Congress of the United States
Washington, DC 20515

November 14, 2014

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

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army
Department of the Army, Civil Works
108 Army Pentagon
Washington, DC 20310

RE: [EPA–HQ–OW–2013–0820; 9908–97–OW]

Dear Administrator McCarthy and Assistant Secretary Darcy:

As Members of the Pennsylvania Congressional Delegation, we appreciate the opportunity to offer comments regarding the proposed rule "*Definition of Waters of the United States Under the Clean Water Act Section 404(f)(1)(A)*" (WOTUS). The proposed rule is of great concern to the citizens of Pennsylvania because it will have significant impacts upon the commonwealth's economy and ability to continue regulation, per the Clean Water Act (CWA). The rule as proposed disregards the long-standing federalist approach empowered within the CWA and would expand federal jurisdiction far beyond the long-held intent of Congress and numerous Supreme Court rulings. Moreover, the proposed rule is susceptible to inconsistent interpretation and application, which holds the potential for substantial implementation costs across various CWA programs, and will likely invite more enforcement actions and third party litigation. While we agree that clarifying the jurisdictional scope of the CWA is necessary, we urge that both the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (ACOE) vacate the proposed rule and fully address the underlying flaws and deficiencies, within their statutory authority, prior to moving forward.

There is widespread agreement that the Clean Water Act has been a beneficial tool for the management and health of our nation's watersheds and water quality. However, while Congressional intent of the CWA has been limited to "navigable waters," the extent of the law's jurisdiction has been the subject of much litigation and regulatory action. Complicating the issue further are Supreme Court decisions that have not adequately described the scope of federal authority under the law, resulting at times in conflict. While the existing law and the Supreme

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Court have left uncertainty regarding what constitutes a "water of the United States," previous holdings have made clear that the federal government's authority is not limitless. Nevertheless, the proposed rule will fundamentally expand the jurisdiction of the CWA to include traditionally non-navigable tributaries and streams, as well as ephemeral waters on ordinarily dry lands. By weakening the historical limits of the CWA, the rule vastly expands the reach of the law far beyond the long-recognized intent of Congress, while also raising legitimate constitutional questions.

Lack of Clarity and State Impacts

Through a strong state-federal regulatory partnership that provides adequate flexibility to address water quality while accounting for local and regional variations and conditions, Pennsylvania has demonstrated a successful track record of improving and protecting the ecological health of its waters. The proposed rule fails to clearly define where the federal government's jurisdiction stops, which is a fundamental threat to the CWA's state-federal partnership and poses devastating impacts on Pennsylvania's ability to manage its own water resources effectively. Comments recently submitted by the Pennsylvania Department of Environmental Protection (DEP) directly discuss this concern:

> *"The rule as drafted creates more confusion than it clarifies, and is already subject to differing interpretations by EPA [Environmental Protection Agency] and ACOE [Army Corps of Engineers] staff. This confusion will delay permitting and could undermine strong state programs. Pennsylvania asks EPA and ACOE to consider an approach that recognizes regional differences in geography, climate, geology, soils, hydrology and rainfall, and that supports strong and comprehensive state programs."*[1]

Effects upon Agriculture and the "Interpretive Rule"

As currently written, this rule will have unprecedented impacts on our nation's farmers, foresters and private landowners. Along with the release of the WOTUS rule, the United States Department of Agriculture (USDA) issued an interpretive rule ("IR") to explain the impacts of the rule on the agriculture sector. This IR presumes to offer farmers a "dredge and fill" permit exemption for "normal farming, ranching, and silvicultural activities" under Section 404 of the Clean Water Act. Despite the release of the IR, there have been many strong concerns voiced across the agriculture community that it does not go far enough to protect usual farming activities. Similarly, the rule does not explicitly prohibit the EPA from requiring farmers to obtain new permits under the CWA.

The IR states that exemptions from "normal activities" would be granted if, and only if, farmers comply with federal conservation guidelines, per USDA's Natural Resources Conservation Service (NRCS), that until this time have been voluntary in nature. In effect, under the WOTUS

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[1] http://thompson.house.gov/sites/thompson.house.gov/files/PADEPLetterWithCommentsOct82014.pdf

rule, a producer must now meet a federally mandated conservation standard, or face the consequences, including rigid penalties, of non-compliance under the CWA. Furthermore, this IR has no binding statutory teeth and would create more uncertainty because it provides EPA the authority to amend the list of conservation practices that would qualify for these limited exemptions at any time. We agree with many in the agricultural community that this IR does more harm than good because it would place limitations upon activities that currently are "exempted," rather than broadly exclude all such activities that have not been subject to the law for four decades. In short, this rule would mandate conservation compliance for traditionally voluntary agricultural practices, while increasing associated costs for such activities, effectively creating more regulatory uncertainty.

Overall Economic Impact

Finally, the economic impact of the proposed rule will be far-reaching, despite the EPA and ACOE claims that it will not have a substantial direct effect on the states. Activities that drive economic development in Pennsylvania, such as highway and road construction, pipeline projects, energy production, infrastructure projects, farming, flood control, and public works projects, will all be subject to federal permitting if this proposal is finalized. The federal Small Business Administration has even commented in a letter to the EPA with concerns that, "the rule will have a direct and potentially costly impact on small businesses."[2]

Conclusion

Due to the fundamental flaws within the proposed WOTUS rule, we urge the Agencies to immediately vacate the rule and begin to address, within their statutory authority, the underlying programs prior to any further rulemaking attempts. We agree that managing the nation's water is critically important; but the Agencies must recognize that farmers, foresters, and other land owners play important roles in meeting our shared goals of clean watersheds and water resources. As currently drafted, the proposed rule creates more uncertainty, more confusion, more costs for landowners and more regulatory burdens upon the states, all with no guarantee or measurable benefit to waters or the American people.

We appreciate the opportunity to comment on this proposal and look forward to your timely reply.

Sincerely,

Senator Pat Toomey

Representative Glenn 'GT' Thompson

[2] http://www.sba.gov/sites/default/files/Final_WOTUS%20Comment%20Letter.pdf

Representative Tim Murphy

Representative Mike Kelly

Representative Tom Marino

Representative Keith J. Rothfus

Representative Lou Barletta

Representative Scott Perry

Representative Joe Pitts

Representative Jim Gerlach