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CLEAN WATER ACT – DEFINITION OF “WATERS OF THE U.S.”

Issue:

The U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) have finalized a rule that will significantly expand the definition of “waters of the United States” under the Clean Water Act (CWA). The final rule is even broader than the proposed rule in number of areas. This regulation expands federal authority beyond the limits approved by Congress and reaffirmed by the U.S. Supreme Court; the impact on farmers and ranchers will be enormous. Farm Bureau is seeking to require EPA to withdraw this regulation and propose a new rule that reflects not only the limitations imposed by both Congress and the Supreme Court but the views offered after formal consultation with states.

Background:

Two Supreme Court decisions over the past decade have reaffirmed that the term “navigable waters” under the CWA does not include all waters. The regulation, which was aggressively pushed by both EPA and environmental groups, will allow EPA and the Corps to use the CWA to regulate activities on dry land. Such an over-reach goes well beyond anything contemplated by the framers of the 1972 law.

Legislative/Regulatory Status:

On June 29, 2015, EPA and the Corps published a final rule defining the scope of waters protected under the CWA in the Federal Register. The final rule will go into effect on Aug. 28, 2015. The rule fails to comply with important regulatory procedural requirements, relies on an incomplete and inaccurate economic analysis, and relies on a flawed report for its scientific justification.

The rule effectively eliminates any constraints the term “navigable” imposes on the Corps’ and EPA’s CWA jurisdiction by granting regulatory control over virtually all waters, assuming a breadth of authority Congress has not authorized. The list of waters deemed “non-navigable” is exceptionally narrow, providing that few, if any waters, would fall outside federal jurisdiction. Such a shift in policy means that EPA and the Corps could regulate any or all waters found within a state, no matter how small or seemingly unconnected to a federal interest. Congress should not permit the agencies to adopt such an approach.

Farm Bureau opposes this rule, which fails to respect the limits of federal CWA jurisdiction articulated by the U.S. Supreme Court in *SWANCC* and *Rapanos*. The Supreme Court rejected the notion that CWA jurisdiction extends to waters with “any” connection to navigable waters (no matter how tenuous) and rejected the agencies’ “land is waters” approach. Any rule must acknowledge that not all water bodies are subject to CWA jurisdiction and provide specific examples of features that are not within the scope of CWA regulation.

EPA continues to use the following inaccurate and misleading talking points:

1. The purpose of the rule is to clarify what waters are (and are not) covered by the CWA;
2. If a farmer did not need a permit before, they won’t need one under the new rule;

3. The rule does not significantly expand what has historically been considered WOTUS;
4. The rule will not substantially affect agricultural producers; and
5. Many of the criticisms are myths and have resulted in confusion and uncertainty within agriculture.

The final rule provides none of the clarity and certainty it promises. Instead, it creates confusion and risk by 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 rule defines terms like “tributary” and “adjacent” in ways that make it impossible for a typical farmer or ranchers 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. The rule will give the agencies sweeping new authority to regulate land use, which they may exercise at will, or at the whim of a citizen plaintiff.

AFBF Policy:

Farm Bureau has significant concerns with the regulations and believes they significantly expand federal jurisdiction, resulting in the imposition of burdensome requirements on agricultural producers.

Farm Bureau supports Congressional efforts to have EPA and the Corps withdraw the rule.

Farm Bureau supports a rule that conforms to the limits approved by Congress and affirmed by the Supreme Court.

Farm Bureau supports S.1140, the Federal Water Quality Protection Act, to rein in EPA's attempt to use the Clean Water Act to expand federal control while protecting those waters that need to be protected to keep pollution from reaching traditional navigable waters.