

## TENNESSEE FARM BUREAU FEDERATION

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November 14, 2014

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

**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 Tennessee Farm Bureau Federation appreciates the opportunity to comment on the Environmental Protection Agency's (EPA) and Army Corps of Engineers' (together, "the Agencies") proposed rule defining "Waters of the United States." The Tennessee Farm Bureau represents farmers across the state who produce a very diverse range of commodities. This proposed rule impacts all landowners in Tennessee and has the potential to affect our farmers' capacity to produce commodities. We hope the Agencies will consider these comments and know they were submitted with the best interest of Tennessee farmers in mind. We also ask the Agencies to consider more detailed comments submitted by the Agriculture Coalition. Their comments outline more detailed legal arguments explaining this proposed rule is flawed. Our intent is to impress upon the Agencies how the plain language of this proposed rule impacts farmers and rural landowners across Tennessee.

### **The Proposal Should Reflect Decades of Court Decisions Restricting Jurisdiction**

The Agencies know the farm community across the nation is not satisfied with this attempt to redefine "Waters of the United States." Why continue the controversy over the federal government's jurisdiction under the Clean Water Act? The Clean Water Act is over forty years old and yet Tennessee farmers must operate with the uncertainty as to when, how, and where they can grow crops and livestock on their own property. In producer meetings where this proposal is explained, it is disheartening to see aged farmers shake their heads in disgust as they talk about this same controversy burdening their livelihood since they were young. A generation of farmers have operated from one set of proposed rules to the other and from one court decision to the other.

During this same forty year period this nation has experienced the greatest surge in technology, information sharing, data collection, and engineering in all of human history.

This nation now has a conservation ethic. It exists in business, industry, and farming. Federal funding for grants, cost sharing, research, and education are at all-time highs. States have operated their water protection programs now for decades. A new generation of state employees now working in state environmental departments have higher education degrees in environmental sciences that did not exist when the Clean Water Act was enacted. Yet the Agencies are proposing a definition of "Waters of the United States" that has greater regulatory impact than at any time in the history of the Clean Water Act. There is no crisis. Rivers are not burning. Water quality can be maintained without the full force of the federal government intruding on all property rights.

We are disappointed the Agencies have missed an opportunity to bring closure to the jurisdictional issue and regulate as the courts and Congress have directed. We believe the U.S. Supreme Court provided a course to resolve these issues and work within this "new day" to establish a clear, definitive line for the citizens of Tennessee and this nation to know where waters of the U.S. end and waters of our sovereign state begin. This proposal does not do that. This proposal is an attempt to recreate failed policies of the past that the U.S. Supreme Court denied. So, again this organization submits comments on the farmer's behalf expressing the legal and practical ramifications to agriculture just as our predecessors before us did decades ago.

#### **Cooperative Federalism is Diminished in this Rulemaking**

In this proposed rule, where is the cooperative federalism Congress envisioned between the Agencies and the state of Tennessee? We do not find it in this proposal. Congress said: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources...." (33 U.S.C. § 1251(b)). This proposal seeks to regulate land use throughout the state and water resources that belong under the jurisdiction of Tennessee's Water Quality Control Act of 1977. Tennessee's water quality statute says: "Recognizing that the waters of Tennessee are the property of the state and are held in public trust for the use of the people of the state...." (TCA 69-3-102(a)). What does this mean under this proposed rule? Based on this proposed rule, where does Tennessee have full jurisdiction over state waters and more importantly over the land use that could affect those waters? We cannot find that distinction between waters of the U.S. and waters of Tennessee.

Tennessee's Water Quality Control Act of 1977 has evolved over the years and it works for Tennesseans. We have a statute, regulations, and guidance that is understood by farmers, business, and industry. Tennessee has been successful in restoring waters back to functional status and meeting designated uses through a variety of means. Tennessee's Board of Water Quality, Oil and Gas is made up of Tennesseans

representing business, agriculture, industry, local government, and conservation interests. They set the standards for our state and focus our state resources and personnel toward protecting waters with a use. This proposal upends much work by our legislature, the Tennessee Department of Environment and Conservation, and the regulated community to protect Tennessee's waters while simultaneously reducing regulatory burdens and promoting economic development.

Our water quality act has minimal alteration protections for water features that do not have a use. We have a sound and workable definition for "Stream" and "Wet weather conveyance." The Agencies' proposal brings the full force of Section 404 requirements to wet weather conveyances located solely within the borders of Tennessee that today do not have a designated use. Tennessee's water quality act defines wet weather conveyances in TCA 69-3-103(43) as:

*"Wet weather conveyance" means, notwithstanding any other law or rule to the contrary, man-made or natural watercourses, including natural watercourses that have been modified by channelization:*

*(A) That flow only in direct response to precipitation runoff in their immediate locality;*

*(B) Whose channels are at all times above the groundwater table;*

*(C) That are not suitable for drinking water supplies; and*

*(D) In which hydrological and biological analyses indicate that, under normal weather conditions, due to naturally occurring ephemeral or low flow there is not sufficient water to support fish, or multiple populations of obligate lotic aquatic organisms whose life cycle includes an aquatic phase of at least two (2) months.*

This definition recognizes these water features do not have a connection to groundwater, flow only during storm events, are not suitable for drinking water supplies, and have no biological function for fish and aquatic organisms. What designated uses will the Agencies expect the State of Tennessee to assign to a wet weather conveyance currently unregulated in our state? How should those wet weather conveyances be listed on the 303(d) list since there are no uses and the only time water can be sampled for impairment is if a state employee pulls water samples during a rain? What should Tennessee list as causes for impairment; no water? The Agencies' proposal will require the state of Tennessee to regulate, enforce, permit, and protect thousands of miles of wet weather conveyances running across fields, forests, residences, business, and roadsides. Tennessee's 303(d) list will not be a document, it will be volumes. Tennessee uses sound science and sound reasoning to protect water quality. The Agencies' proposal uses vagueness, ambiguity, and controversial legal strategies. We are proud of our approach

and frustrated the Agencies would propose to put an end to something Tennessee worked so hard to accomplish and perfect.

Tennessee should not be in a subservient role in protecting upstream, non-navigable waters. Congress established numerous programs and incentives for states to protect smaller, non-navigable waters. This design would ensure the protection downstream of larger, navigable waters under jurisdiction of the Agencies. Many of these programs were structured for land use activities like farming. Sections 208 and 303(e) require management plans for nonpoint sources. Section 319 provides funding for states like Tennessee to control and prevent nonpoint sources. These programs have worked and are taken seriously in Tennessee to ensure we do our part protecting the total network of waters throughout this state from impairment. Why after decades of proven success of these programs propose a rule that would place all water features in Tennessee under federal jurisdiction. Why did Congress implement these programs if they intended for the Agencies to exercise control over all water features? Today watersheds receive 319 funding if nonpoint sources are causing impairment that needs to be addressed. Under this proposal the heavy hand of the federal government will require section 404 permits to do the job. We believe this is a contradiction of Congress's intent.

#### **The Proposal Provides No Clarity for Tennessee Farmers**

The preamble to this proposed rule includes the following statement: "The agencies are providing clarity to regulated entities as to whether individual water bodies are jurisdictional and discharges are subject to permitting, and whether individual water bodies are not jurisdictional and discharges are not subject to permitting." (79 Fed. Reg. 22188). This proposed rule provides no clarity for Tennessee farmers and rural landowners. The Agencies' attempt at clarity declares any and all land features that could contain water as jurisdictional waters. Farmers do not consider this clarity. It should be considered regulatory reach that exposes them to liability that includes civil fines up to \$37,500 per day, criminal penalties, and possible jail time.

This proposed rule seeks to regulate countless miles of ephemeral ditches, drainages, and low spots in a field. This creates confusion and not clarity because the Agencies insinuate in the proposal there is still a distinction between unregulated waters and regulated waters. This proposal has been out for comment since April 21. During that time there has been a national dialogue over this rule and this proposal has been read and studied by many farmers. Again, they do not believe this proposal provides any further clarity. Farmers know the land. They know their region. They know the hydrology in their watersheds. After reading this rule they still do not know what is jurisdictional and what is not. What they do know is the Agencies are attempting to regulate more water features on their land than has been regulated in the past. We take issue with the

Agencies' assertion this proposal will provide clarity because as a practical matter and as a legal matter this rule does not provide clarity for farmers.

The preamble mentions several times that agricultural stormwater discharges and normal farming activities remain exempted discharges. However, those statements are not practical if this proposal moves forward. Please consider the picture below. This is a wheat field in Tennessee on property that has been maintained as farmland for decades. This farm was considered for a development site and therefore needed a jurisdictional determination by the Army Corps of Engineers. This water feature, which is a typical ephemeral water feature found on most farms in the state, was considered a jurisdictional water. We do know the Nashville District of the Corps of Engineers is now considering ephemeral streams jurisdictional much like the proposed rule. Using this example, there is a bed, bank, and ordinary high water mark (OHWM). This would make that water feature in this field a tributary. 40 CFR 232.3 (d)(4) says: "Plowing does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dryland." Even the preamble to the proposal indicates that any elimination of the bed and bank of this feature could be a violation of section 404 (79 Fed. Reg. 22204). Also, normal farming activities are not exempt from section 402 permits. Pesticide applications in or near this water feature and all features like it would require a National Pollutant Discharge Elimination System (NPDES) permit. Any chemical or biological material such as manure or fertilizer would require NPDES permits. If this farm was considered part of a Concentrated Animal Feeding Operation (CAFO) land application area, no waste from the CAFO could be spread in or near this water feature. In Tennessee there would be buffer zones around this water feature. This water feature and ones like it in this field would expose the farmer to third party citizen lawsuits, fines up to \$37,500 per day, and possible criminal penalties.



The Agencies try to comfort the farm community by indicating "gullies and rills and non-wetland swales" are not considered waters of the United States and that normal farming activities are exempt. We cannot accept this. This example is a clear indication that gullies and rills are words that carry very little meaning. Farmers cannot depend on these ambiguous words for protection. Also, without the ability to use all farming practices, the few that may be considered exempted are irrelevant if a farm operation cannot use all needed farming practices. The Agencies may consider our concerns as cynical and pessimistic. The Tennessee Farm Bureau has assisted numerous hard working farm families in regulatory enforcement actions where Clean Water Act regulations were stretched to the full extent and out of context to "punish" each farmer for activities once considered exempt and "normal" farming practices. We have learned over the past forty years that if regulations are vague and ambiguous the Agencies will use the uncertainty to farmers' detriment.

### **Farmers are at Risk of Unknowingly Committing Civil and Criminal Penalties**

We believe the vagueness of this proposed rule violates Due Process. The fines for violating the Clean Water Act can be \$37,500 per day, per violation. If the farmer commits a "knowing" violation there can be potential criminal penalties up to \$100,000 and six years in prison as well as "negligent" violations that can carry fines up to \$50,000 per day and two years in prison. This rule contains contradictions that have been discussed by legal scholars across the nation. How can a farmer know when they are operating in a jurisdictional water if the Agencies cannot describe clarity in a 34+ page *Federal Register* preamble? There are so many vague terms that no one can determine what is lawful or criminal. Ample court precedence warns government agencies of vagueness in criminal statutes. The Tennessee Farm Bureau is charged with providing information and education to Farm Bureau members. We have consulted with environmental consultants, environmental attorneys, and state government water quality staff within our department of environment and department of agriculture. None of these entities have a clear idea what many of the terms mean in this proposal nor do they have advice for farmers to determine where federal jurisdiction would exist on farms. This is unacceptable when the stakes are so high for a violation, even a paperwork violation, to the Clean Water Act.

What makes this rule even more complicated is the "Interpretive Rule" (Docket No. EPA-HQ-OW-2013-0820) for conservation practices which coincided with the release of this proposal. The Tennessee Farm Bureau commented on the "Interpretive Rule" also. Why did EPA need to release an interpretive rule for conservation practices over forty years after passage of the Clean Water Act to clarify certain conservation practices were included in the Clean Water Act's "farming" exemptions? We believe the expanded jurisdiction of this rule negates many of the exemptions for agricultural practices. Therefore, conservation practices that have traditionally been considered exempt agricultural practices would now be permitted activities under this proposed rule. With

the "Interpretive Rule" certain conservation practices would not be subjected to the fallout from this proposed rule.

### **Public Advocacy Violated Administrative Procedures**

The unprecedented public advocacy activities of the Agencies during this comment period was inappropriate. We have never observed the level of promotion used by EPA to garner support for this rule. Public notice and comment is to allow public input so the Agencies can make the best decisions when crafting rules. Public notice and comment is not for the purpose of marketing rules and shaping public policy. Rather, public notice and comment is to ensure rules are written in compliance with the Congressional action which authorized it. There have been multiple fact sheets, Q&A sheets, government blogs, and all types of statements providing new interpretations and details. This campaign caused confusion. How can the U.S and Tennessee citizens, including farmers of Tennessee, provide meaningful comments when the Agencies are misleading by confronting and belittling those who have a different viewpoint on the proposed rule?

We believe the "Ditch the Myth" webpage was extremely misleading to farmers and was full of mistruths about what this rule does. Please consider the first "Myths" and "Facts" listed on the page:

"MYTH: The rule would regulate all ditches, even those that only flow after rainfall.

TRUTH: The proposed rule actually reduces regulation of ditches because for the first time it would exclude ditches that are constructed through dry lands and don't have water year-round."

We have provided you a picture of a "ditch" the Army Corps of Engineers already considers a jurisdictional water because they have recently started regulating ephemeral streams much like the proposed rule prescribes. We cannot imagine where a ditch constructed through dry lands and only flowing in dry lands would be. All ditches are interconnected. This proposed rule makes no distinction where a dry land ditch ends and a ditch in a floodplain begins. We have counties in Tennessee where a majority of the land is located within a class of floodplain. This proposal does not specify if the floodplain is a 25 year, 100 year, 500 year, or 1,000 year storm event. So yes, based on our knowledge of this state and the Agencies' proposal the rule would regulate all ditches.

Consider the next example:

"MYTH: Ponds on the farm will be regulated.

TRUTH: The proposed rule does not change the exemption for farm ponds that has been in place for decades. It would for the first time specifically exclude stock watering and irrigation ponds constructed in dry lands."

This proposal expands the jurisdiction of the Agencies by including ephemeral drainages and isolated wetlands. This is where ponds are built in Tennessee. Literally thousands of ponds are built to impound a drainage in a low area of the drainage. The Agencies use of the term "Dry Land" excludes ephemeral features and isolated wetlands. The Agencies make this exemption for farm ponds meaningless by expanding jurisdiction. You have told farmers they have an exemption in places that do not exist in Tennessee.

We disapproved of the way EPA used comments from 2008 regarding the proposed guidance for Clean Water Act jurisdiction after *Rapanos*. In the document *Persons and Organizations Requesting Clarification of "Waters of the United States" By Rulemaking*, it listed the Tennessee Farm Bureau and included an excerpt from comments submitted in 2008. Even though EPA included a disclaimer saying a request for rulemaking did not imply support it still appeared this organization was in favor of the policies contained in this rule. This should not have been included in the "Ditch the Myth" site which was established to market the policies in this proposed rule. This could easily be misleading to our members. We asked the Agencies to use the rulemaking process to address changes needed after the *Rapanos* case instead of using a guidance document. We were not in favor of the policies contained in the guidance document and did not support using a guidance document to change regulations. However, by including the Tennessee Farm Bureau on the "Ditch the Myth" site it could infer we support the policies contained in this proposal. We ask EPA to remove the Tennessee Farm Bureau from this document.

### **Conclusion**

We believe this rule is flawed both legally and practically. It is unworkable for the Tennessee farmer. Our expectations for the Agencies are much higher than has been reflected in this rulemaking. The Agencies refer to Justice Kennedy's opinion in which he noted the relationship with navigable waters must be more than "speculative or insubstantial" (79 Fed. Reg. 22192). We have already pointed out that Tennessee law recognizes that wet weather conveyances by definition in our statutes are insubstantial. We do not understand how the Agencies can present a rule that clearly includes all water features in Tennessee yet consider those water features not speculative and substantial.

Tennessee's landscape is different than that found in Oregon or Florida. The proposed rule tries a one size fits all approach. This will not work. We have pointed out that many things have changed since 1972. We ask the Agencies to recognize this. We believe the U.S. Supreme Court has given the Agencies an opportunity to reconsider failed policies of the past, and move forward with clarity for landowners and cooperative federalism among states.

This proposed rule should be reconsidered. If implemented in its current form, this proposal will cause an ominous regulatory burden for Tennessee farmers. We do not believe it can be fixed in the current form. Please know the farmers of Tennessee are ready and willing to work with the Agencies to build a proposal that fits the legal and practical parameters of the Clean Water Act.

Sincerely,

A handwritten signature in cursive script that reads "W. Lacy Upchurch". The signature is written in black ink and is positioned below the word "Sincerely,".

W. Lacy Upchurch  
President