

October 6, 2015

The Honorable Gina McCarthy
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

The Honorable John M. McHugh
Secretary of the Army
Department of the Army
200 Army Pentagon, Room 3E528
Washington, DC 20310-0200

Re: Request for Technical and Supporting Information Regarding Implementation Details for the Final Rule to Define “Waters of the United States,” (80 FR 37054), June 29, 2015, Effective on August 28, 2015

Dear Administrator McCarthy and Secretary McHugh:

The undersigned organizations represent or work with farmers, ranchers and foresters who are struggling to understand the practical implications of the final rule defining “Waters of the United States” (WOTUS) under the Clean Water Act. We noted with great interest that on September 17, 2015 policy and technical personnel from your agencies addressed in a closed “webinar” twenty-seven questions from state agency personnel regarding jurisdictional and non-jurisdictional ditches under the final rule. Non-state agency personnel were not invited to participate. For the reasons cited below we ask that you promptly release publicly the answer that your agencies’ provided at the webinar to these and any other questions that were addressed. Furthermore, as additional webinars on other final rule implementation topics are held, we ask that your agencies’ answers to those questions also be made public immediately.

Not just the regulators, but the regulated public, have a need to know how your agencies interpret the rule. Our members are deeply concerned that as a result of this final rulemaking, effective today in thirty-seven states, they now have drainage and water features on their properties that are **categorically** WOTUS. If this is the case, our members know that they are subject to serious civil and even criminal federal liabilities for point source discharges into those features. Liability may be imposed even if the landowner does not know that the features involved are WOTUS. There is a fundamental fairness problem with communicating to the regulators—but not to the regulated community that will bear the liabilities—on the finer points of how to identify WOTUS under the rule.

The questions posed to your agencies on September 17th covered eminently practical matters like what is the difference between ditches and canals, how do we know if ditches were constructed in “dry” land, what definition of “ephemeral,” “intermittent,” and “perennial flow regime” will be used in determining ditch exclusions, and if there is guidance for onsite determinations of this nature. Other questions dealt with how the agencies will determine whether a ditch that has been in place for decades is a “relocated tributary” or is “excavated in” a tributary, and whether permitted discharges into these ditches must be designed to meet water quality standards in the ditch or in the receiving water. The enclosed document details all of the compiled questions posed by the state agencies during the webinar.

Your agencies’ answers to the questions posed to them on September 17, and future answers to questions about implementation of other aspects of the rule, will be vitally helpful to our members to help reduce their confusion and uncertainty and make informed business decisions about whether and how their operations need to change to avoid discharges in violation of the Clean Water Act. The

answers to these questions could mean the difference between our members being in compliance or violation of federal law with all of the attendant liabilities.

We believe your agencies have an obligation to provide this information to the public. Whatever answers and guidance have been provided to assist state agency personnel would be equally useful to the regulated community and should be easy to share.

Thank you for your prompt attention to this important matter.

Sincerely,

American Forest & Paper Association
American Farm Bureau Federation
American Soybean Association
American Sugar Beet Growers Association
American Sugar Cane League
CropLife America
Forest Landowners Association
Forest Resources Association
Hardwood Federation
National Alliance of Forest Owners
National Cattlemen's Beef Association
National Corn Growers Association
National Cotton Council
National Council of Farmer Cooperatives
National Pork Producers Council
Virginia Agribusiness Council

Enclosure