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November 14, 2014

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Re: Docket ID No. EPA–HQ–OW–2011–0880

To Whom It May Concern:

As New York State's largest general farm organization, representing approximately 25,000 members, New York Farm Bureau (NYFB) appreciates the opportunity to comment on the *"Definition of 'Waters of the United States' Under the Clean Water Act"* proposed rule by the U.S. Army Corps (Corps) of Engineers and the Environmental Protection Agency (EPA).

This rule proposal is very significant to our farmers, who represent all commodities, ranging from fruits and vegetables, to dairy and livestock, to field crops and timber. They also represent all production methods, everything from conventional to organic, and farm a variety of landscapes and geography on their farms.

In order to better understand the proposal, NYFB staff and farmers invested time in reading the proposal, the pertinent court cases and other supporting material. In addition, we made a good faith effort to learn about the proposal from EPA staff directly. We participated in two EPA webinars (April 7 and July 16) on the proposed rule. We also attended several EPA-hosted meetings—one specifically for agriculture in Syracuse, N.Y., on June 27, one addressing watershed concerns in Walton, N.Y., on Sept. 18, and we observed the Local Government Advisory Committee in Worchester, Mass., on Sept. 22. In addition, EPA officials toured several farms in Central New York on June 26 and these farmers had the opportunity to speak directly with Nancy Stoner, then Acting Assistant Administrator for the EPA Office of Water.

As a result of these multiple interactions with EPA, farmers came away feeling that the agency frequently contradicted itself, was not able to sufficiently answer questions seeking clarity on how this rule will practically be implemented, and were left with very little confidence that EPA's contention of minimal impacts for agriculture was accurate.

Our farmers take the care and protection of our environmental resources in New York very seriously and are actively engaged in a host of mandatory and voluntary water quality programs. New York State is well known for its robust Agricultural Non-Point Source Program. Clean water is essential to healthy crops and livestock and ensures the protection of the drinking water for our farm families, their communities and all residents of New York.

New York farmers already work closely with the New York State Departments of Environmental Conservation and Agriculture and Markets, USDA-NRCS personnel and local Soil and Water Conservation districts on land and water conservation programs. In fact, NYFB has been a strong advocate for the adoption of various soil conservation practices like no-till farming, riparian buffers and cover crops, and supported the development and outreach to farmers for voluntary environmental programs that even reach beyond the regulated community, such as New York State's Agricultural Environmental Management (AEM) program. Ensuring that farmers have access to environmental programs and expertise—and the resources to take advantage of these—has long been a priority of New York Farm Bureau.

With all of this in mind, NYFB strongly objects to this rule change and believes that it represents a broad expansion of the federal jurisdiction of the Clean Water Act, well beyond the authority granted to the agencies by Congress and subsequently limited by the Supreme Court. ***We strongly encourage EPA and the Corps to withdraw this rule and work with stakeholders and state regulators to determine what, if any, clarifications are necessary and the best way to move forward.*** Our concerns are detailed below.

The Rule Leads To Greater Confusion, Rather Than Clarity

The agencies very clearly state in the preamble that "The purposes of the proposed rule are to ensure protection of our nation's aquatic resources and make the process of identifying "waters of the United States" less complicated and more efficient. The rule achieves these goals by increasing CWA program transparency, predictability, and consistency. The rule will result in more effective and efficient CWA permit evaluations with increased certainty and less litigation." (79 Fed. Reg. 22190)

The preamble goes on to state, "It will provide needed clarity for regulators, stakeholders and the regulated public for identifying waters as "waters of the United States," and reduce time and resource demanding case-specific analyses prior to determining jurisdiction and any need for permit or enforcement actions." (79 Fed. Reg. 22191)

NYFB disagrees that this rule achieves these promises of efficiency, predictability, consistency, less litigation, and reduction of case-specific analyses. In fact, we believe the definitions now are so broad that it is nearly impossible for a typical citizen farmer to determine whether or not many features on his or her farm will be considered "waters of the U.S." and whether or not a federal permit is required to continue farming activities on their land.

Never before has EPA regulated the type of ditches that commonly occur on our farms. Some of these ditches are used to divert water away from pollution sources, like manure storage, and others are used to collect water efficiently and direct it during rainstorms or the spring snowmelt. Many of these on-farm ditches have been either constructed under the guidance of Soil and Water Conservation District personnel or designed and built in concert with nutrient management or other on-farm conservation systems as dictated by NRCS or state standards, such as NRCS Codes 607 and 608.

Under the proposed rule, EPA and the Corps specifically include ditches in the definition of tributaries for the first time and this will likely cause a number of farm ditches, not previously regulated under the Clean Water Act, to fall under the new definition of a tributary. This is an obvious expansion of the reach of the agency.

The rule defines a tributary as having the "presence of a bed and banks and ordinary high water mark…which contributes flow, either directly or through another water" to a traditional navigable water (79 Fed. Reg. 22263). Despite this definition, however, the agencies will not necessarily require that these features exist for a tributary designation, since on low gradients "the banks of a tributary may be very low or may even disappear at times" and the Ordinary High Water Mark (OHWM) need only be indicated by changes in soil characteristics or the presence of litter or debris (79 Fed. Reg. 22202).

In addition, the flow of the tributary may be ephemeral, intermittent or perennial—meeting a very low standard of "contributing flow." Furthermore, the connection to a traditional navigable water must only be through another water or waters that eventually—even many miles away—flow to a traditional navigable water (79 Fed Reg 22202).

How is a farmer expected to unravel this kind of definition when the requirements are not always required? And how far does that farmer have to trace a farm ditch or an area with seasonal flow to determine whether it ever, eventually, if it is actually carrying water, runs into something that is considered a Water of the U.S.? Do they have to walk their neighbor's farm and the yard of the neighboring home after that and behind the next neighboring business and into the neighboring county? How will they know if a water eventually--many miles later and without the presence of a visible bed or banks—could contribute flow to a water?

There are exemptions for ditches spelled out in the rule: those that are "excavated wholly in uplands, drain only uplands and have less than perennial flow" and those that "do not contribute flow, either directly or through another water" to a traditional navigable water. However, given that these circumstances will not often be met—given that ditches are built to collect and carry water and usually are directed toward a spot where water already naturally collects—these exemptions will provide limited relief to farmers.

The term "tributary" is just one example, but the other definitions like "adjacent," "neighboring," "significant nexus" and even "floodplain" (what floodplain interval are the agencies referring to?) are similarly broad and confusing. As a result, farmers wishing to ensure their compliance with the Clean Water Act will be forced to seek individual determinations for a host of low spots, ditches, seasonal drainages, and isolated wetlands just to make sure they are legally farming. However, no additional staff or resources are planned for NRCS, or other agencies, which make these determinations. In fact, there is already a significant delay in NRCS determinations in areas of our state. Increasing the need for these determinations will delay farming and other land activities, add costs, and be a disincentive to landowners to responsibly manage their land.

Farmers are willing to do their part in protecting the waters on their land, but they need clear definitions that allow them and regulators to clearly and consistently determine jurisdictional waters. With the current reading of these definitions appearing to practically bring all ditches, low spots and other wet areas under Clean Water Act permitting requirements, this rule does not meet the test for clarity and predictability laid out in the preamble.

The Rule Undermines Congressionally Granted Agricultural Exemptions

Due to the broadness of the definitions explained above, we anticipate many more areas on farms will fall under Clean Water Act jurisdiction and this will effectively remove the explicit exemptions that Congress granted for agriculture. Congress did not intend for farms to be required to receive costly and onerous CWA permits just to conduct typical farming activities.

There are current agricultural exemptions from:

- Section 404 for "normal" farming activities
- Section 404 for the construction of farm ponds
- Section 402 so that agricultural stormwater discharges are considered "non-point sources"

The definition changes in this rule would increase the difficulty for livestock farms, operating under a state or federal CAFO permit, to spread organic fertilizer (manure) onto farm fields. This is a sound agricultural practice when applied at an agronomic rate and frequency under appropriate field and weather conditions that limits the possibility of any runoff. This practice is a key part of New York's certified CAFO plans and has the added benefit of decreasing the use of synthetic fertilizers. However, this practice could become too impractical to continue if this rule moves forward, due to a maze of buffer zones crisscrossing small farm fields so as to avoid even a drop of manure (considered a pollutant) landing in a low-spot or ephemeral drainage now considered a "water of the U.S."—even if that feature is dry at the time. In this case, how does EPA propose addressing the nutrient management needs of farms and disposing of this previously valuable resource?

It is not practical for farms to fence off or draw a buffer zone around every potential low spot that collects rainwater and every ephemeral flow that is only wet in the Spring after snowmelt just so they can avoid moving any soil or releasing a drop of manure when it is spread. Congress knew that when they wrote the agricultural exemptions into the Clean Water Act.

To be in compliance, farmers will be forced to obtain approval under a Section 402 discharge permit just to carry out their comprehensive nutrient management plan to fertilize their fields. This means EPA will be deciding when, how, and even if a farmer may fertilize crops or protect them from insects and disease instead of allowing agronomic conditions and conservation efficacy dictate how to best protect water quality through on-farm activities that vary from day to day. In this way, EPA's proposal will turn New York's CAFO program into a circuitous permit system focused on paperwork instead of achieving any true environmental or water quality gains. In its simplest form, it is the difference between EPA's knowledge vs. timely, site-specific conservation wisdom to achieve the common goal of sustainable clean water.

How long will approval for this type of discharge permit take when, for instance, an Army Worm infestation can claim a whole hay field in a single day and then move across the street to the next farm—as we saw in New York in 2012. It is impossible to imagine federal regulators being able to respond in the timeframes necessary to meet agriculture's seasonal and often very timely needs.

We are also concerned about the classification of agricultural stormwater runoff. If EPA classifies a wet spot in a corn field as a "water of the U.S.," then manure application in that area is immediately a point source discharge that requires a NPDES permit. Previously, depending on the size of the farm, the manure application was dictated by the farm's nutrient management plan approved as part of its CAFO permit. Any runoff from the field after a rain event was treated as agricultural stormwater and regulated by the state as a non-point source of pollution. However, under the new definitions, these exemptions are effectively removed and the state loses much of its non-point source oversight.

While this rule clearly does not omit the agricultural exemptions, the definitional changes have the power to effectively remove them in real-life application by making it impossible to apply these exemptions to newly reclassified "waters of the U.S." Additionally, it is not acceptable to our family farm

members that EPA assume it can provide clarity on its proposed agricultural exemptions in real-world application instead of addressing these valid concerns before any final regulatory action is taken.

Interaction with State Programs and A Change of the Regulatory Scheme

NYFB and our farmers are very concerned with how this expansion of Clean Water Act jurisdiction and change in the regulatory scheme will impact our state water quality programs that are already in place. And we have not been able to discern that EPA or the Corps actually consulted with these state regulators in advance of issuing this rule to gauge what the effect on current programs would be and if this would negatively impact overall water quality improvement.

By effectively removing the agricultural stormwater exemption as explained above, and regulating areas of fields and farmsteads as waters of the U.S., we have serious concerns that this will weaken or at least bring uncertainty to our successful state water quality programs. By changing the traditional role of the state to regulate this non-point source pollution—as in the past and as the CWA intended—this proposal undermines all the collaborations and measureable improvements that our non-point programs have achieved.

The preamble to the rule states that Congress passed the CWA to protect the nation's waters, "while recognizing, preserving, and protecting the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution within their borders." (79 Fed. Reg. 22191) When EPA and the Corps are proposing rules that regulate common ditches as "tributaries" and make everything inside a floodplain jurisdictional, they are not allowing the states to effectively regulate within their borders as they see fit.

Lack of Resources to Handle Exponential Increase in Feature-by-feature Determinations

It is clear to our farmers that the number of features on their farms that will need to receive determinations from NRCS will grow significantly should this rule go into effect. This will be necessary just to ensure that they are in compliance with the law and do not place themselves at greater risk for a citizen suit. No agency is able to certify for a farmer that he does not have jurisdictional waters on his property—or at least that is what Ms. Stoner told us in person in Syracuse—and the rule makes it too confusing for a farmer to make this assertion himself, so they will need to rely on requesting NRCS determinations for any areas in question. They will do this just to protect themselves and have something to defend against any violation notices or lawsuits should another regulator or citizen decide that a feature on the farm "looks like" it should be a water of the U.S.

In response to this anticipated increase in determination needs, EPA and the Corps have provided no additional resources for NRCS or anyone else to handle this workload. In fact, NRCS in our state is already facing serious backlogs in many areas and unable to keep up with the current demand. One county reportedly has more than 1,000 determination requests in the queue.

Waiting for determinations in a system that is not prepared or equipped for this workload will undoubtedly cause great delays for farmers in conducting the normal and necessary farming activities needed to conduct their business. The agencies have provided no indication that they acknowledge this problem, let alone a plan or the financial commitment to address the problem?

Additionally, this increase in individual determinations will be done by the best professional judgment of staff. While NRCS officials are generally well respected in the farm community, it is inevitable that individuals will come to different conclusions on some of the confusing features on farms, especially those that seldom carry water. This will directly undermine the rule's stated goal of consistency by

increasing subjectivity. We have already seen a range in determination decisions within our state and certainly within the country.

The agencies should only be developing rules that are clear, concise, and can be implemented consistently across the country, not rules that muddy the waters more and lead to more subjective enforcement.

Citizen Suits Threaten Farms, Businesses, Municipalities and State Agencies

The lack of clarity in definitions proposed in this rule opens farmers up to the very real risk of citizen suits that attempt to enforce the Clean Water Act. Farmers strive for compliance, but when the requirements become hazy to discern and even the officials writing the rules are unable to answer questions clearly and to the satisfaction of practical landowners, it seems a true risk that litigation is likely. Farmers in full compliance with these complex and unclear rules may still have to go through great expense, stress and time to defend themselves against the claim of a violation brought by someone who is confused by the lack of clarity in the new rules. The agencies involved here have significant knowledge about the length of time and the cost of a typical citizen suit, including those that are unsuccessful or otherwise lack merit.

Furthermore, the fines and penalties associated with the Clean Water Act can be imposed on a farmer even if the so-called discharge was into a dry feature when there was no water present. In our opinion, this equates to land regulation, rather than an effort to better protect the nation's navigable waters, interstate waters and territorial seas.

The citizen suit threat and risk of hefty fines are just as concerning for businesses, municipalities and state agencies. Lawsuits can be lodged by those with legitimate complaints just as easily as by special interests or disgruntled neighbors. These can cause massive delays, halting projects for an extended amount of time and driving up costs. Expanding the Clean Water Act will open up more small businesses and projects for the public good to citizen suits and this threatens the opportunities for economic development and infrastructure improvements that we so desperately are seeking in New York.

Impacts on Agriculture

This rule change has the potential to take a significant amount of land out of agricultural production. This is in conflict with our own state's goals to ramp up agricultural production and increase the amount of fresh, local food consumed by our residents.

Particularly at risk are the valuable muck lands in New York State. Best known among these is the Black Dirt in Orange County, but rich muck soils exist in other parts of the state as well. These are some of our most sought after agricultural lands because they are extremely productive vegetable areas. All of these areas were originally drained as part of public works projects to convert them into farmland. The drainage ditches that run between the muck fields at regular intervals would very easily be considered "tributaries" under this rule's definition. That would take large swaths of these lands out of production so that buffer zones could be created and/or significantly increase the cost of food production in these areas by requiring expensive and time consuming permits.

It is concerning that this rule places generations-old family farm businesses all across our state at serious risk. They cannot afford a violation of the law to the tune of $37,500 per violation per day just because EPA decides a dry spot in their field was fertilized and it should be classified (through murky definitions) as a "water of the U.S." Nor can these farms afford the thousands of dollars of additional permitting fees

just to conduct the activities required to grow a crop and raise livestock. And they certainly can't afford the tens of thousands of dollars that it could cost to defend themselves against a citizen suit claiming they violated the CWA when they did everything they could to ensure compliance. These costs are serious threats to the 36,000 farms in New York, nearly all of them family-owned small businesses.

Finally, this rule as written is in conflict with our domestic food production goals. New York and the country are seeing growing demand for local food, but this regulation makes it more expensive and difficult to farm domestically by expanding the Clean Water Act to areas best regulated by the states. When foreign sources of food are less safe and much less regulated, this rule could indirectly lead to a less safe food supply for our population.

Grave Impacts on Our Communities and State

In the same way that farms will face delays if they have to wait for feature determinations and approval of new permits, this rule will add delays and additional costs for projects our communities and state initiate. These could include public transportation, renewable energy installations, disaster recovery (as our state will be hampered in providing waivers to do necessary conservation work following weather disasters), flood mitigation, and more.

A total of 35 counties in New York—more than half—passed resolutions opposing this definition change and calling on EPA to withdraw this rule. Copies of all these resolutions were forwarded to EPA under separate cover and should be entered into the docket. These counties realize that routine maintenance of their roadside ditches could be impacted by this rule and drive up costs for their highway departments. One county estimated that their highway department would need $750,000 to $1 million more in its budget just to continue its current maintenance work under the new regulatory definitions.

The changes also hamper the economic development plans that our communities and state work to create. The responsible and careful use of our land for development purposes makes sense in our communities, but excessive regulation that unnecessarily impedes this without measureable benefits to the environment represents a serious overreach by the agencies.

Conclusion

New York Farm Bureau also submitted comments to the docket regarding the "Interpretive Rule" (EPA-HQ-OW-2013-0820) that accompanies this rule, asking for it's withdraw as well. We have also previously submitted a letter in conjunction with 9 other business, government and agricultural organizations from New York asking for the full rule to be withdrawn given the damage it will cause agriculture, business, government and other important entities in our communities and our state. These organizations included: New York Farm Bureau, New York Association of Counties, The Business Council of New York, National Federation of Independent Business, New York State Association of Realtors, Farm Credit East, New York Conference of Mayors, Northeast Agribusiness and Feed Alliance, Associated General Contractors of New York State and the New York County Highway Superintendents Association.

In additional to the comments we have submitted, we are also in agreement with and urge you to carefully review those comments entered into the docket by the American Farm Bureau Federation and the Waters Advocacy Coalition (WAC) which call on EPA and the Corps to withdraw this rule. These comments describe in even greater detail how these faulty definition changes will expand Clean Water Act jurisdiction across nearly even wet area on our farms.

In addition, we would like to point out that the National Association of State Departments of Agriculture, the National Association of Conservation Districts and the Small Business Administration are among the numerous groups which have called on the agency to withdraw this rule due to its serious shortcomings.

The broad opposition to this rule, and the fact that many independent interests view the rule as lacking clarity and vastly expanding Clean Water Act jurisdiction, should clearly demonstrate to EPA and the Corps that the rule is flawed and must be reconsidered. For this reason, and all those listed above, we strongly urge you to withdraw the rule completely and work with stakeholders and state regulators to determine appropriate next steps. NYFB and our farmers stand ready to engage in this process with you.

Thank you for considering these comments.

Sincerely,

Dean E. Norton
President