Statement of the American Farm Bureau Federation

BEFORE THE HOUSE AGRICULTURE COMMITTEE
SUBCOMMITTEE ON CONSERVATION, ENERGY, AND FORESTRY

REGARDING: THE DEFINITION OF "WATERS OF THE UNITED STATES"
PROPOSED RULE AND ITS IMPACT ON RURAL AMERICA

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I would like to thank Chairman Thompson, Ranking Member Lujan Grisham, and Members of the Subcommittee for the opportunity to testify on the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' (Corps) (together, "the Agencies") proposed rule to define "waters of the United States" under the Clean Water Act (CWA) and on the rule's impact on farmers, ranchers and rural America.[1]

My name is Ellen Steen, and I am the General Counsel and Secretary of the American Farm Bureau Federation (AFBF). In my current position and in two decades of private law practice prior to joining AFBF, I have become all-too familiar with how Clean Water Act regulations are interpreted by the Agencies and by the courts. I have litigated over the validity and interpretation of Clean Water Act regulations concerning the use of pesticides, permit requirements for livestock and poultry farms, the scope of Clean Water Act exemptions for farming and forestry, and the scope of "waters of the United States." I have defended farmers and forest landowners against enforcement actions by EPA and by environmental interest groups who advocate broad interpretations of Clean Water Act regulatory obligations and narrow interpretations of agricultural and forestry exemptions.

I have closely studied the proposed rule—reading it against the backdrop of my own experience with the interpretation and enforcement of Clean Water Act regulations. I would stake my professional reputation on the fact that this rule—unless it is dramatically altered from what was proposed—will result in potential Clean Water Act liability and federal permit requirements for a vast number of commonplace and essential farming, ranching and forestry practices nationwide. I say "potential" liability only because it is impossible to know how many farmers, ranchers and forest landowners will be visited by agency enforcement staff or will be sued by citizen plaintiffs' lawyers—and it is impossible to know when those inspections and lawsuits will happen. But what is certain is that a vast number of common, responsible farming, ranching and forestry practices that occur today without the need for a federal permit would be highly vulnerable to Clean Water Act enforcement under this rule.

Several statutory exemptions demonstrate Congress's clear determination *not* to impose Clean Water Act regulation on ordinary farming and ranching activities. Over the past year, EPA and the Corps have repeatedly said that farmers and ranchers have nothing to fear from the proposed rule because those traditional agricultural exemptions remain intact. These statements are misleading. The existing agricultural exemptions, as interpreted by the Agencies, will not protect farmers and ranchers from burdensome federal permit requirements and potentially devastating liability under this proposed rule.

Agency and judicial interpretations over the past several decades have significantly limited the agricultural exemptions that have traditionally insulated farming and ranching from Clean Water Act permit requirements. Much of the remaining benefit of those exemptions would be eliminated by an expansive interpretation of "waters of the United States" to cover ditches and drainage paths that run across and nearby farm and pasture lands. The result would be wide-scale litigation risk and potential Clean Water Act liability for innumerable routine farming and

[1] The proposed rule is published at 79 Fed. Reg. 22,188 (April 21, 2014).

ranching activities that occur today without the need for cumbersome and costly Clean Water Act permits. To understand why, one must look to the specifics of each exemption.

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

One key agricultural exemption applies to "agricultural stormwater discharges" and "return flows from irrigated agriculture." Congress recognized that stormwater and irrigation waters can carry nutrients, pesticide and other materials from agricultural lands, but did not want to impose section 402 permit requirements for farmland runoff or irrigation waters. Thus, Congress specifically excluded precipitation runoff and irrigation water from regulation as a "point source" discharge.[2] The exemption applies even if the stormwater or irrigation water contains "pollutants" and is channeled through a ditch or other conveyance that might otherwise qualify as a "point source" subject to Clean Water Act section 402 National Pollutant Discharge Elimination System (NPDES) permit requirements.

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 into navigable waters *carried by* stormwater or irrigation water, which would typically flow through ditches or ephemeral drainages. However, the exemption was not crafted to cover the direct addition of pollutants into "waters of the U.S." by other means—such as materials that fall into or are sprayed into jurisdictional waters.

In enacting the Clean Water Act in 1972, Congress likely would not have imagined that the beneficial and intentional application of useful products to farm fields could be viewed as a discharge of "pollutants"—even if those fields might contain wetlands or might adjoin streams. Over the past two decades, however, courts have found that the beneficial use of pesticide in accordance with label requirements *can* be a discharge of "pollutant" that requires a Clean Water Act section 402 permit, if pesticide falls into waters of the U.S.[3] The reasoning of those court decisions also would place other useful activities at risk of being deemed a discharge of "pollutant"—such as the application of chemical or organic fertilizer.

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 Clean Water Act "pollutant" discharge liability and permit requirements. A Clean Water Act pollutant discharge to waters of the U.S. arguably would 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 Clean Water Act discharge liability. Thus, to avoid liability, farmers will have no choice but to seek a discharge permit for farming, or else "farm around" these features—allowing wide buffers to avoid activities that might result in a discharge. Such

[2] *See* 33 U.S.C. § 1362(14).

[3] *See League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002); *National Cotton Council v. EPA*, 553 F.3d 927 (6th Cir. 2009).

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.

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

Another important exemption excludes "normal" farming, ranching and forestry activities from section 404 "dredge and fill" permit requirements.[4] This exemption specifically applies to discharges of "dredge and fill" material, which would include moving dirt—e.g. plowing, grading, digging, etc.—in wetlands that are deemed to be "waters of the United States." Congress enacted the exemption in 1977, in response to Corps regulations defining "waters of the United States" to include certain wetlands. Under the 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.[5]

While Congress's plain words might seem to broadly insulate *all* "normal" farming, ranching and forestry from section 404 permit requirements, EPA and the Corps quickly narrowed the exemption—and have continued to narrow it over the years. For example, the Agencies immediately promulgated regulations interpreting the exemption to apply only to "established"—i.e. "ongoing"—operations.[6] Because the exemption was enacted in 1977, this has been construed to mean that only farming ongoing at the same location since 1977 was exempted from permit requirements.[7] Newer (post-1977) operations that involve farming or ranching in jurisdictional wetlands would, according to the Agencies, require a section 404 permit until the operation has become "established."[8] Even where farming or ranching has been temporarily stopped, and then recommenced, the Agencies have found the operation ceased to be "ongoing," and the exemption no longer applies.

Many farming and ranching operations cannot qualify for the "normal" exemption, as interpreted by the Agencies, because they have not been continuously conducted at the same location since 1977. Under the proposed rule, these operations will be subject to section 404 permit requirements (and potential Clean Water Act enforcement and penalties) for moving dirt (plowing, planting, building fences, etc.) where those activities occur in low spots and drainage paths deemed to be waters of the U.S. under the proposed rule.

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[4] 33 U.S.C. § 1344(f)(1).

[5] 33 U.S.C. § 1344(f)(1)(A).

[6] 33 C.F.R. § 323.4(a)(1)(ii); 40 C.F.R. § 232.3(c)(1)(ii)(A).

[7] *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).

[8] Despite multiple inquiries during the public comment period on the proposed rule, the Agencies have so far refused to publicly confirm or deny this point. In at least one private meeting, however, high ranking EPA officials have confirmed 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 which it would be deemed 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).

Another limitation on the scope of the "normal" farming exemption is the so-called "recapture" provision. Under this provision, the normal farming exemption does not apply 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 crop production).[9] Put differently, where discharges of dredged or fill material are used to bring land into a *new use* (*e.g*. making wetlands amenable to farming) and *impair the reach* or *reduce the scope* of jurisdictional waters, those discharges are not exempt.

The Agencies have broadly interpreted the "recapture" provision to apply even when the "new use" is simply a change from one crop to another crop.[10] But the greatest expansion yet would result from the current proposed rule. If "waters of the United States" include land features as subtle as an ephemeral drainage path running across a farm field—or small, isolated wetlands in a field—even ordinary plowing could easily "impair" the reach or "reduce" the scope of those purported "waters." In fact, in the preamble to the proposed rule, the Agencies admit that if farming has eliminated a bed and bank where one previously existed (e.g., cultivation has smoothed the gradient on a farm field, eliminating a subtle channel), the Agencies would view that as "converting" a jurisdictional water into a "non-jurisdictional water."[11] Any such action—including ordinary plowing—would violate the Clean Water Act in the Agencies' view.

3. Section 404(f) Exemption for Construction or Maintenance of Farm Ponds

A third important agriculture-related exemption is the exemption in section 404 for "construction or maintenance of farm or stock ponds or irrigation ditches."[12] This provision exempts 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.[13]

Through guidance and enforcement actions, the Corps and EPA have interpreted the farm pond exemption narrowly and applied the so-called "recapture" provision broadly. In the Agencies' 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."[14] In the experience of many farmers, the recapture provision essentially swallows the farm pond exemption. Where farm or stock pond construction has involved wetlands or small ephemeral drainages later deemed to be jurisdictional "tributaries," farmers have been ensnarled in enforcement.

The proposed rule will further limit farmers' and ranchers' ability to build and maintain farm ponds. While some farmers have already been harmed by "case-by-case" determinations that impounded ephemeral drainages were jurisdictional tributaries, the proposed rule would establish

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[9] 33 U.S.C. § 1344(f)(2).

[10] *See, e.g.*, http://www.spk.usace.army.mil/Missions/Regulatory/Permitting/Section404Exemptions.aspx#farming (Corps Sacramento district website discussing normal farming exemption).

[11] 79 Fed. Reg. at 22,204, n.8.

[12] 33 U.S.C. § 1344(f)(1)(C).

[13] *Id.* § 1344(f)(2); *see* also 33 C.F.R. § 324.3(c).

[14] *See* 79 Fed. Reg. 22,188, 22,201 (April 21, 2014).

categorical jurisdiction over virtually any ephemeral drainage as a "tributary." Thus, any impoundment of those features will be an unlawful discharge absent a section 404 permit, and the resulting farm pond itself will be a water of the U.S. Likewise, any construction of a farm pond in a small low spot (wetland) now deemed to be jurisdictional will also require a section 404 permit and the resulting pond will also be 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 depressional 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.

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Countless farmers and ranchers nationwide urgently need the assistance of this Committee to avoid the harmful effects of this proposed rule. Thank you for your consideration and for any action you take to ensure that the effects of this rule on farmers and ranchers are fully considered.