Fighting for the U.S. Cattle Producer!
R-CALF USA

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Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue NW.
Washington, DC 20460
Attention: Docket ID No.
EPA–HQ–OW–2011–0880.

Via E-Mail: www.regulations.gov

Re: R-CALF USA Comments in Docket No. EPA-HQ-OW-2011-0880; FRL-9901-47-OW, RIN 2040-AF30: Definition of "Waters of the United States" Under the Clean Water Act: Proposed Rule

Dear Sir or Madam:

The Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (R-CALF USA) appreciates this opportunity to submit comments to the U.S. Army Corps of Engineers, Department of the Army, Department of Defense (DOD), and the Environmental Protection Agency (EPA) regarding the agencies' proposed rule: *"Waters of the United States" under the Clean Water Act* (Proposed Rule), published at 79 Fed. Reg. 22,188 – 22,274 (April 21, 2014).

R-CALF USA is a non-profit association that represents thousands of independent U.S. cattle farmers and ranchers in approximately 40 states. R-CALF USA works to sustain the profitability and viability of the U.S. cattle industry, a vital component of U.S. agriculture. R-CALF USA's membership consists primarily of independent cow-calf operators, cattle backgrounders and feedlot owners. Various main street businesses are associate members of R-CALF USA.

I. INTRODUCTION: EXPANDED REGULATORY OVERSIGHT IS UNWARRANTED BECAUSE INDEPENDENT U.S. CATTLE FARMERS AND RANCHERS ARE UNPARALLELED STEWARDS OF WATERS RESIDING ON THEIR PRIVATE PROPERY

R-CALF USA has thousands of independent U.S. cattle-producing members that own and/or lease land on which surface water is located. Many of these members have owned and/or

leased their land for multiple generations, and all or nearly all have endeavored for decades, if not longer, to preserve and protect their water resources. These members know that clean and abundant water is absolutely essential for the production of livestock, the production of crops and feedstuffs, and to sustain their lives and those of their families, their fellow farming and ranching neighbors, and their future generations that will eventually take over as stewards of their land and water.

In other words, R-CALF USA members are principal caretakers and stewards of all the waters of the United States that reside on the surfaces of their private property – on lands they own and/or control. Nowhere in the Proposed Rule is there even a scintilla of evidence to suggest that the U.S. Army Corps of Engineers, the Department of the Army, DOD or the EPA (collectively "EPA et al.") has done in the past, or can be expected to do in the future, a superior job at restoring and maintaining the chemical, physical and biological integrity of every body of water that resides on or flows through the private property of independent U.S. cattle farmers and ranchers than those very independent U.S. cattle farmers and ranchers have already been doing for the past several decades (and for over a century or more in some cases) and will most likely continue to do (based on their historical patterns and practices) long into the foreseeable future.

Therefore, the record does not contest R-CALF USA's strong contention that the organisms or organizations most capable of achieving the objectives of the Clean Water Act (CWA) are those independent cattle farmers and ranchers who have a vested present and future interest - spanning one or more generations – in restoring and maintaining the chemical, physical and biological integrity of all surface waters residing on their private property.

No bureaucratic agency, nor its employees, can match the innate devotion and commitment that independent U.S. cattle farmers and ranchers possess to vigorously protect the integrity of their water that is essential to sustaining themselves and their livelihoods, and their future generations and their future generations' future livelihoods when the land upon which the water is located is transferred from one generation to another. Thus, the Proposed Rule's imposition of regulatory authority over independent U.S. cattle farmers and ranchers for purposes of restoring and maintaining the integrity of the waters on their private property is unnecessary and would be counterproductive.

For the reason stated above and the reasons articulated below, EPA et al. should immediately withdraw the Proposed Rule, thus continuing to allow independent U.S. cattle farmers and ranchers, whose private property supports surface waters, to continue restoring and maintaining the chemical, physical and biological integrity of that water for generations to come. EPA et al. provides no evidence to suggest that these independent U.S. cattle farmers and ranchers are not already achieving the objectives of the Clean Water Act in a far superior manner than that of any of the agencies that are now trying to usurp control away from independent U.S. landowners and lessees over the waters located on those landowners' and lessees' private property. Independent U.S. cattle farmers and ranchers are the quintessential stewards of the surface waters residing on their private property and they are unparalleled in their historical achievement of meeting the stated objectives of the Clean Water Act.

II. THE PROPOSED RULE IS ARBITRARY AND CAPRICIOUS

A. The Proposed Rule Represents the Proverbial Solution in Search of a Problem, Rendering it Arbitrary and Capricious.

The purpose of the Proposed Rule according to EPA et al. is to "reduce documentation requirements and the time currently required for making jurisdictional determinations." Yet, nowhere in the Proposed Rule do the agencies state or even estimate how much time is presently devoted to making jurisdictional determinations. This omission precludes completely any analysis of whether the agencies' time expended for such purposes is excessive or whether the proposed changes would reasonably be expected to materially alter the amount of time the agencies' currently devote to such activities.

Further, EPA et al. provide an exhaustive analysis regarding how water quality in traditional navigable waters is impacted from flows beginning at the navigable waters' upstream headwaters. This analysis appears scientifically sound. However, the agencies provide no evidence to refute R-CALF USA's contention that many, and perhaps most, of the upstream water flows leading to traditional navigable waters are actually enhancing the chemical, physical, and biological integrity of the traditional navigable waters to which they flow because they have been restored and maintained by independent U.S. cattle producers that have a vested interest in protecting and preserving the surface waters on their private property for generations to come. In other words, the agencies provide no discernable nexus between the science of water flows and the agencies' purported need to regulate independent U.S. cattle farmers and ranchers who already are doing a superior job at meeting the objectives of the Clean Water Act by restoring and maintaining the integrity of the waters located on lands they own and/or control.

Indeed, the agencies' proposal to declare jurisdiction and subsequently regulate virtually every spot of water in the United States, including those waters that are already being preserved and protected in a manner that fully achieves the objectives of the Clean Water Act, and potentially including waters that the Supreme Court has stated is beyond the jurisdiction of the agencies, would defeat completely the agencies' claim that the purpose of the Proposed Rule is to save the agencies' time in the fulfillment of their obligations under the Clean Water Act.

The agencies' contention that "fewer waters will be subject to the CWA under the proposed rule than are subject to regulations under existing regulations" cannot be reconciled with the agencies' proposed definition of "waters of the United States," which would, for example, significantly broaden the agencies' explicit jurisdiction over tributaries that are dissected by natural breaks such as wetlands. Moreover, the broadening of the agencies' geographical jurisdiction would necessarily include a significant increase in the number of landowners and lessees subject to the agencies' oversight, thus significantly increasing the time the agencies would need to manage their data bases and permit applications and to otherwise carry out the objectives of the Clean Water Act.

It is not at all self-evident, as the agencies infer by not articulating a measureable statement of need for their Proposed Rule, that there is any need whatsoever for the EPA et al. to

subject independent U.S. cattle farmers and ranchers and the lands they own and/or control to additional regulatory burdens simply because science shows that nutrients, sediment, and even contaminants flow downstream.

Because the Proposed Rule does not explain why the agencies believe it necessary to expand their jurisdictional scope, both geographically and in terms of the number of persons subject to their regulatory control, and because such a broadening of jurisdiction would most likely increase the time the agencies would be required to spend for permitting and other regulatory activities, thereby defeating the agencies' stated goal of reducing the time the agencies spend on carrying out their duties under the Clean Water Act, the Proposed Rule is arbitrary and capricious and should be withdrawn.

B. The Proposed Rule Infringes on the Rights of States to Determine When and If Regulatory Oversight Is Needed to Protect Waters Within Their Jurisdiction, Thus Rendering It Arbitrary and Capricious.

By expanding their regulatory control over more waters by, e.g., using the subjective regulatory standard of having a "significant nexus" between intermittent and isolated water bodies and intrastate wetlands and traditional navigable waters, as well as by explicitly including tributaries dissected by natural breaks such as wetlands, EPA et al. are directly infringing on the rights of States to self-governance.

Similar to the discussion in Section II. A. above, EPA et al. provide no evidence that the respective States in the United States are not already restoring and maintaining the chemical, physical and biological integrity of some if not most of the waters within their borders or that federal control over the waters currently under state jurisdiction is needed to restore and maintain such integrity even in instances where a state may have identified a contamination problem in need of mitigation and future prevention. Again, it simply is not self-evident that EPA et al.'s proposal to greatly expand its jurisdiction, including jurisdiction over waters currently under the jurisdiction of a particular State, would have any effect at all on improving the integrity of the waters in that State.

The EPA et al.'s proposal to capture authority over non-navigable, intrastate waters away from the States using the subjective regulatory standard of having a "significant nexus" to either traditional navigable waters or interstate waters is a perversion of the U.S. Constitution's Commerce Clause. If Congress had intended EPA et al. to seize jurisdictional control over virtually every spot of water it would not have expressly limited the jurisdictional scope of the Clean Water Act to that of "navigable waters." The fact that there has been some regulatory creep and case law based on case-specific facts that have enabled EPA et al. to assert jurisdiction beyond what are viewed traditional navigable waters does not give the agencies' license to infringe on States' rights with a regulatory edict as is now proposed.

Because the effect of EPA et al.'s proposal is to assert jurisdiction over waters that are currently subject only to State jurisdiction by overreaching their statutory directive and doing so without so much as explaining why they believe federal jurisdiction would be superior to State

jurisdiction in restoring and maintaining the integrity of the waters within each State, the Proposed Rule is arbitrary and capricious and should be withdrawn.

C. The Proposed Rule Undermines the Constitution's Balance of Powers by Substituting the More Restrictive Jurisdictional Constraints Established by Congress With a Standard Employed by the Judiciary Branch to Decide a Narrow, Fact-Specific Case, Thereby Rendering the Proposed Rule Arbitrary and Capricious.

Congress limited EPA et al.'s jurisdictional scope under the Clean Water Act by declaring that scope to be "navigable waters." 79 Fed. Reg., at 22,191. As mentioned above, regulatory creep and fact-specific case law has resulted in the agencies' assertion that its jurisdiction has increased somewhat beyond what are viewed traditional navigable waters.

Importantly, the agencies' unilaterally effected those expansions without any Congress-enacted amendments to the Clean Water Act, through regulations codified in 1986 and by the deference certain courts granted EPA et al. when deciding complaints under the Clean Water Act. At least that was the case until recently when two U.S. Supreme Court decisions effectively halted EPA et al.'s crusade to continually expand their control over waters never contemplated by Congress.

The 2001 Supreme Court decision in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers (SWANCC),* and its 2006 decision in *Rapanos* v. *United States (Rapanos)* effectively forced EPA et al. to retreat from their ongoing campaigns to capture more jurisdiction without any additional congressional mandates.

Thus, the current jurisdictional scope of EPA et al. was established by Congress, implemented by the executive branch through its agencies, and subsequently interpreted by the judiciary based on fact-specific circumstances. But now, EPA et al. proposes to improperly bestow the legislative or law-making functions reserved for Congress upon the judicial branch whose role is not to legislate, but rather, to interpret. EPA et al. proposes to do this by substituting Congress' directive limiting the agencies' scope of jurisdiction to navigable waters with a standard devised by a single U.S. Supreme Court Justice who was not joined by any other U.S. Supreme Court Justice when he articulated his basis for agreeing with the Court's plurality decision regarding the fact-specific case of *Rapanos*.

That standard, of asserting jurisdiction when the agencies declare a "significant nexus" to waters that are navigable, is to be codified into regulation under the Proposed Rule as if it were a statutory amendment in need of implementation. Not only are the agencies improperly working backwards to establish new law, but also, they are not even abiding by the decision of the U.S. Supreme Court plurality that did not subscribe to the highly ambiguous "significant nexus" standard. The four-Justice plurality actually took a far more conservative and straightforward approach by limiting the Clean Water Act's jurisdiction to "relatively permanent, standing or continuously flowing bodies of water. . .'' that are connected to traditional navigable waters, as

well as wetlands with a continuous surface connection to such relatively permanent water bodies. 79 Fed. Reg., at 22,192.

R-CALF USA believes that EPA et al. are acting improperly if not in direct contradiction to the Constitution of the United States by asserting that the judicial branch of government has authorized it to expand its jurisdictional scope well beyond the limitations imposed by statute. Moreover, R-CALF USA believes the agencies are inappropriately attempting to apply a standard that is not only embraced by only a minority of U.S. Supreme Court Justices (i.e., only one Justice), but also, that was established for the purpose of deciding the *Rapanos* case with facts unique to *Rapanos*. In other words, the agencies are misguided in their attempt to adopt for universal purposes a standard applied by only one Justice in *Rapanos* to decide the *Rapanos* case that had unique, not universal, facts that impacted the dispute.

For the reasons stated above, the Proposed Rule is arbitrary and capricious and should be withdrawn.

D. The Proposed Rule Is in Direct Conflict with the Interests of Independent U.S. Cattle Farmers and Ranchers.

R-CALF USA members drafted and approved the following resolution at their 15th annual membership meeting held in August, 2014. Pursuant to R-CALF USA's bylaws, the resolution was then placed on a ballot and mailed to all cattle-owning R-CALF USA members in the United States for their vote. By their affirmative vote, R-CALF USA members have officially adopted this resolution as a permanent R-CALF USA membership policy.

Private Property Proposed Resolution 1:

WHEREAS, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers propose to amend the definition of "waters of the United States" within the Clean Water Act, thereby expanding the jurisdiction of the Clean Water Act;

WHEREAS, the federal government is improperly prosecuting agricultural producers for violating Section 404 of the Clean Water Act;

WHEREAS, the Clean Water Act permitting requirements are a means to control the use and enjoyment of private property and create an economic burden on livestock production;

WHEREAS, it was not the intent of Congress to impede agricultural production in the United States through the enactment of the Clean Water Act;

WHEREAS, the Clean Water Act includes exemptions from Section 404 permitting requirements, including those for farming and ranching activities, upland soil and water conservation practices, and the construction and maintenance of stock ponds and irrigation ditches;

> **THEREFORE BE IT RESOLVED,** R-CALF USA supports strict interpretation of the original Congressional language and opposes the creation of any agency policy or federal law, including, but not limited to, statutes, regulations, executive orders, and judicial decisions, which would effectuate an expansion of the jurisdiction of the Clean Water Act.
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> **THEREFORE BE IT FURTHER RESOLVED,** the U.S. Environmental Protection Agency, the U.S. Army Corps of Engineers, and any other government agency shall not enforce the Clean Water Act in any way that would impair, diminish, divest, or destroy the water rights vested under state and local laws; the traditional customs and usage; and the decisions by the courts.

As clearly explained in the above membership policy, the Proposed Rule is in direct conflict with the interests of independent U.S. cattle farmers and ranchers and should be immediately withdrawn.

III. CONCLUSION

For the reasons set forth above R-CALF USA urges EPA et al., in the strongest way possible, to immediately withdraw their Proposed Rule.

Sincerely,

Bill Bullard