May 15, 2017

U.S. Environmental Protection Agency
Washington, D.C. 20004

RE: Docket EPA-HQ-OA-2017-0190

The undersigned organizations commend the Environmental Protection Agency [the agency] for opening this docket and are pleased to submit the attached comments in response to the agency's request.

Our organizations represent individuals engaged in agricultural production, both for crops and livestock. Requirements imposed by the agency through its regulations can have significant impacts on our members; many of these impacts can be felt in the areas outlined by the agency for review[1] In the attached comments, we have sought to meet the agency's request to be as specific as possible. In some instances, where information responsive to the agency's request for "supporting data or other information such as cost information" is not available, we have attempted to quantify the impact of the regulatory burden as concretely as possible and to "provide specific suggestions regarding repeal, replacement or modification." We welcome questions from your office or the Task Force if these comments need further amplification and will do our best to respond in as prompt and comprehensive a manner as possible. We greatly value this effort and hope the agency succeeds in alleviating unnecessary and costly regulatory burdens on the agriculture community.

In this context, we wish to make a brief preparatory remark. As of mid-May, the docket exceeded 17,000 comments, the overwhelming majority of them anonymous. These are presumably submitted from well-intentioned individuals but they preponderantly assume that the agency's initiative is to undo, weaken, rescind or otherwise impair the nation's environmental safeguards. We see nothing in the Federal Register notice that supports such an inference. We wish to state for the record that the undersigned organizations are not requesting that the agency engage in, nor would we expect the agency to pursue, an effort to impair, rescind, weaken or in any way retreat from health or environmental safeguards that have been authorized by Congress. Nothing in Executive Order 13777 would have the agency ignore its statutory obligations to administer the environmental laws Congress has passed. We are not asking the agency to weaken its commitment to health and the environment. We have identified regulatory obligations that can be modified or repealed consistent with the laws Congress has enacted and we strongly encourage the agency to consider these recommendations.

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[1] In its notice, EPA has specifically asked for recommendations that address regulations that, *inter alia,* "(i) eliminate jobs, or inhibit job creation; (ii) are outdated, unnecessary, or ineffective; (iii) impose costs that exceed benefits; (iv) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; (v) are inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note), or the guidance issued pursuant to that provision in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard or reproducibility…"

We appreciate your consideration of these comments. If you have questions or wish to discuss any specific issue in this submission, please contact Paul Schlegel at the American Farm Bureau Federation at **Ex. 6** or pauls@fb.org.

Sincerely,

Agri-Mark Dairy Cooperative, Inc.
American Dairy Coalition
American Farm Bureau Federation
AmericanHort
American Soybean Association
American Sugarbeet Growers Association
American Sugar Cane League
California Specialty Crops Council
Dairy Cares
Dairy Farmers of America
Dairy Producers of New Mexico
Dairy Producers of Utah
Exotic Wildlife Association
Federal Forest Resource Coalition
GROWMARK, Inc.
Idaho Dairymen's Association
Missouri Dairy Association
National All-Jersey
National Aquaculture Association
National Association of State Departments of Agriculture
National Association of Wheat Growers
National Cattlemen's Beef Association
National Corn Growers Association
National Cotton Council
National Council of Agricultural Employers
National Council of Farmer Cooperatives
National Peach Council
National Pork Producers Council
National Milk Producers Federation
National Sorghum Producers
National Turkey Federation
Northeast Dairy Farmers Cooperatives
Panhandle Peanut Growers Association
Professional Dairy Managers of Pennsylvania
Select Milk Producers, Inc.
Society of American Florists
South East Dairy Farmers Association
Southwest Council of Agribusiness
St. Albans Cooperative Creamery

Upstate Niagara Cooperative, Inc.
US Apple Association
USA Rice
US Cattlemen's Association
Washington State Dairy Federation
Western Peanut Growers Association
Western United Dairymen

I. **'Waters of the US' (WOTUS) Rule (80 Fed. Reg. 37054, June 29, 2015)**

On February 28, President Trump signed Executive Order 13778 directing EPA to review the WOTUS rule and to publish a proposal rescinding or revising it. We strongly support the President's EO and urge EPA to pursue this effort aggressively.

Recommendation: We recommend that the agency:

(a) repeal the existing rule (80 Fed. Reg. 37054).

(b) in a separate rulemaking, propose a revised rule that more closely adheres to the language of the Clean Water Act and Supreme Court decisions in *Riverside Bayview*, *SWANCC* and *Rapanos*.

II. **Spill Prevention Control and Countermeasures (SPCC) Rule (40 CFR 112)**

While EPA attempted to address concerns of the agriculture community raised by the SPCC rule, the program presents nearly insurmountable difficulties for agricultural producers. That assessment is borne out by the agency's own Regulatory Impact Analysis (RIA). EPA examined the Clean Water Act violation data from 2001 to 2006. In over 10,000 violations in that time period, only 292 involved oil spills of any type, and only **one** of those involved a farm. Many other estimates in the RIA were incorrect as well. EPA estimated an approximate figure of 152,000 affected farms based on USDA numbers. Nowhere did EPA mention the USDA numbers presented in the 2005 round of proposals that numbered potentially affected farms closer to 400,000. Yet despite these facts, EPA moved to place a costly and burdensome rule on the agricultural industry with no data to show a risk justifying the cost. EPA included other incorrect assumptions to bolster the cost-savings analysis. They estimated a savings of $3.6 million due to exempting pesticide application equipment but that cost was only based on a report from one state. They estimated $2,000+ savings from not regulating home heating oil tanks but those tanks were exempted in the original 1973 rule and no one has ever applied SPCC to those tanks anyway. While Congress granted the agency flexibility to address any concerns on farms, the agency rejected this approach and imposed the strictest limit possible.

Recommendation: The SPCC for farms should be repealed.

III. **CERCLA/EPCRA**

(a) On April 11, 2017 the US Court of Appeals for the DC Circuit issued a ruling in long running litigation that struck down a 2008 rule providing an exemption from federal reporting of emissions from livestock farms and providing a partial exemption from state/local reporting of such emissions. As a result of the DC Circuit ruling, in late May or early June 2017 livestock farmers will be responsible for calculating the rate of various chemical emissions associated with the storage of manure for use as a fertilizer, and treat and report these emissions as "emergency releases" to state and local authorities under 42 U.S.C. § 11004 (EPCRA § 304) and to the Coast Guards National

Response Center under 42 U.S.C. § 9603 (CERCLA § 103). These reports provide little emergency planning/response benefit to regulators or the public, and in fact could have a detrimental impact on emergency response programs (and the public's reliance on them) because the receipt of hundreds of thousands of reports of livestock odor will overwhelm a system designed for responding to true emergencies. Failure to file the reports will subject livestock farmers to expensive citizen suit litigation filed by eco and animal rights activists.

(b) In recent years, efforts have been made to extend the liability provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980 and the Emergency Planning and Community Right-To-Know Act (EPCRA) of 1986 to livestock and poultry operations for emissions or discharges from manure produced in those operations. Animal agriculture operations are already regulated under the Clean Water Act, the Clean Air Act, and various state laws to protect the environment; these statutes provide for permitting, enforcement and, if needed, remediation. Manure is not a superfund waste and was not intended by Congress to be regulated as such.

Recommendation: EPA should promulgate regulations confirming that manure is not regulated under CERCLA or EPCRA.

IV. Worker Protection Standards (WPS) rule (40 CFR Part 170)

(a) Designated Representative. In the WPS rule promulgated November 2, 2015, EPA included a provision that permits anyone claiming to be a 'designated representative' (DR) to gain access to a farmer's proprietary records relating to pesticide use.[2] This provision provides farmers with no protection from fraudulent or counterfeit claims; does not assure that records released by the farmer will actually be shared with workers; and imposes no constraints on what DR's may do with documentation once it is obtained. EPA has never cited any data or facts that demonstrate that such a provision would improve worker safety. Thus, the regulation imposes an unnecessary regulatory burden and cost, while exposing farmers to legal liability, with no discernible benefit.

Recommendation: EPA should repeal 40 CFR § 170.311(b)(9) and related provisions.

(b) Application Exclusion Zone (AEZ). In the final WPS, EPA inserted a final articulation of the Application Exclusion Zone (AEZ) that unduly burdens state agencies and the regulated community.[3] As finalized, the AEZ goes beyond the Agency's stated intent

[2] The specific requirement is at 40 CFR 170.311(b)(9).
[3] WPS provision at 170.405(a)(1) establishes the applicable AEZ distances, and WPS provision 170.405(a)(2) establishes a requirement for the agricultural employer not to allow any worker or other person in the AEZ within the boundaries of the establishment until the application is complete. Provision at 170.505(b) establishes a requirement for the handler to suspend the application if any worker or other person is anywhere in the AEZ. Thus,

to create a one-hundred foot buffer surrounding the application equipment that, according to the regulations now in place, extends beyond the agricultural establishment, arguably jeopardizing a grower's ability to manage all his land and prohibiting appropriate pest mitigation activities if there is any kind of structure, permanent or otherwise, inhabited or vacant within one hundred feet of the agricultural establishment. Furthermore, any individual, structure, or a passing vehicle within one hundred feet of the property can effectively cease the grower's application activity. After the final rule was promulgated, EPA's Office of General Counsel (OGC) was working to issue interpretive guidance clarifying the Agency's intent under the final regulation; however, Agency guidance does not carry the weight and authority of a codified federal regulation and does not provide the necessary clarity to assist state regulatory agencies or the grower community with compliance and enforcement activities. In short, both EPA and the state regulatory agencies are still uncertain on how to enforce or deliver compliance assistance on the AEZ.

Recommendation: EPA should revoke the Application Exclusion Zone (AEZ), which goes beyond EPA's original intent and creates an unworkable and unenforceable provision that does not provide any additional regulatory protections beyond those already required under law.

V. Resource Conservation and Recovery Act

In 1979, EPA promulgated regulations that reflect Congress' intent that the agency not regulate manure or crop residue under the Solid Waste Disposal Act (42 U.S.C. § 6903(27)). Certain court decisions, however, have injected uncertainty in this area of the law. Legislation is now pending in Congress (the Farm Regulatory Certainty Act) to provide legal certainty for farmers.[4] The legislation would also amend Section 7002 of the Solid Waste Disposal Act (42 U.S.C. § 6972(b)(1)) to clarify that farmers are not to be targeted twice if they are engaged in legal action with a federal or state regulatory entity to address identified issues.

Recommendation: EPA should continue its policy of not regulating agricultural nutrients under RCRA. The EPA also should vigorously defend existing regulatory actions should a farming operation be targeted with a third-party lawsuit for an alleged violation that is already being addressed by a federal or state legal or administrative proceeding.

VI. "Normal farming" activities under § 404(f) of the Clean Water Act (33 CFR § 323.4)

Sec. 404(f)(1) of the Federal Water Pollution Control Act (33 U.S.C. § 1344(f)(1)) provides an exemption from 404 "dredge and fill" permitting for a wide range of normal farming,

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the AEZ goes beyond the boundaries of the establishment in question and applies to any area on or off the establishment within the AEZ while the application is ongoing.

[4] The Farm Regulatory Certainty Act would amend Section 1004(27) of the Solid Waste Disposal Act to codify EPA's existing regulations.

ranching and silviculture activities, including plowing, seeding, cultivating, harvesting for the production of food, fiber, and forest products as well as construction or maintenance of farm or stock ponds or irrigation ditches and for the maintenance of drainage ditches. Even though this broad language is written in the statute, the Corps' regulation (33 CFR § 323.4) and EPA's and the Corps' guidance and information interpretations have narrowed the scope of 'normal' farming, ranching and silviculture activity.[5] Thus, even some explicitly exempt activities (i.e., plowing) have come under enforcement action. Congress has included appropriations riders directing EPA and the Corps to eliminate funding for the so-called "recapture" provision at Sec. 404(f)(2), which the agencies use to sweep otherwise exempt activities back into the regulatory program, yet EPA and the Corps have ignored Congress' directives.

Recommendation: EPA and the Corps should undertake a rulemaking that supersedes the Corps' existing regulation as well as prior guidance from the agencies and codifies the normal farming, ranching and silviculture exemption under § 404(f)(1) of the Clean Water Act consistent with the text of the statute.

VII. **Total Maximum Daily Loads (TMDLs) (40 CFR Part 130)**

EPA has used guidance and informal interpretation of sparse statutory text (Clean Water Act Sec. 303(d)) and ambiguous decades-old regulations to create a regulatory mechanism that puts EPA bureaucrats and technocrats in the role of land use planners. This has blurred the lines of authority between the Federal and state governments and robbed state environmental agencies of the ability to devise and adapt their own plans to most effectively and efficiently achieve water quality standards. This EPA overreaching raises the cost of achieving water quality goals, inhibits adaptive management and unlawfully puts EPA in the role of regulating farming practices. EPA's existing rules also fail to ensure that established water quality goals are in fact *achievable* before burdensome or even economy-breaking implementation measures are imposed. This is of particular concern where water quality impairment results largely from naturally occurring "pollutants.".

Recommendations: EPA should revise its TMDL regulations to provide clarity and certainty to the regulated community and state and local governments by assuring that:

(a) States, not EPA, have the authority to set pollutant "allocations" for waters within their borders and incorporate the allocations into state implementation plans. This provides states and localities with the flexibility they need to change allocations when needed.

(b) EPA's TMDL authority is limited to approving or setting the *total* maximum load for a particular pollutant, as required by the statutory term "*total* maximum daily load."

[5] For example, while the Act itself does not restrict the exemption, the agency has seemingly used the recapture provision in 404(f)(2) to claim that the exemptions for normal activities only apply to 'established, ongoing' operations. It has further extended this interpretation to claim that changing an operation from one agricultural activity (e.g., grazing cattle) to another (e.g., planting, cultivating and harvesting crops) constitutes a 'change in use' and therefore negates the exemption provided in the law. See https://efotg.sc.egov.usda.gov/references/public/NM/CWA_404(f)_Ag._Exemptions.pdf

VIII. **Prior Converted Cropland (33 CFR § 328.3(b))**

In 1993, EPA and the Army Corps of Engineers promulgated a regulation that clarified that wetlands converted before 1985 into farmland were 'prior converted croplands' (PCC) and therefore, not "waters of the US." The preamble to the rule clearly provided that land remains as PCC regardless of the use to which the land is put. Yet, in 2005, the Army Corps of Engineers issued guidance eroding this exemption by proclaiming that land is no longer PCC if it is put to a non-agricultural use. A federal court found the guidance is unlawful because it conflicts with the 1993 rule,[6] but the Corps ignored the court's decision and continues to implement the guidance in order to re-regulate land.

Recommendation: EPA should undertake a rulemaking to clarify the 1993 rule that PCC lands are not subject to CWA regulation as jurisdictional wetlands regardless of the use to which the land is put.

IX. **Army Corps of Engineers 1987 Wetlands Delineation Manual and Regional Supplements**

In 1993, Congress prohibited the U.S. Army Corps of Engineers from using appropriated funds to delineate wetlands under the 1989 Wetlands Delineation Manual.[7] Congress further stated that no funds shall be used to implement *any subsequent manual adopted without the public notice and comment* procedures of the Administrative Procedure Act (APA). In the meantime, Congress authorized the Corps to use the 1987 Wetlands Delineation Manual, but only until the adoption of a final delineation manual.

Almost 25 years later, the Corps has failed to propose, much less adopt, a final wetlands delineation manual. Instead, the Corps continues to use the 1987 Manual, adding regional "supplements" to modify the very same delineation criteria Congress disallowed in 1993. Rather than placing the Manual and regional supplements through the rulemaking process, the Corps has used the supplements to avoid the Congressional directive to formally promulgate a final Manual.

Recommendation: We recommend that EPA clarify that no regional supplements should be used in making determinations of what constitutes "navigable waters" and/or initiate a joint

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[6] *New Hope Power Company and Okeelanta Corporation v. U.S. Army Corps of Engineers and Stockton* 2010 WL 3834991 (S.D. Fla. September 29, 2010)

[7] See Energy and Water Development Appropriations Act, Pub. L. No. 102-377, 106 Stat. 1315: "None of the funds in this Act shall be used to identify or delineate any land as a "water of the United States" under the Federal Manual for Identifying and Delineating Jurisdictional Wetlands that was adopted in January 1989 or any subsequent manual adopted without notice and public comment. Furthermore, the Corps of Engineers will continue to use the Corps of Engineers 1987 Manual, as it has since August 17, 1991, until a final wetlands delineation manual is adopted. PUBLIC LAW 102-377—OCT. 2, 1992 106 STAT. 1325 None of the funds in this Act shall be used to finalize or implement the proposed regulations to amend the fee structure for the Corps of Engineers regulatory program which were published in Federal Register, Vol. 55, No. 197, Thursday, October 11, 1990."

rulemaking with the Corps that subjects the wetlands delineation manual through the rigors and transparency of the APA's public notice and comment process.

X. EPA's proposed revision regarding objection to administratively continued permits (40 CFR § 123.44) (Docket ID No. EPA-HQ-OW-2016-0145c)

EPA has proposed granting to itself the power to object to administratively continued permits by providing EPA Regional Administrators the discretion to change the status of an administratively continued permit to "proposed permit," an outcome that would trigger the robust federal review process outlined in 81 Fed. Reg. 31344, 31372 (May 18, 2016).

This proposed revision marginalizes a valuable tool afforded to states with authorized NPDES permit programs – the ability to administratively continue an existing NPDES permit in lieu of permit reissuance. This tool is important because it allows states to prioritize limited resources and limited personnel to ensure the most efficient management of their state NPDES program. This revision, if finalized, further erodes State authority to manage their own programs and will discourage unauthorized states from assuming NPDES authority.

Denial of an administratively continued permit, which this rule revision entails, would leave agricultural producers who hold NPDES permits without permit coverage and vulnerable to citizen lawsuits. It also raises a constitutional concern due to the lack of due process considerations given that there is no procedure to challenge the EPA's decision to change a permit's status to "proposed." The revision raises additional concern because it exceeds EPA's statutory authority. Clean Water Act § 402(d) grants EPA the authority to review proposed permits and to object to them, which if objected to prohibits the permit from issuing. The revision here would replicate this administrative power and apply it to administratively continued permits, a step that goes beyond the power Congress granted to EPA in the Clean Water Act.

Finally, this effort by EPA is not needed because EPA already manages a largely successful effort that resolves the underlying issue. The Priority Permit Measure provides an avenue for EPA to target state-issued NPDES permits to undergo the reissuance process by designating them as "priority permits".

Recommended: EPA withdraw its proposed revision regarding objection to administratively continued permits (40 CFR § 123.44) (Docket ID No. EPA-HQ-OW-2016-0145c)

XI. National Ambient Air Quality Standards (NAAQS) for Coarse Particulate Matter (PM_{10})

The NAAQS and definition for coarse particulate matter are overly broad and do not take into account naturally occurring sources like dust found on farms.

Recommendation: EPA should clarify its NAAQS regulations to ensure that agricultural producers are not found to be in violation of the Clean Air Act for conditions beyond their control when operating under general farming practices.