

November 14, 2014

Environmental Protection Agency  
EPA Docket Center  
EPA West, Room 3334, 1301  
Constitution Avenue, NW  
Washington, DC 20460  
ATTN: ID No. EPA-HQ-OW-2011-0880

**Re: Comments on the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, Docket ID No. EPA-HQ-OW-2011-0880**

The undersigned agricultural organizations appreciate the opportunity to provide comments to the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) (together, "the Agencies") on their proposed rule to define "waters of the United States" under the Clean Water Act (CWA).

Recently Administrator McCarthy characterized some of the agricultural community's concerns about the proposed rule as "ludicrous," and she proclaimed that "[t]he bottom line with this proposal is that if you weren't supposed to get a permit before, you don't need to get one now."<sup>1</sup> As detailed in our comments below, however, our concerns with the rule are well founded, and the proposed rule *would* result in federal permit requirements for many commonplace and essential farming practices. We urge the Agencies not to finalize this flawed rule, which would fundamentally change the scope of the CWA and radically expand the Agencies' regulatory power over routine agricultural practices.

In both the proposed rule and the Agencies' marketing campaign aimed at selling the proposal to farmers, ranchers and the general public, the Agencies paint two misleading and contradictory pictures. The first is of two federal agencies making only minor tweaks to increase the "clarity" and "certainty" of a regulatory scheme long accepted by landowners and businesses. Under this scenario, the rule merely clarifies and provides certainty for a regulatory scheme needlessly muddled by the U.S. Supreme Court. So minor is the impact on landowners, the Agencies claim that the proposed rule would impact a mere 1,332 acres nationwide under the section 404 program.<sup>2</sup> The second picture is one of a crisis, where the proposed rule is necessary to protect roughly 60% of the nation's flowing rivers, lakes, wetlands, and drinking water sources, which have been left vulnerable by state inaction and the Supreme Court's confusing opinions.

"Clarification" or "crisis?" These inconsistent pictures are both fictions. The proposed rule provides none of the clarity and certainty it promises. Instead, it creates confusion and risk by

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<sup>1</sup> A. Gangitano & J. Hagstrom, "McCarthy addresses 'misinformation' about Waters of the US Rule," AgWeek (July 14, 2014), *available at* <http://www.agweek.com/event/article/id/23667/>.

<sup>2</sup> Proposed rule economic analysis page 4, *available at* [http://www2.epa.gov/sites/production/files/2014-03/documents/wus\\_proposed\\_rule\\_economic\\_analysis.pdf](http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf)

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 proposed 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. Moreover, no crisis exists. The agencies do not argue that they need to regulate farming and ranching to protect navigable waters. Yet, the proposed rule gives them sweeping authority to do so, which they may exercise at will, or at the whim of a citizen plaintiff.

**I. The Proposed Rule Will Profoundly Affect Everyday Farming and Ranching Activities.**

Farming and ranching are water-dependent enterprises. Whether they are growing plants or raising animals, farmers and ranchers need water. For this reason, farming and ranching tend to occur on lands where there is either plentiful rainfall or adequate water available for irrigation (via ditches). There are many features on those lands that contain or carry water only when it rains and that may be miles from the nearest truly “navigable” water. Farmers and ranchers regard these landscape features as simply low spots on farm fields.

There are also features on farms and ranches that tend to be wet year round, but are not jurisdictional waters today. For example, many ponds are used on farms and ranches for purposes such as stock watering, providing irrigation water, or settling and filtering farm runoff. Additionally, irrigation ditches 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 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 back to those source waters. In short, America’s farm and ranch lands are an intricate maze of ditches, ponds, wetlands, and ephemeral drainages. The following photos show just two examples<sup>3</sup> of the sorts of features typically found on farmlands across the country:



Given the breadth of the definitions in the proposed rule, the vast majority of ephemeral drainage features and ditches on farmlands and pastures described above would be categorically regulated

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<sup>3</sup> Additional examples are shown in Appendix A.

as jurisdictional tributaries under the proposed rule. And the vast majority of small wetlands, ponds and pools (including, potentially, ephemeral ponds, which some might call “puddles”) would be either categorically regulated as “adjacent” waters or could still be regulated as “other waters.” Consequently, with the exception of very narrow section 404 exemptions discussed in Part IV.A below, regulating drains, ditches, stock ponds, and other low spots within farm fields and pastures as “navigable waters” would mean that *any* discharge of a pollutant (e.g., soil, dust, pesticides, fertilizers and “biological material”) into those ditches, drains, ponds, etc. will be unlawful without a CWA permit.

This jurisdictional expansion will be disastrous for farmers and ranchers. Farmers need to apply weed, insect, and disease control products to protect their crops. On much of our most productive farmlands (areas with plenty of rain), it would be extremely difficult to avoid entirely the small wetlands, ephemeral drainages, and ditches in and around farm fields when applying such products. If low spots in farm fields are defined as jurisdictional waters, a federal permit will be required for farmers to protect crops. Absent a permit, even accidental deposition of pesticides and herbicides into these “jurisdictional” features (even at times when the features are completely dry) would be unlawful discharges.

The same goes for the application of fertilizer—including organic fertilizer (manure)—another necessary and beneficial aspect of many farming operations. 40 CFR §122.2 (definition of “pollutant”). It is simply not feasible for farmers to avoid adding fertilizer to low spots within farm fields that may become jurisdictional. As a result, the proposed rule will impose on farmers the burden of obtaining a section 402 discharge permit to fertilize their fields—and put EPA into the business of regulating whether, when, and how a farmer’s crops may be fertilized. In fact, if low spots on pastures become jurisdictional wetlands or tributaries, EPA or citizens groups could sue the owner of cows that “discharge” manure into those “waters” without a section 402 permit. They could sue any time a farmer plows, plants, or builds a fence across small jurisdictional wetlands or ephemeral drains.<sup>4</sup> Given the “very low” “threshold” the Agencies apply before “truly de minimis activities” turn into “adverse effects on any aquatic function,” farmers and ranchers would even have to think about whether “walking, bicycling, or driving a vehicle through” a jurisdictional feature is prohibited. 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993). Federal permits would be required (again, subject to the very narrow exemption of certain activities from section 404 permits, discussed below at Section III) if such activities cause fertilizer, dirt, or other pollutants to fall into low spots on the field, even if they are dry at that time.

These are just some of the examples of how disruptive the proposed rule would be to our members’ livelihoods. The stakes could not be higher. The regulation of low areas on farmlands and pastures as jurisdictional “waters” means that *any* activity on those lands that moves dirt or applies any product is subject to regulation. Everyday farming activities such as plowing, planting, disking, fertilizing, insect and disease control, and fence building in or near ephemeral drainages, ditches, or low spots could be a violation of the CWA, triggering civil penalties of up to \$37,500 per violation per day—or even higher criminal penalties—unless a permit is obtained. The tens of thousands of dollars of additional costs for federal permitting of ordinary farming

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<sup>4</sup> A plow has been found to be a point source. *See Borden Ranch P’ship v. United States Army Corps of Eng’rs*, 261 F.3d 810 (9th Cir. 2001).

activities, however, is beyond the means of most farmers and ranchers—the vast majority of whom are family-owned small businesses.<sup>5</sup> Even those farmers and ranchers who can afford it should not be forced to wait months, or even years, for a federal permit to plow, plant, fertilize, or protect their crops.

## **II. Rather than Clarity, the Proposed Rule Provides Potentially Unlimited Jurisdiction.**

### **A. The Proposed Rule Does Not Make It Clear to Farmers and Ranchers Which Features Will Be Jurisdictional, but Opens the Door for the Assertion of Jurisdiction Over Countless Features that Are Ubiquitous on America’s Farmlands.**

The Agencies’ stated goal for this rule is to provide “clarity” and reduce the confusion, red tape and uncertainty allegedly caused by the Supreme Court over what waters are jurisdictional. This proposal, however, clarifies only that the Agencies could regulate almost any low spot on a farmer’s field where water sometimes stands or channels. The proposal would categorically regulate as “navigable waters” countless ephemeral drainages, ditches and other features across the countryside that are wet solely from precipitation and may be miles from the nearest truly “navigable” water. It would also regulate small, remote “wetlands”—which may look like nothing more than low spots on a farm field — just because those areas happen to be near a jurisdictional ditch or ephemeral, or located in a floodplain.

The proposal does not provide clarity to farmers and ranchers; it only exposes them to unknowing violations of the law by farming in, and discharging typical farm nutrients and pesticides into, features that look more like land than water. Because farmers and ranchers can be liable for heavy CWA civil and even criminal fines and jail time for unlawful discharges to “navigable waters,” they must be able understand how that term applies to their land.

Although the text in the proposal provides more confusion than clarity, EPA rejects the one tool that could provide certainty to farmers and ranchers—maps. To identify how deep into the countryside the “tributary networks” would go, our consultants, Geosyntec Consultants, used the same U.S. Geological Survey (USGS) data employed by the Agencies to create maps of the nation’s perennial, intermittent and some ephemeral streams.<sup>6</sup> Today’s sophisticated technology allowed the map programs to zoom in closely on the ground to show exactly what streams and 100 year floodplains have been identified by USGS and what the surrounding landscape looks like. The Agencies apparently had the same datasets and maps in their records (supposedly

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<sup>5</sup> As noted in comments filed by the Small Business Administration’s Office of Advocacy, EPA and the Corps have failed to take into account small business impacts, including impacts on small business farmers. *See*, October 1, 2014 letter to Administrator McCarthy and Major General Peabody from Winslow Sargeant, Chief Counsel for Advocacy. Due to this failure, SBA recommends that EPA and the Corps withdraw the rule. EPA-HQ-OW-2011-0880-7958, October 17, 2014.

<sup>6</sup> See [www.tinyurl.com/epawaters](http://www.tinyurl.com/epawaters) and a selection of screen shots at Appendix B.

without the zoom-in capability), but did not make them part of the public record for this rulemaking.<sup>7</sup> These maps should have been part of the public record.

Once the maps were made public, the Agencies disclaimed their usefulness and promised that the maps would not be used to determine jurisdiction.<sup>8</sup> The fine print in the proposed rule, however, indicates that the Agencies *do* intend to use USGS maps, among other tools, to identify jurisdictional tributaries. The proposal states that the Agencies have various tools at their disposal to trace whether a water eventually flows into a traditional navigable water, interstate water, territorial sea or jurisdictional impoundment, including “U.S. Geological Survey maps, aerial photographs or other reliable remote sensing information or other appropriate information.” 79 Fed. Reg. at 22,202. The maps may not be legal determinations of jurisdiction, but the Agencies cannot disavow the influence of these USGS maps and their datasets on jurisdiction. In fact, EPA Administrator McCarthy testified that the EPA’s maps would be used for jurisdictional determinations.<sup>9</sup> For farmers and ranchers who can see their farm with a highlighted line indicating an ephemeral stream running through it, the maps are a strong indication of just how far the reach of jurisdiction will extend into the countryside.

The Agencies also provide an incomplete description to the general public about what types of waters the Agencies intend to regulate. EPA’s marketing campaign provides images of flowing rivers, streams and marshes teeming with wildlife and recreational activity. These waters bear no resemblance to the majority of the features that the rule would regulate as “tributaries,” wetlands or ponds. Typical features on farms and across the countryside include low areas that collect water from local drainage and over time develop wetland characteristics.<sup>10</sup> Others are subtle channels formed by rolling hills or even more subtle changes in elevation, where water naturally channels when it rains. Just as common are ditches that carry water only when it rains but that fall outside proposed ditch exclusion because they contain wetlands somewhere along their length, or because they sometimes receive stormwater flows from nearby ephemeral drains or

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<sup>7</sup> The maps were first requested, obtained and publicly released by the House Science Committee, U.S. House of Representatives and can be found at <http://science.house.gov/epa-maps-state-2013#overlay-context>. Copies of the maps are found in disks at Appendix C.

<sup>8</sup> In EPA’s official blog, Tom Reynolds claims “EPA has never and is not now relying on maps to determine jurisdiction under the Clean Water Act.” EPA Connect, the Official Blog of EPA’s Leadership, August 28, 2014 at 3:43 EDT “Mapping the Truth.” <http://blog.epa.gov/epaconnect/2014/08/mapping-the-truth/>. A copy is attached at Appendix D.

<sup>9</sup> In a March 27, 2014 hearing before the House Appropriations Committee Subcommittee on Interior, Environment, and Related Agencies, Administrator Gina McCarthy told Chairman Rogers that EPA has “some mapping in the docket associated with this rule that people can access at this point.” Administrator McCarty went on to say: “There has been no mapping before, there has been no certainty so we are identifying the rivers and streams and tributaries and other water bodies that science tells us is really necessary to protect the chemical, physical, and biological integrity of navigable waters. We have taken the opportunity to map those; we are certain we will get comment on them.” Hearing transcript at page 132 and 135, attached at Appendix E.

<sup>10</sup> U.S. Army Corps of Engineers, Wetlands Delineation Manual, January 1987.

wetlands. These are all common features found on our nation's farms and ranches, and they will all be open to regulation under the proposed rule.

The proposed rule will cause continued confusion over the boundaries of federal jurisdiction. As explained in the following sections, it provides little clarity in the three primary definitional changes described below, each of which results in a significant expansion of federal control over land and water resources across the nation.

### **B. "Tributaries" Cannot Include Ephemeral Drainages**

The definition of a "tributary" is one of the most expansive and problematic terms in 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 "ephemeral" drainages that only channel stormwater after heavy rains. Most of the time, ephemeral drainages are dry land—they are not flowing rivers or streams. Yet, the Agencies insist that "[t]ributaries that are small, flow infrequently, or are of substantial distance from the nearest (a)(1) through (a)(4) water, e.g., headwater perennial, intermittent, and ephemeral tributaries" are nevertheless part of the tributary network regulated by this proposal. 79 Fed. Reg. at 22,206.

The Agencies have proposed an overly broad "tributary" definition focusing on the presence of a bed, bank, ordinary high water mark (OHWM) and any minimal amount of flow that eventually reaches (directly or through any number of other paths and channels) to a creek or stream that in turn ultimately flows to a traditional navigable water. *See* 79 Fed. Reg. at 22,263.<sup>11</sup> The terms "bed" and "bank" simply mean land with lower elevation in between lands of higher elevation. This includes land with only subtle changes in elevation—any land where rainwater naturally channels as it flows downhill. All but the flattest terrain will have natural paths of lower elevations that water will follow. The Agencies further state that the upper limit of a tributary "is established where the channel begins" which is difficult enough for the Corps itself to discern—let alone a typical farmer or rancher.<sup>12</sup> *Id.* at 22,202. In addition, if the "upper limit" of a tributary is "where the channel begins," then each farmer or rancher with *any* "channels" on his lands (land with lower elevation in between lands of higher elevations) presumably must investigate the entire length of that channel, both up-gradient and down-gradient, even beyond his own property lines, to determine whether an OHWM can be found.

Equally obtuse is the Agencies' statement that "a tributary is a longitudinal surface feature that results from directional surface water movement and sediment dynamics demonstrated by the presence of bed and banks, bottom and lateral boundaries, or other indicators of [ordinary high water mark]." *Id.* at 22,202. Even a bed and bank have become unnecessary to call water a "tributary"—later in the proposal, the Agencies announce that "in some regions of the country

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<sup>11</sup> The rule would provide: "The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR § 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section."

<sup>12</sup> Presentation by Matthew K. Mersel, USACE, "Development of National OHWM Delineation Technical Guidance," March 4, 2014. Attached hereto as Appendix F.

where there is a very low gradient, the banks of a tributary may be very low or may even disappear at times.” *Id.* This example, and countless others, demonstrate the extreme breadth and subjectivity inherent in the proposed “tributary” definition. The proposed rule would regulate activities on *land* on which water channels and flows when it rains, so long as the flowing water leaves a mark on the land. It may even regulate land where there is no visible channel.

The proposed rule fails to provide a meaningful way to distinguish “erosional features,” which the Agencies claim will be non-jurisdictional, from jurisdictional ephemeral tributaries. The Agencies explain:

Rills are less permanent on the landscape than streams and typically lack an OHWM, whereas gullies are younger than streams in geologic age and also typically lack an OHWM; time has shaped streams into geographic features distinct from gullies and rills.

The two main processes that result in the formation of gullies are downcutting and headcutting, which are forms of longitudinal (incising) erosion. These actions ordinarily result in erosional cuts that are often deeper than they are wide, with very steep banks, often small beds, and typically only carry water during precipitation events. The principal erosional processes that modify streams are also downcutting and headcutting. In streams, however, lateral erosion is also very important. The result is that streams, except on steep slopes or where soils are highly erodible, are characterized by the presence of bed and banks and an OHWM as compared to typical erosional features that are more deeply incised.

79 Fed. Reg. at 22,218-19 (citations omitted). Explanations such as this are worse than unhelpful to the regulated public, whose land features will be deemed to be “tributaries” or “erosional features” based on the discretion and subjective judgment of Agency staff. The proposal requests comment on how the Agencies could provide “greater clarity” on how to distinguish erosional features from ephemeral tributaries. *Id.* at 22,219. We are left wondering how the Agencies could possibly provide *less* clarity.

Furthermore, “ordinary high water mark” is a 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 some sort of mark, even if flows are infrequent. The Agencies themselves recognize that the definition of OHWM is vague, ambiguous and inconsistently applied.<sup>13</sup> 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 simply a matter of judgment,<sup>14</sup> so reliance on this term provides neither certainty nor clarity. Moreover, we

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<sup>13</sup> GAO Report, “Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction,” February 2004.

<sup>14</sup> Presentation by Matthew K. Mersel, USACE, “Development of National OHWM Delineation Technical Guidance,” March 4, 2014. See Appendix F.

understand that the Corps is in the process of redefining how it determines an OHWM, yet nowhere in the proposal do the Agencies signal to the public that this behind-the-scenes change is occurring, placing a key term in the proposed rule beyond public comment.<sup>15</sup>

The Agencies claim the proposal is faithful to key Supreme Court decisions, yet the Supreme Court admonished the Agencies' for using the OHWM indicator. 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 disparaged 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). If a determination that a particular channel has an OHWM is so broad and subjective, how can a farmer or rancher know whether a particular low area across his land is simply land or instead is a regulated ephemeral tributary?

By failing to provide clarity, the Agencies are forcing farmers to either: (1) presume that an ephemeral drainage that carries water only when it rains is a jurisdictional tributary, or (2) seek a jurisdictional determination from the Corps, or (3) take a chance that their activities near or in such features may result in unlawful discharges carrying civil penalties of up to \$37,500 a day. Even worse, a farmer could face criminal liability with jail time and up to \$100,000 a day in fines. With such stiff statutory penalties—including the loss of one's own personal liberty—farmers and ranchers deserve more clarity.

### **C. Under the Proposed Rule, Nearly Every Ditch Could Be Regulated as a Tributary.**

None of the current regulations defining "waters of the U.S." names ditches. In fact, the CWA does not define ditches as "waters of the U.S.," but as "point sources" that may discharge to "waters of the U.S." *See* 33 U.S.C. § 1362(14). Nevertheless, over the years, the Agencies have *informally* interpreted those regulations to sometimes include ditches as "tributaries" on a case-by-case basis.

In their marketing campaign, the Agencies repeatedly insist that the rule does not expand jurisdiction over ditches, that most ditches will not be regulated, that ditches are excluded, and that the Agencies do not intend to regulate ditches.<sup>16</sup> A careful reading of the proposal's fine print, combined with a common sense understanding of ditches and how they function, however, shows that the proposed rule would in fact regulate many ditches. (At the very least, the

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<sup>15</sup> Wetlands Regulatory Assistance Program (WRAP), "A Review of Land and Stream Classifications in Support of Developing a National Ordinary High Water Mark (OHWM) Classification" by, Matthew K. Mersel, Lindsey E. Lefebvre, and Robert W. Lichvar (August 2014), <http://www.erdc.usace.army.mil/Media/FactSheets/FactSheetArticleView/tabid/9254/Article/486085/ordinary-high-water-mark-ohwm-research-development-and-training.aspx>. Attached at Appendix G.

<sup>16</sup> U.S. EPA, "Facts About the Waters of the U.S. Proposal", July 1, 2014, [http://www2.epa.gov/sites/production/files/2014-09/documents/facts\\_about\\_wotus.pdf](http://www2.epa.gov/sites/production/files/2014-09/documents/facts_about_wotus.pdf) and attached at Appendix H.

proposed language could easily be interpreted to regulate many ditches, and we presume that, like most EPA/Corps regulations, it would be broadly interpreted by the Agencies.) Lost in the denials is the fact that, for the first time ever, the text of the Agencies' regulations will specifically define the term "tributary" to include "ditches" and "canals." The proposed rule would categorically regulate 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—unless the ditch falls within a narrowly crafted exclusion for certain "upland" ditches.

The Agencies limit excluded "upland" ditches to those with less than perennial flow and that are excavated *wholly* in uplands and drain *only* uplands.<sup>17</sup> Relatively few ditches will qualify for this exclusion because most ditches will be excavated in a (now) jurisdictional ephemeral, will contain wetlands somewhere along their length, or will during large rainfall events receive overflow from some wetland or other waterbody. *See* 79 Fed. Reg. 22,203 (exclusion covers only ditches excavated in uplands rather than wetlands or other types of waters "for their entire length"). The Agencies will not look only at the ditch as it currently exists, but also to "[h]istorical evidence, such as photographs, prior delineations, or topographical maps, that may be used to determine whether a water body was excavated wholly in uplands and drains only uplands, and has less than perennial flow." *Id.*

Even if a farmer or rancher has a ditch that only drains uplands on his own property, that does not mean the ditch is excluded from federal jurisdiction. The proposal limits the exclusion 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." *Id.* at 22,203. Ditches can run for miles, and farmers or ranchers generally have no idea of what types jurisdictional features (wetlands and ephemeral drainages in particular) connect to the ditch outside of their own property. Moreover, ditch segments are connected via pipes and other conveyances. At what point does one ditch start and another ditch begin? Or, do the Agencies believe that the "entire" length of a ditch begins when the water is first diverted from its original source of water—and ends when the ditch flows into a natural creek or stream? None of these questions are answered in the proposal, yet they are the questions that must be answered before anyone can identify these so-called "tributaries" under the proposed rule. At the very least, farmers and ranchers might reasonably be hesitant to "bet the farm" that a ditch running through their land is not, and never was, excavated in an ephemeral drain or wetland *at any point along its entire length.*

This problem is exacerbated because over the last several decades, the Agencies have broadened 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 be considered wetlands today. Because the purpose of ditches is to carry water, many ditches will tend to develop "wetland" characteristics and therefore will not be "wholly in uplands."

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<sup>17</sup> The proposed rule articulates an additional "exclusion" for ditches that "do not contribute flow" of any amount to actual navigable waters. However, such ditches would not meet even the expansive "tributary" definition anyway. Further, such ditches are presumably quite rare, because the primary purpose of ditches is to carry water.

Moreover, because the purpose of a ditch is to carry water, few ditches are excavated along the tops of ridges that could never have contact with “navigable waters.” The most logical places to dig stormwater ditches are at natural low points on the landscape to act as drains. Clearly, most ditches will have some section that was excavated in a natural ephemeral drainage or a low area with wetland characteristics. Such ditches will not qualify for the proposed exclusion for “wholly upland” ditches.

Ironically, in an agricultural setting, the ditch itself might be jurisdictional even though the surrounding areas are “prior converted cropland” (PCC) specifically excluded from CWA jurisdiction. For example, if a ditch was excavated in wetland and otherwise meets the Agencies’ broad “tributary” definition, but the ditch was constructed to drain a wetland prior to 1985, which is now PCC, is the PCC excluded but the ditch that runs within or alongside it jurisdictional?

The Agencies mistakenly claim that jurisdiction over ditches in the 2008 post-*Rapanos* guidance was broader than in the current proposal. *See Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. U.S. & Carabell v. U.S.* (U.S. EPA and U.S. Army Corps of Engineers, Dec. 2, 2008). Although the 2008 guidance excluded from regulation ditches that do not carry a “relatively permanent flow” (versus the proposal’s less than perennial flow), that exclusion was not part of a broader regulatory expansion that categorically defined both ephemeral drainages and ditches as tributaries. Moreover, the Agencies have asked for comment on whether the appropriate standard should be the “less than intermittent flow” standard. 79 Fed. Reg. at 22,203; 22,219. At the same time the Agencies are trying to convince farmers and ranchers that the proposed rule will not regulate ditches, they are also asking the public for additional comment and considering an even narrower exemption than has been proposed.

In response to the Agencies’ request for comment: we do not support a ditch exclusion based on “less than intermittent flow.” Such a limitation would make the ditch exclusion even narrower than the already narrow proposed standard. For example, irrigation ditches 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 generally have flowing water as long as water is available for use. Farmers and ranchers routinely conduct maintenance activities on these ditches located on their property (maintenance currently not subject to federal restrictions under CWA sections 402 or 404). 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 allocate water based on vested water rights and permit systems. If the Agencies further restrict the ditch exclusion, even fewer ditches would qualify—and in particular many irrigation ditches would become jurisdictional intermittent tributaries. This would interfere with state regulation of these ditches and the rights to the water they contain and would seriously impede the ability of farmers to move water to fields.

**D. Many More Waters Will Become Jurisdictional Under the New and Expanded “Adjacent Waters” Category.**

The Agencies insist that the proposal does not seek to regulate any “new” categories of water. Yet the Agencies add an entirely new category—“adjacent waters”—that is vastly broader than existing regulations covering the more limited subset of “adjacent wetlands.” 79 Fed. Reg. at

22,206. The Agencies justify this misleading “no change” statement, claiming that prior to the Supreme Court’s decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng’rs* (SWANCC),<sup>18</sup> the Agencies asserted jurisdiction over adjacent ponds and the like as “other waters.” 79 Fed. Reg. 22,207. This may be true, but the SWANCC court rejected regulation of these isolated “other” waters as beyond the scope of the Agencies’ CWA authority. SWANCC, 531 U.S. at 168. More importantly, since the “other waters” jurisdiction is established case-by-case, whereas jurisdiction over “adjacent waters” would be categorical, there can be no question that the proposed “adjacent waters” category would create new jurisdiction over countless small ponds, pools, and similar waters that have never previously been regulated.

The new “adjacent waters” category also significantly expands the concept of adjacency, by defining “neighboring” to include features located in the “riparian area” or “floodplain” of a traditional navigable water or tributary (including newly defined ephemeral or ditch tributaries), or features with a “shallow subsurface . . . or confined surface hydrologic connection” to any such feature.<sup>19</sup> Under this proposed definition, countless small wetlands or other small waters that are somewhat near any tributary (including dry ephemeral tributaries and ditches) or coast will be potentially within the scope of federal jurisdiction. 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. Farm ponds, for example, will have overflow outlets designed to allow overflow during heavy rains, so as to protect the integrity of the pond. Presumably, the Agencies would see this as a “confined surface hydrologic connection.” The inclusion of small, isolated wetlands, ponds and similar features that are “adjacent” to ditches or ephemeral drainages would sweep into federal jurisdiction countless small and otherwise remote wetlands and ponds that dot the nation’s farmlands. This broad and overreaching concept of adjacency provides neither certainty nor any reasonable limit on federal jurisdiction, despite the fact that the *Rapanos* plurality rejected the Agencies’ reliance on this sweeping definition as “extended beyond reason to include, inter alia, the 100—year floodplain of covered waters.” *Rapanos*, 547 U.S. at 746.

Perhaps the most perplexing aspect of the proposed “adjacent waters” category is that the Agencies claim these waters will be *categorically* (i.e. automatically) jurisdictional, even though only regulators, in their “best professional judgment” can decide whether any given water is “adjacent.” When only regulators can identify, using their “best professional judgment,” the relevant floodplain or riparian area, farmers, ranchers and other landowners will be completely unable to identify “categorically” jurisdictional waters on their lands. 79 Fed. Reg. at 22,208-09. These landowners are at risk of post-hoc determinations and liability when they had no way of knowing that “waters” on their land would later be deemed jurisdictional. The only certainty is for regulators who can be confident in their ability to regulate most any small wetland, pond, pool, or—yes—puddle, either as an adjacent water or an “other water” (see below at 13).

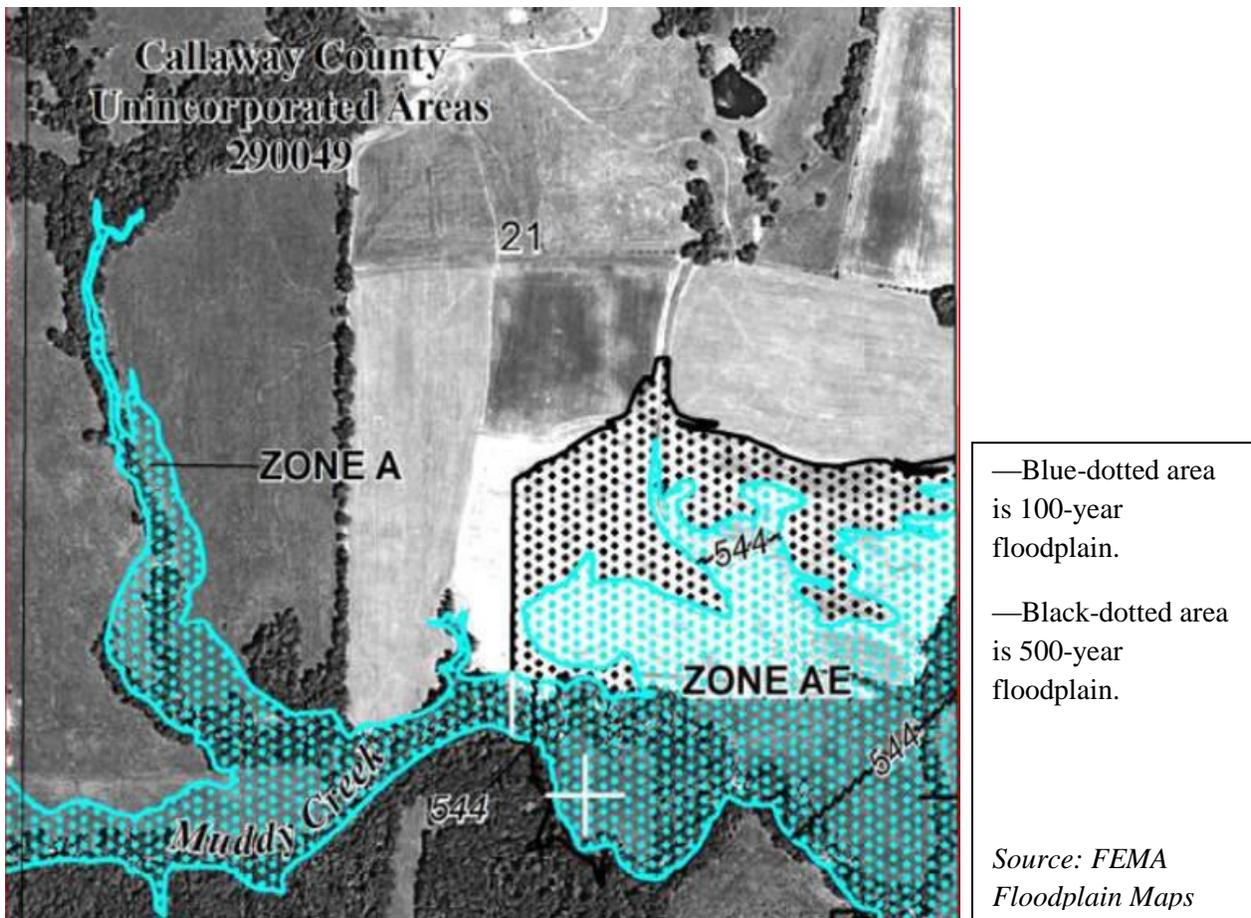
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<sup>18</sup> 531 U.S. 159 (2001).

<sup>19</sup> 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 distant they are from true navigable waters.

The Agencies admit that there “is no scientific consensus” over which floodplain interval is appropriate.<sup>20</sup> EPA cannot rationally make a categorical determination that all waters in an unknown floodplain have a “significant nexus” to “navigable waters” and are thus “navigable waters” themselves when the Agencies have no idea which flood interval to use. Whether the Agencies seek to assign a single floodplain interval nationwide, or choose to assign a floodplain interval on a water-by-water basis, the decision will essentially be arbitrary.

The following example illustrates the potential breadth of defining “adjacent” waters to include anything within a “floodplain” of a navigable water. The image below 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, 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 ephemeral drainages that flow toward Muddy Creek.



<sup>20</sup> U.S. EPA, “Questions and Answers - Waters of the U.S. Proposal” at 5, September 2014, attached as Appendix I.

**E. Even “Other Waters” Not Captured in Other Categories Could Be Deemed Jurisdictional.**

For any remaining “other waters” that do not fall within the broad and vague categories of “tributary” or “adjacent” waters (*e.g.*, even more isolated wetlands, ponds and the like), the proposed rule would nevertheless authorize the imposition of jurisdiction if regulators find that the water, alone or in combination with other “similarly situated” waters in the “region,” has a “significant nexus” to any traditional navigable water. *See* 79 Fed. Reg. at 22,270. “Significant nexus” would be defined as a “more than speculative or insubstantial effect” on the “chemical, physical or biological integrity” of a navigable water. *Id.* The “region” would be the “watershed that drains to the nearest [traditional navigable water]. *Id.* And “similarly situated” waters would be those that “perform similar functions and are located sufficiently close together or sufficiently close to a ‘water of the United States’ so that they can be evaluated as a single landscape unit...” *Id.* The preamble description of what constitutes “other waters” consists of page after page of potential scientific indicators of physical, biological and chemical connections. *See id.* at 22,212-14. The possibilities are so numerous and broad that regulators will have no difficulty finding a “significant nexus” for even the most minor wet spots when combined with all similar features in the watershed.<sup>21</sup> Farmers, on the other hand, can never know with any confidence that *any* wet spot on their land is beyond the scope of “other waters” jurisdiction.

**III. The Agencies Should Not, and Indeed Cannot, Interpret the Statutory Definition of “Navigable Waters” so Expansively.**

**A. The Proposed Rule Would Unlawfully Conflict with Statutory Exemptions Intended to Prevent Federal Permit Requirements for Common Farming and Ranching Activities.**

Congress plainly expected that most activities on farmlands and pastures would be covered by state programs aimed at controlling nonpoint source pollution and would not be subject to federal permit requirements. Congress specifically included in the CWA several critical statutory exemptions for agriculture, each of which would be unlawfully undermined by the proposed rule:

- Section 404 exemption for “normal” farming and ranching activities
- Section 404 exemption for construction of farm or stock ponds
- Exclusion of agricultural stormwater discharges and return flows from irrigated agriculture from the definition of “point source” and hence, from Section 402 permitting

When Congress wrote these exemptions, it used language that assumed that farming and ranching activities generally occur on land, not in “waters of the United States.” An expansive interpretation of the phrase “waters of the United States”—one that effectively defines land to be

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<sup>21</sup> 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.

jurisdictional waters—would effectively nullify Congress’s specific determination to avoid federal permitting requirements for farming and ranching.

As explained in more detail below, the statutory exemptions for agriculture demonstrate a clear and consistent determination by Congress not to impose CWA 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. The proposed rule’s assertion of jurisdiction over ditches, dry ephemeral drainages and low spots on farm fields would render those exemptions meaningless.

#### 1. Section 404(f) Exemption for “Normal” Farming and Ranching Activities

In the mid-1970s, when the Corps, for purposes of section 404 permitting, began to define “navigable waters” to include certain wetlands—so as to make farming, ranching and forestry practices within those wetlands potentially subject to CWA 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). Under this exemption, “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). The Agencies have interpreted this exemption very narrowly to apply only where farming has been ongoing at the same location since 1977 (the year that the exemption and its implementing rules were adopted). *See, e.g., United States v. Cumberland Farms of Conn., Inc.*, 647 F. Supp. 1166 (D. Mass. 1986), *aff’d* 826 F.2d 1151 (1st Cir. 1987). In addition, by statute, the exemption is inapplicable to any activity “having as its purpose bringing an area of navigable water into a use to which it was not previously subject, where the reach of navigable waters may be impaired or the reach of such waters be reduced” (i.e. converting wetland to non-wetland so as to make it amendable to a new use). 33 U.S.C. § 1344(f)(2). This limitation is often referred to as the “recapture” provision.

The Agencies have repeatedly overstated the protection afforded by the normal farming and ranching exemption by refusing to publicly acknowledge their interpretation of an “established” operation.<sup>22</sup> Our research, as well as experiences within the forestry sector, indicates that only operations that commenced (at the same location) in 1977 or earlier would be deemed

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<sup>22</sup> 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 the Agencies claim to have “expanded” agriculture’s CWA exemptions through this interpretive rule, we strongly disagree with that conclusion and provided comments to and requested withdrawal of the interpretive rule. As described in comments submitted by AFBF to that docket, 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. *See* American Farm Bureau Federation “Comments in Response to Notice of Availability Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices, EPA–HQ–OW–2013–0820; 9908–97–OW (July 7, 2014) (attached hereto as Appendix J). We hereby attach and incorporate those comments by reference in their entirety.

“established”—and any later commenced operation would require a section 404 permit. Despite multiple inquiries, the Agencies have refused to provide any public confirmation or denial on this point. In at least one private meeting, however, EPA officials have admitted that farming (in a jurisdictional feature) that has not been ongoing since 1977 would require a section 404 permit, but “only for the first year”—after that, it would be an “established” operation. *See* Letter from Craig Hill, President, Iowa Farm Bureau, to Ken Kopocis, Deputy Assistant Administrator, U.S. EPA Office of Water (Sept. 29, 2014) (<http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-7633>). We request clarification on this important point in any final Agency action on the proposed rule.

The Agencies also downplay the impact of the “recapture” provision. Seeking to allay farmer concerns, the proposal claims that the term “tributary” does not include ephemeral features located on farmlands that do not possess a bed and bank are not tributaries. 79 Fed. Reg. at 22,204. Yet, the Agencies tip their hand in this carefully worded section of the preamble. According to the Agencies, if farming has eliminated a bed and bank where one previously existed (e.g., cultivation has leveled out changes in gradient on the field), the Agencies would view that as “converting” a jurisdictional water into a “non-jurisdictional water.” *Id.* at n.8. Any such conversion, according to the Agencies, would require a Section 404 permit unless it occurred prior to enactment of the CWA.

## 2. Section 404(f) 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 section 404 permit requirements any discharge of dredged or fill material into waters of the U.S. for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches. This exemption, however, like the “normal” farming and ranching exemption, is subject to the “recapture” provision. *Id.* § 1344(f)(2); *see* also 33 C.F.R. § 324.3(c).

Through guidance and enforcement actions, the Corps has interpreted the farm pond exemption narrowly and applied the so-called “recapture” provision broadly. In the Corps’ view, impounding a jurisdictional feature is an unlawful discharge of dredged or fill material, and the resulting impoundment is itself a “water of the U.S.” 79 Fed. Reg. at 22,201. In the experience of many farmers, where wetlands or ephemeral “tributaries” are involved in farm or stock pond construction, the recapture provision essentially swallows the exemption. Farmers have been ensnared in litigation and enforcement due to the creation of ponds by impounding small ephemeral drainages. *See, e.g.*, Appendix K, <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, it will establish categorical jurisdiction over virtually every ephemeral drainage as a “tributary” and countless other low spots as “adjacent” waters. Thus, any impoundment of those features will be an unlawful discharge absent a section 404 permit, and the resulting farm pond itself will become a “water of the U.S.” In addition, any construction of a farm pond in a small low spot (wetland) swept into CWA jurisdiction under the “other

waters” provisions of the proposed rule will also require a section 404 permit and will result in a pond that is itself a water of the U.S.

This aspect of the rule will affect countless (maybe most) farm and stock ponds (of which there are millions). By expanding jurisdiction to include common ephemeral drainages and isolated wetlands, the rule will prohibit the impoundment of these natural drainage or depression areas—which is often the *only* rational way to construct a farm or stock pond. Farm or stock ponds are typically constructed at natural low spots to capture stormwater that enters the pond through sheet flow and ephemeral drainages. Depending on the topography, pond construction may be infeasible without diking a natural drainage path on a hillside. For that reason, the proposal’s exclusion 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” is almost meaningless. “Dry land” would exclude anything that qualifies as a wetland or any ephemeral feature where stormwater naturally channels—presumably even non-jurisdictional wetlands or ephemeral features. This leaves little “dry land” available for any rational construction of a farm pond. 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 expansion of jurisdiction would render the farm pond exclusion meaningless, and the proposed regulatory exclusion for certain farm or stock ponds would provide no relief for most farmers and ranchers.

3. Exemption from Section 402 Permitting for Agricultural Stormwater and Return Flows from Irrigated Agriculture

Another key agricultural exemption in the CWA applies to “agricultural stormwater discharges” and “return flows from irrigated agriculture.” 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 CWA section 402 National Pollutant Discharge Elimination System (NPDES) permit requirements. The exemption shows Congress’s clear intent to exclude farmers and ranchers from CWA 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 drainages. 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 ditches and ephemeral drainages 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 CWA liability and permit requirements. A CWA pollutant discharge to navigable

waters arguably will be deemed to occur each time even a *molecule* of fertilizer or pesticide falls into a jurisdictional ditch, ephemeral drainage or low spot—even if the feature is dry at the time of the purported “discharge.” Courts (and EPA) have long held that there is no *de minimis* defense to CWA discharge liability. 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. Such requirements are contrary to congressional intent and would present substantial additional hurdles for farmers who wish to conduct practices essential to growing and protecting their crops.

**B. The Proposed Rule’s Expansion of CWA Jurisdiction Is Not Necessary to Protect the Nation’s Waters, and It Raises Significant Federalism Questions.**

The proposed rule appears to be 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 that the Agencies would displace “is perhaps the 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 CWA takes several approaches to protecting water resources and associated land uses. They include (but are not limited to) the section 402 and 404 permit programs, led by EPA and the Corps, respectively. Many other sections of the CWA protect waters through cooperative state/federal action. *New York v. United States*, 505 U.S. 144, 167 (1992) (CWA depends on scheme of “cooperative federalism”). Congress provided EPA (and the Corps) with several tools to indirectly persuade state authorities to protect water quality, such as the award of grant money and other incentives. Congress also gave EPA the ultimate approval authority over various state management plans, water quality standards and total maximum daily loads. Fundamentally, however, the regulation of state land and water resources resides with state regulatory authorities, not with the federal government. State and local officials have a long history of working with landowners to improve water quality. And EPA does not hold back in using its bundle of sticks and carrots to persuade state authorities to follow EPA’s lead. In defending this proposed rule, however, the Agencies downplay, if not ignore, the key role states play in protecting their own waters and the fundamental changes the proposed rule would make to the balance of authority between federal and state governments dictated by Congress.

In its public messaging on the proposed rule, EPA has tried to justify the proposal by citing a deeply flawed article by the Environmental Law Institute (ELI) as evidence that a large number of states have inadequate regulatory authority to protect state waters.<sup>23</sup> The ELI article and the Agencies' strategy in proposing this rule ignores the many non-regulatory aspects of the CWA, in addition to countless purely state and local programs, that protect water quality regardless of the presence of any direct regulated discharge to jurisdictional waters of the U.S. See comments submitted by the Pennsylvania Department of Environmental Protection at EPA-HQ-OW-2011-0880-798.

The CWA has several major programs designed to protect navigable waters from impacts caused by activities affecting smaller and more isolated upstream features, including non-regulatory programs specifically crafted to address water quality impacts of land uses like farming. These provisions include section 208 and the related statewide continuous planning process under section 303(e). 33 U.S.C. §§ 1288, 1313(e). Both sections 208 and 303(e) require states to develop comprehensive Water Quality Management Plans including best management practices that can control significant sources of nonpoint sources of pollution. In 1987, Congress added section 319 to provide additional incentives in the form of grant funding to incentivize states to address nonpoint sources, while also requiring more detailed nonpoint source management programs. *See* 33 U.S.C. § 1329. State programs under these provisions have been, and can continue to be, very effective. To protect downstream navigable waters, the Agencies do not need to require a federal permit for every feature that can conceivably be characterized as "water." The fact that these and other programs directing state planning and action are essential parts of the CWA reflects Congress's decision to leave states in the lead role—not a subservient role—in protecting upstream non-navigable waters and regulating land use. The Agencies need not stretch the definition of "waters of the United States" to achieve the CWA's goal of protecting water quality, and it would contradict clear congressional intent to do so.

#### **IV. Codifying Past Agency "Practice" Does Not Make It Lawful.**

The Agencies repeatedly state throughout the preamble and in their marketing campaign that the proposal merely codifies longstanding agency practice. We have no doubt that the Agencies have asserted broad jurisdiction over waters outside the proper scope of the CWA in the past. Such agency practice, however, does not legitimize the proposed overbroad assertion of jurisdiction. The Agencies' expansive assertions of jurisdiction have been debated and litigated for decades. With a few notable exceptions, the Agencies have largely escaped judicial review of their unlawful assertions of jurisdiction because of their insistence (upheld by some courts) that jurisdictional determinations are not subject to judicial review. Only in cases where EPA brought (or threatened in the case of the *Sackett* litigation) an enforcement action could a landowner challenge the Agencies' assertion of jurisdiction in court.<sup>24</sup> After decades of evading judicial

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<sup>23</sup> Environmental Law Institute, *State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act*, at 2 (May 2013), attached as Appendix L and *available at* <http://www.eli.org/research-report/state-constraints-state-imposed-limitations-authority-agencies-regulate-waters>. Comments on this study are included in separately filed comments as part of the Waters Advocacy Coalition.

<sup>24</sup> *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

review, the Agencies now appear to believe that unchecked past agency practice validates the proposed rule. It does not.

Nor can the Agencies point to explicit regulatory language to justify reliance on past agency practice. For example, the Agencies claim to have always regulated ephemeral streams. But the term “ephemeral” (unlike the term “intermittent” or “perennial”), which is used 75 times in the current proposal, is never mentioned in prior regulations. The text and preamble of the current regulations (promulgated in 1986 by the Corps and in 1988 by EPA) contain no reference to regulating “ephemeral” streams or drainages. Neither do the 1977 regulations. Likewise, current and past regulatory text says nothing to suggest that ditches are a category of “tributaries.” (The Agencies have indicated in past preambles that certain ditches *may* qualify as “navigable waters” on a case-specific basis, but they were never categorically defined as “tributaries.”) The Agencies have asserted in guidance documents and in enforcement actions that certain ditches and “ephemeral streams” are subject to CWA jurisdiction, but those are examples of *ad hoc* “regulatory creep,” not notice-and-comment rulemaking. In other words, the fact that the Agencies have occasionally asserted jurisdiction over these types of features in the past does not make it lawful to categorically assert jurisdiction over them now.

Before the Supreme Court’s ruling in *SWANCC*, the Agencies’ assertion of CWA jurisdiction was essentially boundless and unchecked. The Agencies’ basis for asserting jurisdiction over “other waters,” waters in undefined floodplains, ditches, and ephemeral drainages in the proposed rule is as tenuous as the Migratory Bird Rule rejected in *SWANCC* and the “any hydrological connection” theory rejected in *Rapanos*. Since 2008, 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 a traditional navigable water. Key to that analysis is the volume, duration and frequency of flow, as well as proximity to downstream navigable waters. *See Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. U.S. & Carabell v. U.S.* (U.S. EPA and U.S. Army Corps of Engineers, Dec. 2, 2008). Under the proposed rule, however, the volume, duration and frequency of flow—as well as distance to navigable waters—are deemed *irrelevant*. *See, e.g.,* 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 ditches and ephemeral drainages that meet the definition of “tributary”—reaching up the landscape to the point where the channel begins<sup>25</sup>—will be *categorically* deemed to be “navigable waters” if they carry *any* flow that *ever* reaches navigable waters. The Agencies may not wish to admit it, but they are proposing a substantial expansion of federal jurisdiction.

## V. The Rule Would Impose Burdensome New Permitting Requirements

The Agencies have downplayed the significant impact this regulatory expansion will have on the business of farming and ranching. Telling farmers and ranchers to just “get a permit” is unhelpful when getting a permit means far more than filling out a form and paying a permit fee. The costs associated with obtaining a permit often include fees of both lawyers and technical consultants whose expertise is necessary to ensure an accurate application and to develop the plans that must

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<sup>25</sup>*See id.* at 22,202 (“Under the proposed definition of a tributary, the upper limit of a tributary is established where the channel begins.”).

be submitted with the application. There are also ongoing compliance costs related to management practices, recordkeeping, reporting and monitoring.

For section 404 permits in particular, the costs range from hefty to obscene. There are two types of permits available depending on the farming activity and the amount of “navigable waters” that will be impacted. If a farming activity will impact less than half an acre of “navigable waters” (or less than 300 linear feet), a farmer can seek a Nationwide Permit (NWP), such as NWP 40 for certain agricultural activities, under CWA section 404(e).<sup>26</sup> Studies show that the average cost to secure an NWP is about **\$35,954**. With more ephemeral streams and ditches deemed “navigable waters,” fewer activities will qualify for NWPs and more farmers will need to seek individual section 404 permits, which have a staggering average cost of **\$337, 577**.<sup>27</sup>

Some of the most substantial costs associated with section 404 permitting include “mitigation” requirements and other “conditions” attached to any permit that a farmer must accept to be able to conduct the permitted activity.<sup>28</sup> Moreover, obtaining these permits takes time (assuming a permit is granted at all). While an NWP may take “only” ten months to obtain, an individual permit often takes more than two years.<sup>29</sup> In the meantime, permit applicants cannot move forward with their operations.

Few studies have quantified the costs of seeking and complying with section 402 permits, perhaps because of the great variability among industries and the wide range of costs associated with individual permits versus “general” permits. The record for EPA’s 2003 concentrated animal feeding operation (CAFO) rule does have some cost estimates for permit compliance based on 1997 dollars, to include nutrient management planning, facility upgrades, land application, and technologies for balancing on-farm nutrients, although those costs do not include the initial costs of engineering a livestock or poultry operation. At that time, EPA estimated that the cost of compliance would be \$26,904 for Large CAFOs and \$8,782 for Medium CAFOs.<sup>30</sup>

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<sup>26</sup> NWPs under section 404(e) are only for activities which are “similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment.” 33 U.S.C. § 1344(e)(1).

<sup>27</sup> See David Sunding & David Zilberman, *The Economics of Environmental Regulations by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 76 (2002) (analyzing permit costs and demonstrating that the cost difference is even more significant with larger projects). A more detailed analysis is available in comments submitted by the Water Advocacy Coalition.

<sup>28</sup> See Section 404 permit instructions for the Corps’ Rock Island District (Iowa, Illinois and Missouri) at <http://www.mvr.usace.army.mil/Missions/Regulatory/ApplicationFormsInstructions.aspx>. Each Corp district has similar instructions, which is just the start of the materials applicants must provide to the Corps.

<sup>29</sup> Sunding at 76.

<sup>30</sup> <http://water.epa.gov/polwaste/npdes/upload/EPA-HQ-OW-2002-0025-0058.pdf>

For pesticide applications, a section 402 “general” permit may or may not be available, as many pesticide NPDES general permits have been drafted for specific types of applications that would not include row crop production. Several EPA public statements during the comment period have indicated that general permits are available for pesticide use, but EPA has provided no specific information on how many states actually offer general permit coverage for pesticide applications to row crops. Meanwhile, EPA has been utterly silent on the absence of any general permits (to our knowledge) for fertilizer application (outside the CAFO context). Does EPA plan to pursue federally mandated and enforceable “nutrient management plans” for row crop farmers across the nation, as it has for CAFOs? Regardless, unless and until EPA and the states that administer the section 402 permitting program issue general permits for fertilizing crops, farmers may have no choice but to pursue individual permits simply to fertilize their crops grown within or near the countless newly jurisdictional low spots on farm fields.

Whether general or individual permits are involved, perhaps the largest likely cost of NPDES permitting requirements for essential farming practices is the cost of not being allowed to apply products or nutrients in or around newly jurisdictional features that are ubiquitous across our nation’s most productive farming country. This cost is in the form of diminished productivity, reduced efficiency and increased risk of disease—not to mention the risk of enforcement (imagine a farmer being forced to prove in court that he turned the spray nozzle off before passing over a dry ephemeral drainage). EPA’s failure to even consider implications such as these further undermines the credibility of its already fatally flawed economic impact analysis of the proposed rule.

## **VI. The Proposed Rule’s Vagueness Poses Due Process Concerns**

The vagueness of the proposed rule as described above also creates a Due Process problem because of the heavy civil fines and criminal penalties carried by the CWA. Civil and administrative penalties can equal \$37,500 per day, per violation 33 U.S.C. § 1319(d),(g) (last adjusted to reflect inflation at 78 Fed. Reg. 66,843). A “knowing” violation carries potential criminal penalties of up to \$100,000 and six years in jail time. *Id.* at § 1319(c)(2). Even a “negligent” violation can result in fines of \$50,000 per day and two years in jail. *Id.* at § 1319(c)(1). The permit application process also presents further peril: a false statement, representation or certification can bring fines up to \$20,000 per day and four years in jail. *Id.* at §1319(c)(4).

EPA publicizes the severity of CWA criminal penalties and the fact that a farmer can not only lose the farm, but lose his or her liberty. EPA has, in fact, specifically targeted agriculture for criminal enforcement. In July of 2013, EPA issued a “Criminal Enforcement Alert” letting livestock and poultry operations classified as CAFOs know that EPA is ramping up and targeting CAFOs in its criminal enforcement of the CWA’s discharge prohibitions.<sup>31</sup> The Alert contained several examples of farmers who faced criminal penalties and staggering fines. For the farmer operating a CAFO, it is now very important to clearly understand whether a low spot in the land application field is a jurisdictional wetland or whether channelized rainwater that occasionally flows across that same field is an ephemeral tributary. Knowingly spraying manure as fertilizer

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<sup>31</sup> Appendix M, EPA “Criminal Enforcement Alert, July 2013, also available at <http://www2.epa.gov/sites/production/files/documents/cr-cafo-06-13.pdf>

to that cropped land application area would be a direct and unlawful discharge to a jurisdictional water if the channel is an ephemeral tributary. Likewise, knowingly or negligently applying pesticides directly to a similar ephemeral drain crossing a corn field without an NPDES permit carries the same risk of criminal prosecution.

Instead of providing clarity and certainty so that law abiding farmers can understand and comply with the law, the proposed rule categorically defines “waters of the U.S.” amorphously, turning on so many vague terms that no one can know what conduct is criminal and what conduct is lawful. Yet an incorrect guess can result in criminal liability and even incarceration.

Consequently, the rule violates the basic Due Process requirement that criminal statutes provide a fair warning that the common world will understand. *United States v. Bass*, 404 U.S. 336, 348 (1971). As proposed, there is little in the rule that the “common world” will understand—indeed most of the preamble and even the regulatory text is scientific jargon. No farmer, or any other landowner, can reasonably be expected to understand and carry out scientific determinations (such as the identification of an OHWM, or the distinction between an ephemeral stream and an erosional feature, or the aggregate impact of all “similarly situated” features in “the region”) that agency officials themselves find daunting.

In addition, decades of Supreme Court precedent have established that “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” *Rewis v. United States*, 401 U.S. 808, 812 (1971); *United States v. Universal CIT*, 344 U.S. 218, 222 (1952) (The courts will “not derive criminal outlawry from some ambiguous implication.”); *United States v. Cardiff*, 344 U.S. 174, 176 (1952) (“The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited”). Likewise, the Agencies must avoid any regulatory interpretation that would impose a loss of liberty over terms so vaguely defined.

## **VII. The Vagueness of the Proposed Rule Undermines its Validity**

As our comments above have shown, key terms and concepts in the proposed rule lack clear definitions comprehensible to the public. When, for example, is a low spot that collects water when it rains a puddle, and when is it an ephemeral pond adjacent to a tributary, subject to regulation? What distinguishes an erosional feature from a jurisdictional ephemeral stream? At what point is there a sufficient “nexus” between an isolated wetland, in the aggregate with all “similarly situated” wetlands in the “region,” and some distant navigable water? What sort of shallow subsurface connection suffices to establish adjacency? The vagueness of the proposed rule makes it impossible for farmers and ranchers to know whether wet spots, ponds and ephemeral drainages on their land will be deemed “waters of the United States.”

These ambiguities not only present serious practical difficulties for ranchers and farmers, but also cast serious doubt on EPA’s authority to enforce the proposed rule at all. EPA evidently intends that its case-by-case judgments will fill in the proposed rule’s many gaps (79 Fed. Reg. at 22,208-09), giving it flexibility in future enforcement actions to mold the vague text of the regulation as it sees fit. That it may not do. The Supreme Court has in recent decisions warned against deferring to agencies’ interpretations of their own vague regulations in situations, like this one, where deference would “encourage[e] agencies to be vague in framing regulations, with the plan of issuing ‘interpretations’ to create the intended new law without observance of notice

and comment procedures.” *Decker v. Nw. Env’tl Defense Ctr.*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part). Put another way, the Supreme Court will not “permit [an] agency, under the guise of interpreting a regulation, to create de facto a new regulation.” *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 881 (2011). Yet that is just what EPA proposes to do here: to issue a hopelessly vague regulation, the concrete meaning of which it will provide later on, in case-by-case “interpretations” and presumably further “guidance” without the notice-and-comment procedures mandated by the APA.

Indeed, even in cases where there is “no reason to suspect that the [agency’s] interpretation does not reflect [its] fair and considered judgment” (*Chase Bank*, 131 S. Ct. at 881), justices of the Supreme Court have expressed serious doubts about the practice of deferring to agencies’ interpretations of their own ambiguous regulations under *any* circumstances. *See Decker*, 133 S. Ct. at 1339 (“there is some interest in reconsidering” *Auer* deference) (Roberts, C.J., joined by Alito, J., concurring). The reason for those doubts is evident: When “the power to prescribe is augmented by the power to interpret,” it encourages agencies “to speak vaguely and broadly, so as to retain a ‘flexibility’ that will enable ‘clarification’ with retroactive effect,” turning the motivating rationale for Administrative Procedure Act (APA) notice-and-comment rulemaking on its head. *Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part). EPA’s adoption of that suspect strategy could not be any more obvious than it is in this case.

### **VIII. EPA’s Advocacy During the Public Comment Period Violates APA Requirements and Undermines the Purposes of Public Participation**

Almost as troubling as the proposal itself is the unprecedented public advocacy that the Agencies have engaged in to garner support for their own rule. The modern social media age provides many new tools for far-reaching and timely public communications, but the content of those communications must comply with the underlying goals of the notice-and-comment rulemaking process: “to get public input so as to get the wisest rules;”<sup>32</sup> “encouraging public participation in the administrative process;”<sup>33</sup> and ensuring “agency accountability and reasoned decisionmaking.”<sup>34</sup> Here, in contrast, EPA’s aggressive marketing campaign suggests that its paramount concern has been to garner support and quash opposition to the proposal.

Since the proposal was issued, the Agencies have published multiple fact sheets, Q&As, official government blogs and various other statements that offer new interpretations about what the rule does and does not do, making the details of the proposal itself a moving target.<sup>35</sup> The Agencies’ marketing campaign, however, has not merely created confusion about the content of the

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<sup>32</sup> *Dismas Charities, Inc. v. U.S. Dep’t of Justice*, 401 F.3d 666, 680 (6th Cir.2005); *see also Conn. Light & Power Co. v. Nuclear Reg. Comm’n*, 673 F.2d 525, 530 (D.C. Cir. 1982) (“The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process.”).

<sup>33</sup> *North Carolina Growers’ Ass’n, Inc. v. United Farm Workers*, 702 F.3d 755, 763 (4th Cir. 2012) (“The important purposes of this notice and comment procedure cannot be overstated.”).

<sup>34</sup> *Am. Med. Ass’n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995).

<sup>35</sup> *See* Comments submitted by the Waters Advocacy Coalition on the “Proposed Rule to Define ‘Waters of the United States,’” Docket ID No. EPA-HQ-OW-2011-0880, September 29, 2014.

proposal, but also crossed the line from providing information about a proposal to an advocacy campaign apparently aimed at belittling and silencing those with differing viewpoints.<sup>36</sup>

The statements on EPA’s “Ditch the Myth” website<sup>37</sup> largely track statements made by its then-Acting Assistant Administrator for Water Nancy Stoner in a July 7, 2014 entry on EPA Connect, the Official Blog of EPA’s Leadership, entitled “Setting the Record Straight on Waters of the US.”<sup>38</sup> In that blog, Ms. Stoner indicates her wish to clear up “confusion” about the proposed rule and that she “want[s] to make sure you know the facts.” Like “Ditch the Myth,” Ms. Stoner’s blog entry goes on to detail a number of supposed facts or truths to counter so-called myths or misunderstandings. The numerous inaccuracies in Ms. Stoner’s blog forced AFBF to respond with a detailed rebuttal, just to ensure that its own members and the agricultural community in general would receive accurate information on the rule and its implications.<sup>39</sup>

EPA’s campaign to convince the agricultural community that the rule will have no effect on them and their operations tends to frustrate meaningful public comment on the proposed rule. Indeed, for each of the reasons explained in AFBF’s responses to Ms. Stoner’s blog, EPA’s statements may mislead the public (and indeed appears aimed at misleading the public) into believing that their interests will not be affected by the proposed rule. EPA followed up with an equally misleading set of Q&As in September, forcing yet another detailed AFBF rebuttal to provide accurate information to the agricultural community.<sup>40</sup> EPA’s spin campaign aimed at convincing a significant segment of the stakeholder community that it is *not* affected by the proposed rule, when in fact it will be dramatically affected, violates both the letter and the spirit of APA notice-and-comment rulemaking requirements.

Administrator McCarthy has made several statements—while on an “outreach” tour aimed at agricultural stakeholders—characterizing those same agricultural stakeholders’ concerns about the proposed rule as “ludicrous” and “silly.”<sup>41</sup> Such characterizations have a chilling effect because stakeholders may decline to waste their time preparing comments likely to be not only ignored but derided as unworthy of consideration.<sup>42</sup> Whether stakeholder concerns are

<sup>36</sup> See *Conn Light & Power Co.*, 673 F.2d at 530 (explaining that if an agency “fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency’s proposals”).

<sup>37</sup> See Appendix N, EPA “Ditch the Myth” website at <http://www2.epa.gov/uswaters/ditch-myth>

<sup>38</sup> See Appendix H and blog at <http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/>.

<sup>39</sup> See AFBF Response to Nancy Stoner Blog at Appendix O.

<sup>40</sup> See Appendix I for the September Fact Sheet and Appendix P for AFBF’s response, “Trick or Truth.”

<sup>41</sup> See Attachment Q, A. Gangitano & J. Hagstrom, “McCarthy addresses ‘misinformation’ about Waters of the US Rule,” AgWeek (July 14, 2014), *available at* <http://www.agweek.com/event/article/id/23667/>.

<sup>42</sup> See *Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp. 2d 830, 847 (E.D. Cal. 2008) (“[if] the public perceives that the agency will disregard its comments, there may be a chilling effect that causes the public to refrain from submitting comments as an initial matter”).

objectively right or wrong, such behavior by agency officials—and its top leadership, no less—reflects a lack of openness to public input and a lack of regard for legitimate public apprehension.

What makes these actions even more troublesome is that they occurred while the rule was still out for public comment, impairing and inhibiting the public’s ability to understand and provide meaningful input on the proposal, and locking the Agencies into a “position” on the proposal and its effects before the comment period has even closed. Thus EPA’s goal of suppressing opposition on the proposed rule has trumped its duties to describe it accurately and to openly consider alternative views. Rather than being open to receiving a diverse range of viewpoints, encouraging the open exchange of information, and engaging in *meaningful* public discussion, EPA has instead focused on aggressively pushing a one-sided view of the proposed rule and has derisively deflected legitimate public concerns about the rule’s likely consequences.

In addition to rebuking public concerns and, in our opinion, publishing misinformation aimed at the agricultural community, EPA has engaged in a remarkable social media campaign to solicit support for the rule. In its Thunderclap campaign, EPA has actually suggested that anyone who feels that clean water is important and who wishes EPA to protect clean water for their health, family, and community should show their support for the proposed rule via these social media tools. Expressing general support for “clean water” via a Thunderclap or Twitter statement, however, cannot fairly be equated with meaningful comment on EPA’s proposal.

Other organizations have joined in the act as well, such as Organizing for Action (OFA), the successor to President Obama’s 2012 campaign organization. On September 17, OFA sent an initial mass email asking Obama supporters to click a link adding their name to support “common-sense protections the President has proposed.”<sup>43</sup> Then, on October 17, OFA sent a follow up email (apparently addressed to everyone who had clicked on the initial email) indicating that OFA would be filing comments with EPA and requiring the recipients to “opt-out” if they did *not* want their names added to comments in support of the proposed rule.<sup>44</sup> Neither of these communications included any substantive information about the proposal at all—only inflammatory rhetoric about fighting polluters and special interests who “oppose clean water.” We do not know whether EPA or other Administration officials coordinated with OFA on this effort to generate ill-informed support for the proposed rule, but any such coordination would raise serious questions about the tactics used to influence the public.

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<sup>43</sup> September 17, 2014 email from Organizing for Action [info@barackobama.com](mailto:info@barackobama.com); Stand Up for Clean Water page at [http://www.barackobama.com/protect-our-water/?keycode=&email=\(redacted\)&zip=33774&utm\\_medium=email&utm\\_source=obama&utm\\_content=3+-+httpmybarackobamacomStandUpforCleanWater&utm\\_campaign=em14\\_x\\_cc\\_20141018\\_x\\_x\\_ofa\\_wotus&source=em14\\_x\\_cc\\_20141018\\_x\\_x\\_ofa\\_wotus](http://www.barackobama.com/protect-our-water/?keycode=&email=(redacted)&zip=33774&utm_medium=email&utm_source=obama&utm_content=3+-+httpmybarackobamacomStandUpforCleanWater&utm_campaign=em14_x_cc_20141018_x_x_ofa_wotus&source=em14_x_cc_20141018_x_x_ofa_wotus) (attached hereto as Appendix R).

<sup>44</sup> October 17, 2014, 4:36 p.m. email from Organizing for Action <[info@barackobama.com](mailto:info@barackobama.com)>; Opt-out page at [https://my.barackobama.com/page/s/thanks-for-taking-a-stand-to-protect-our-water-supply?utm\\_medium=email&utm\\_source=obama&utm\\_content=1+-+http](https://my.barackobama.com/page/s/thanks-for-taking-a-stand-to-protect-our-water-supply?utm_medium=email&utm_source=obama&utm_content=1+-+http) (attached hereto as Appendix S).

Taken together, all of the above EPA actions demonstrate a focus on drumming up support and dampening opposition to the proposed rule, which has undermined the Agency's ability to clearly explain the proposal, invite comments, and meaningfully consider those comments. These actions deprive the public of a "meaningful opportunity" to comment on EPA's controversial proposal.<sup>45</sup> Instead, they suggest that EPA had made up its mind before the public participation process was even concluded.

**IX. Contrary to the Agencies' Marketing Campaign, the Undersigned Agricultural Organizations Did Not Push for *This* Proposed Rule.**

The undersigned groups would like to respond to misleading statements made by EPA in its marketing campaign suggesting that our organizations requested this proposed.<sup>46</sup> For many years, agricultural organizations and numerous other stakeholders have asked the Agencies to stop relying on non-binding guidance as a basis for asserting and expanding federal jurisdiction. We publicly made these comments several times, including in letters and comments to EPA.<sup>47</sup> In those materials, agricultural groups and others stressed that:

- A proposal to revise the Agencies' regulations defining "waters of the U.S." must clearly identify the limits to CWA jurisdiction articulated by the Supreme Court in *SWANCC* and *Rapanos*. In those cases, the Supreme Court *rejected* the notion that CWA jurisdiction extends to nonnavigable, isolated, intrastate waters or to any area with a hydrologic connection to navigable waters. The Court disagreed with the Agencies' "land is waters" approach.
- A proposed rule should not allow for the watershed aggregation approach contained in the Agencies' 2011 draft Guidance. Consistent with *SWANCC*, the proposed rule should explicitly state that isolated (or "non-physically proximate") waters are not subject to CWA jurisdiction.
- A proposed rule must not simply adopt confusing legal standards such as "significant nexus," but rather establish clear and reasonable jurisdictional lines to assist the regulated public and regulators in implementing the CWA on the ground.

The Agencies' proposed rule does none of this. It provides no clarity and establishes no meaningful limits to EPA's power over activities that have some effect on water quality or on the water itself. The proposed rule bears no resemblance to the type of action that the undersigned or any other group within the regulated community asked for. We ask that the Agencies cease implying that any of the undersigned groups requested this rule.

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<sup>45</sup> *Rural Cellular Ass'n v. F.C.C.*, 588 F.3d 1095, 1101 (D.C. Cir. 2009) (citations omitted) (explaining that "[t]he opportunity for comment must be a meaningful opportunity" and that courts have repeatedly "held that in order to satisfy this requirement, an agency must also remain sufficiently open-minded"); *see also Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 450 (3d Cir. 2011).

<sup>46</sup> *See* U.S. EPA, "Persons and Organizations Requesting Clarification of 'Waters of the U.S.' by Rulemaking," available at [http://www2.epa.gov/sites/production/files/2014-03/documents/wus\\_request\\_rulemaking.pdf](http://www2.epa.gov/sites/production/files/2014-03/documents/wus_request_rulemaking.pdf); attached herein as Appendix T.

<sup>47</sup> *See* letter from the Waters Advocacy Coalition to EPA on Feb. 12, 2013, attached as Appendix U.

## X. Conclusion

For the foregoing reasons, the undersigned ask the Agencies to withdraw the proposed rule and start a real conversation, not a lecture, with the agricultural community and state regulators. The Agencies took input in the form of public comments to their 2011 proposed guidance defining navigable waters, but did not heed (or even discuss) the concerns of the agricultural community or other sectors of the U.S. economy. The Agencies' rule would confer federal control over all but the most remote and unconnected waters—including countless features that are much more like *land* than *water*. Congress did not give the Agencies that authority, and the Agencies may not take what Congress did not give.

Sincerely,

Agribusiness Association of Kentucky  
Agribusiness Council of Indiana  
Agricultural Council of Arkansas  
Agricultural Retailers Association  
Agri-Mark, Inc.  
Alabama Cotton Commission  
American Farm Bureau Federation  
American Horse Council  
American Sugarbeet Growers Association  
Arizona Cotton Growers Association  
Arizona Pork Council  
Arkansas Pork Producers Association  
Association of Texas Soil & Water-  
Conservation Districts  
Blue Diamond Growers  
California Association of Wheat Growers  
California Cotton Ginners Association  
California Cotton Growers Association  
California Association of Winegrape-  
Growers  
Corcoran Irrigation District  
Corn Producers Association of Texas  
Crop Protection Association North Carolina  
Cross Creek Flood Control District  
Dairy Producers of New Mexico  
Dairy Producers of Utah  
Delta Council

Delta Lands Reclamation District No. 770  
El Rico Reclamation District No. 1618  
Exotic Wildlife Association  
Farm Credit Council  
Florida Fertilizer & Agrichemical-  
Association  
Gates-Jones Water Company  
Georgia Agribusiness Council  
Georgia Cotton Commission  
Georgia Pork Producers Association  
Georgia Poultry Federation  
Henry Miller Water District  
Idaho Dairymen's Association  
Idaho Grain Producers Association  
Illinois Farm Bureau  
Illinois Fertilizer & Chemical Association  
Illinois Pork Producers Association  
Independent Cattlemen's Association of-  
Texas  
Indiana Pork Producers Association  
Indiana State Poultry Association  
International Certified Crop Advisors  
Iowa Pork Producers Association  
Kansas Agribusiness Retailers Association  
Kansas Association of Wheat Growers  
Kansas Cooperative Council  
Kansas Grain and Feed Association  
Kansas Pork Association

Kentucky Pork Producers Association  
Kings County Canal Company  
Louisiana Cotton Producers Association  
Melga Canal Company  
Michigan Pork Producers Association  
Mid-America CropLife Association  
Milk Producers Council  
Minnesota Association of Wheat Growers  
Minnesota Crop Production Retailers  
Minnesota Pork Producers Association  
Mississippi Pork Producers Association  
Mississippi Poultry Association  
Missouri Agribusiness Association  
Missouri Dairy Association  
Missouri Pork Association  
Montana Grain Growers Association  
National All-Jersey  
National Association of Wheat Growers  
National Cattleman's Beef Association  
National Chicken Council  
National Cotton Council of America  
National Council of Farmer Cooperatives  
National Pork Producers Council  
National Turkey Federation  
National Wheat Growers Association  
Nebraska Pork Producers Association  
Nebraska Wheat Growers Association  
New York Pork Producers Cooperative  
New York State Agribusiness Association  
North Carolina Cotton Producers-  
Association  
North Carolina Pork Council  
North Carolina Poultry Federation  
North Carolina Small Grain Growers-  
Association  
North Dakota Grain Growers Association  
Northeast Dairy Farmers Cooperatives  
Ohio AgriBusiness Association  
Ohio Pork Producers Council  
Oklahoma Cotton Council  
Oklahoma Pork Council  
Oklahoma Wheat Growers Association  
Oregon Cherry Growers, Inc.  
Oregon Dairy Farmers Association  
Oregon Wheat Growers League  
Plains Cotton Growers, Inc.  
Riverside & Landowners Protection-  
Coalition  
Rocky Mountain Agribusiness Association  
Rolling Plains Cotton Growers, Inc.  
Select Milk Producers, Inc.  
South Carolina Pork Board  
South Dakota Agri-Business Association  
South Dakota Grain & Feed Association  
South Dakota Pork Producers Council  
South East Dairy Farmers Association  
South Texas Cotton & Grain Association  
Southern Cotton Growers, Inc.  
St. Albans Cooperative Creamery, Inc.  
Sunmaid Growers of California  
Sunsweet Growers, Inc.  
Tennessee Pork Producers Association  
Texas Association of Dairymen  
Texas Broiler Council  
Texas Cattle Feeders Association  
Texas Cotton Ginners Association  
Texas Egg Council  
Texas Forestry Association  
Texas Grain & Feed Association  
Texas Pecan Growers Association  
Texas Pest Management Association  
Texas Poultry Federation  
Texas Poultry Improvement Association  
Texas Seed Trade Association  
Texas Sheep & Goat Raisers Association  
Texas Soybean Association  
Texas Turkey Federation  
Texas Wheat Producers Association  
Texas Wildlife Association  
Tulare Lake Basin Water Storage District  
Tulare Lake Canal Company  
Tulare Lake Drainage District

Tulare Lake Reclamation District No. 749  
Tulare Lake Resource Conservation District  
Tulare Lake Water Company  
U.S. Durum Growers Association  
U.S. Poultry & Egg Association  
U.S. Rice Producers Association  
United Egg Producers  
United Fresh Produce Association  
Upstate Niagara Cooperative, Inc.  
Virginia Agribusiness Council  
Virginia Pork Industry Association  
Virginia Poultry Federation  
Virginia State Dairymen's Association  
Washington Association of Wheat Growers  
Western Agricultural Processors-  
Association  
Western United Dairymen  
Wyoming Ag-Business Association  
Wyoming Crop Improvement Association  
Wyoming Wheat Growers Association