pastures—the proposed rule will make it impossible for many farmers to apply fertilizer or crop protection products to those fields without triggering potential Clean Water Act liability and permit requirements. A Clean Water Act pollutant discharge to navigable waters arguably will be deemed to occur each time even a *molecule* of fertilizer, pesticide or dust falls into the jurisdictional ditch, ephemeral or low spot—even if the feature is dry at the time of the purported "discharge."[8] Thus, farmers will have no choice but to "farm around" these features—allowing wide buffers to avoid activities that might result in a discharge—or else obtain an NPDES permit for farming. Technically, cattle or horses would need to be fenced out of ephemerals and low spots to avoid a direct "discharge" of manure. This is contrary to congressional intent and would present a substantial additional hurdle for farmers to conduct essential practices to grow and protect their crops and livestock.

[8] Courts have long held that there is no *de minimis* defense to Clean Water Act discharge liability.

IV. **Practical Implications for Farmers and Ranchers**

Farming is a water-dependent enterprise. Whether they are growing plants or animals, farmers and ranchers need water. For this reason, farming and ranching tend to occur where there is either plentiful rainfall or adequate water available for irrigation (via ditches). Not surprisingly, America's farm and ranch lands are an intricate maze of ditches and ephemeral drains. As explained above, under the proposed rule, virtually all of these features would be categorically regulated as "navigable waters."

If the drains and ditches that cross between, among and within farm fields and pastures are regulated as "navigable waters," the implications for farmers and ranchers will be disastrous. Except for the very narrow section 404 exemptions discussed above, regulating these features as jurisdictional "waters" would mean that *any* discharge of a pollutant (e.g., soil, dust, "biological material") into those ditches and drains is unlawful, absent a Clean Water Act permit. Typical farming activities, such as plowing, planting, discing, insect and disease control, and fence building in or near ephemeral drains, ditches or low spots could be a violation of the Clean Water Act, subject to civil penalties of up to $37,500 per violation per day—or even higher criminal penalties—unless a permit is obtained.

V. **The Proposed Rule Suffers from Several Procedural Flaws**

The agencies' economic, technical and small business analyses are severely flawed. First, according to an expert review by Dr. David Sunding, the agencies' economic analysis contains numerous glaring and problematic errors that "are so severe as to render [the economic analysis] virtually meaningless."[9] Second, the proposed rule relies on the draft Connectivity Synthesis Report that is still undergoing vetting and peer review by the Science Advisory Board (SAB). Rather than wait for the final SAB report before drafting a proposed rule that purports to rely on the science contained in that report, the agencies plowed forward with a proposed rule that relies on a draft. It is clear that the agencies are not properly taking the science into account and that the outcomes have been pre-determined. Finally, the agencies have refused to meaningfully comply with the Regulatory Flexibility Act (RFA). The agencies erroneously certified that the proposed rule would not have a significant economic impact on a substantial number of small entities. This certification flies in the face of the undeniably "significant" impacts the proposed rule will have on small businesses.

A. **The Economic Analysis Significantly Underestimates the Increase in Jurisdiction.**

The Sunding Report concludes that "the EPA analysis relies on a flawed methodology for estimating the extent of newly-jurisdictional waters that systematically underestimates the impact of the definition change."

[9] Report by Dr. David Sunding, "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States", May 15, 2014. Prof. Sunding holds the Thomas J. Graff Chair of Natural Resource Economics at the University of California, Berkeley. He is the founding director of the Berkeley Water Center and currently serves as the chair of his department. He has won numerous awards for his research, including grants from the National Science Foundation, the U.S. Environmental Protection Agency and private foundations.

A threshold problem with EPA's economic analysis is that it analyzes the implications of only one category of Clean Water Act jurisdiction under the new proposed rule, "other waters." As discussed above, the proposed rule includes broad new definitions (e.g. "tributary" and "neighboring") that will categorically sweep into Clean Water Act jurisdiction countless features currently subject to only case-by-case regulation based on a significant nexus analysis. However, the economic analysis focuses solely on how jurisdiction might change for "isolated waters" that are not jurisdictional under the current Clean Water Act framework, but that are likely to become jurisdictional under an expanded definition of "other waters."

As Dr. Sunding found, the database EPA used to estimate economic implications for incremental expansion of jurisdiction does not track information on these new terms and categories of jurisdiction. For example, EPA's economic analysis recognizes that the "isolated waters" category does not take into account the rule's new aggregation principle, and explains that EPA could not assess the potential impacts of aggregation of other waters within a watershed without "actual field experience." Indeed, EPA's analysis also acknowledges that there will be additional costs to the Corps to update the system to "reflect needed data elements" as a result of the rule's new jurisdictional categories. EPA does not alter its analysis to account for this major deficiency. As a result, numbers extrapolated from the records, which do not marry up with the draft rule's categories of jurisdiction, are not useful for approximating the economic implications of the percentage of increase in jurisdiction or the increase in jurisdictional acreage.

Second, the analysis relies on FY 2009/2010 as the baseline year for estimating impacts. FY 2009/2010 was a period of significant contraction in the nation's economy, and the housing market specifically, due to the financial crisis. As a result of this contraction, there were fewer construction projects and significantly smaller projects than in periods of normal economic activity. In statistical terms, this is an issue of sample selection, where due to exogenous events the sample selected for the analysis is not representative of the overall population. Because the report bases its findings on this period of extremely low construction activity, the result is artificially low numbers of applications and affected acres. By using the number of permits issued in 2010 as a baseline, EPA significantly underestimates the affected acreage.

Third, EPA's economic analysis only considers permitting data from section 404 to estimate the potential additional percentage of acres that would come under jurisdiction. EPA then assumes that every other section of the Clean Water Act would be affected the exact same way as section 404, applying the estimated increase in percentage of acres impacted to all other relevant sections of the Clean Water Act. There is no reason to believe that this is a valid approach given significant differences in location and in permitting requirements for different economic activities. EPA recognizes this limitation, [10] but does nothing to address it.

B. The Economic Analysis Significantly Underestimates the Cost of the Proposed Rule.

EPA's economic analysis is further flawed because it underestimates the cost of the proposed rule by relying on section 404 permitting cost data that are nearly 20 years old. To make matters worse, these costs are not adjusted for inflation or any other changes in the permit system.

[10] EPA 2011. *Draft Guidance on Identifying Waters Protected by the Clean Water* Act, p. 3.

Moreover, EPA's analysis omits the costs of avoidance and delay, which are likely the largest out-of-pocket expenses for anyone seeking a Corps permit. While estimations of these costs are included in the report cited by EPA, they are inexplicably absent from EPA's "review and synthesis." According to the report EPA cites, individual section 404 permit application costs were measured as $43,687 plus $11,797 per acre of impacts to "waters of the U.S." For nationwide permits, costs were measured as $16,869 plus $9,285 per acre of "waters of the U.S." impacted.[11] If those figures were updated to 2014 dollars in order to account for inflation the application costs are even more astounding. In 2014 dollars, individual section 404 permit application costs would be $62,166 plus $16,787 per acre of impacts to "waters of the U.S." For nationwide permits, costs would be $24,004 plus $13,212 per acre of "waters of the U.S." impacted. (See Sunding Report at 17.)

EPA's analysis further underestimates costs for some programs, like section 303 (state water quality standards, "total maximum daily loads" and implementation plans) and section 402, by assuming them to be "cost-neutral or minimal" without providing any analysis to support this assumption. The effects of expanded jurisdiction are likely to vary significantly from program to program; however, careful assessment of program-specific effects is omitted in lieu of simplistic, generalized estimations.

EPA acknowledges that additional permit applications may require increased consultation with other agencies, which would drive up the price tag of a definitional change. EPA, however, omits these costs from its analysis.

C. The Economic Analysis Significantly Overestimates Benefits of the Proposed Rule.

EPA's analysis is also flawed for reasons of overestimation. Relying on third-party, outdated studies, EPA overestimates an average willingness to pay for wetland mitigation. These studies are highly problematic because they are old—nine of the 10 studies EPA used are more than a decade old (the oldest is nearly 30 years old)—and do not provide accurate estimates of benefits. Many were not published in peer-reviewed journals.

EPA calculates benefits based on an unstated and improbable assumption that all of the incremental wetlands affected by the definitional change would be completely destroyed if federal jurisdiction were not expanded. EPA then (1) presumes that benefits calculated for a specific geography and time can be readily applied elsewhere, forcing a comparison between different types of wetlands being considered, and (2) makes the assumption that the public would be willing to pay the same amount to protect an isolated low spot or pond as they would a high-value wetland. This significantly biases EPA's analysis. Even the studies cited by EPA show highly localized impacts that are not broadly applicable beyond the study site.

[11] Sunding and Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, Natural Resources Journal, Vol, 42, p. 74.

EPA makes little effort to account for changes in economic trends, recreational patterns and state preferences over time. Finally, EPA suggests there may be "across the board" savings in program enforcement related to increased clarity in the Clean Water Act program.

Taking these underestimates and overestimates into account, Dr. Sunding concludes that EPA's analysis suffers from a lack of transparency and that the methodology, errors and omissions render it virtually meaningless.

D. The Agencies' Rulemaking Does Not Take Into Account Scientific and Technical Underpinnings.

The agencies' proposed rule relies on a draft review of the scientific literature on "connectivity" currently under review by an SAB. The agencies have drafted the proposed rule in reliance on the draft Connectivity Synthesis Report, without waiting for the SAB's final report. Sending a proposed rule to OMB for interagency review before the SAB completes its peer review demonstrates that the agencies are not properly taking the science into account and that the outcomes have been pre-determined. Any proper rulemaking should begin with an agency collecting, developing and then appropriately evaluating all of the relevant science. The agency should seek to validate or correct its understanding of the science through conducting independent scientific peer review. Finally, the agency should use what is learned through a vetting process to inform any policy or regulatory decisions.

Instead, EPA has asked the SAB to engage in a post-hoc review of a severely limited portion of the science that will be used to justify a rule that has already been written. EPA's decision to develop a rule based on a scientific report that has not undergone external scientific peer review calls into question the legitimacy of the rulemaking process. EPA should allow the SAB to complete its review. The agencies should extend the comment period on the proposed rule until after this process is complete and the report is thoroughly vetted to ensure that any final rule is based on the final, peer-reviewed connectivity report.

E. The Impacts to Small Business Are Staggering.

On April 23, the House Small Business Committee added the proposed rule to its website alerting small businesses to burdensome federal regulations. According to Committee Chairman Sam Graves (R-Mo.), the "EPA and Corps are proposing to expand the jurisdiction of the Clean Water Act to include nearly every damp patch of land in the United States." Graves termed the proposed rule a "regulatory overreach," saying:

> [This] means small businesses and landowners may need costly permits and face lengthy delays for ordinary activities on private property. Projects may need to be redesigned or relocated to satisfy federal regulators. Worse, permit applications may be denied. This extraordinary intrusion into the lives of many farmers, ranchers and small business owners has the likely potential to be economically devastating and must be stopped.

The agencies have not properly complied with the procedural requirements of RFA. The agencies try to dodge the RFA by claiming that the "scope of regulatory jurisdiction in this

proposed rule is narrower than that under the existing regulations." 79 Fed. Reg. at 22,220. Therefore, "because fewer waters will be subject to the Clean Water Act under the proposed rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations … [and] will not have a significant adverse impact on a substantial number of small entities." *Id.* The agencies thus erroneously conclude that no RFA analysis is required.

But there can be no question that the proposed rule has direct effects not only on regulated entities, but also on the entire nation. The scope of Clean Water Act jurisdiction has implications that permeate all sections and programs under the Act, such as section 303 water quality standards and total maximum daily loads, section 311 oil spill prevention control and countermeasures, section 401 water quality certifications, the section 402 NPDES program and the section 404 dredge and fill permit program. These programs regulate countless diverse small business activities across the nation, from farming and roadside produce stands, to home building, to manufacturing and energy development. The agencies' proposal expands these Clean Water Act programs geographically to cover more areas across the landscape including ditches, dry washes and desert drainages. When public or private property is deemed "waters of the United States" by the agencies, there are numerous impacts that flow from that determination, including the reduced value of land, the need to hire consultants to prepare permits, delays, restrictions on land use and the cost of complying with permitting requirements, including mitigation—not to mention the potential for permit denial or the cost of forgoing a project entirely rather than take on the bureaucracy. These widespread impacts are felt acutely by small businesses.

In Florida, for example, it is estimated that 40 percent of the value of farmland is directly attributable to its future development potential.[12] Thus, when Clean Water Act regulatory jurisdiction or permitting requirements are expanded over farmland, the value of that land decreases significantly because of the associated regulatory burdens. For farmers and ranchers, their land is typically their principal asset and frequently provides collateral for loans and other capital purchases needed to operate their farm or ranch. The agencies' determination that Clean Water Act jurisdiction exists over ditches and other features on farmland may affect small farmers' ability to obtain loans.

As another example, agricultural insect, weed and disease control will increasingly be subject to NPDES requirements under EPA's new permit program for pesticides.[13] Some small business owners have estimated that it will cost an additional $50,000 per year to comply with the new paperwork burden imposed by the pesticide permit program alone.[14] These burdensome NPDES

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[12] Plaintiga, A.J., Lubowski, R.N., and R.N, Stavins, *The Effects of Potential Land Development on Agricultural Land Prices*, 52 J. of Urban Economics 561, 581 (2002).

[13] It is estimated that under the new NPDES permit program for pesticides, 365,000 new sources will be required to obtain NPDES permits, but this estimate was made prior to, and does not account for, the expansion of jurisdiction proposed in the Draft Guidance. *See* EPA, "Background information on EPA's Pesticide General Permit," http://cfpub.epa.gov/npdes/pesticides/aquaticpesticides.cfm (viewed Jun. 26, 2011).

[14] *See* Responsible Industry for a Sound Environment, "Comments in Response to Draft National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit for Point Source Discharge from the Application of Pesticides," Docket No. EPA-HQ-OW-2010-0257, http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2010-0257-0490 (Jul. 19, 2010).

requirements place severe limitations on the location and operation of many activities undertaken by small entities. Expanding the scope of waters that are regulated as “waters of the United States” to ditches and other ephemeral features only adds to the “waters” at issue in the pesticide general permit and thus exacerbates the complexities and costs of implementing this program.

The bottom line is that the expansion of the waters regulated under the Clean Water Act has enormous implications for small business entities that the agencies have not considered, much less explained.

VI. **Conclusion**

Farmers, ranchers and other landowners will face a tremendous new roadblock to ordinary land use because of this proposed rule. The rule will make it more difficult to farm and ranch, build homes, develop energy resources and otherwise use the land. Farm Bureau believes the proposed rule will have a detrimental effect on existing farmers, on encouraging new and beginning farmers to enter the profession and potentially on landowners’ willingness to undertake conservation practices.

The agencies have obscured rather than explained the rule’s impacts on farmers, ranchers and others.

We need Congress’ help to fight this rule.

Thank you for the opportunity to explain our opposition to the waters of the U.S. proposed rule. We would be glad to provide any further information the Committee may need.

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