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Attention: Docket ID No. EPA-HQ-OW-2011-0880

Re: Request for Extension of Comment Period on EPA and Corps Proposed Rule Defining Waters of the United States” Under the Clean Water Act, Docket ID No. EPA-HQ-OW-2011-0880

Dear Ms. Downing and Ms. Jensen:

The undersigned organizations respectfully request an extension of the public comment period on the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers’ (Corps) Proposed Rule Defining “Waters of the United States” Under the Clean Water Act (CWA), 76 Fed. Reg. 22,188 (Apr. 21, 2014), to either 90 days beyond the current comment deadline, or 90 days beyond the EPA’s release of the final connectivity report, whichever is later.

We represent a large cross-section of the nation’s construction, real estate, mining, agriculture, manufacturing, energy, and wildlife conservation sectors, all of which are vital to a thriving national economy. Projects and operations in these sectors are regulated in one manner or another by the CWA. As such, the scope of jurisdiction under the CWA is of fundamental importance not only to the undersigned organizations, but also to the Nation. Given the significance of the proposed rule, the public should be permitted the opportunity to thoroughly review and comment on the EPA’s proposed rule as well as its supporting documentation, including its lengthy Appendices (Appendix A – Scientific Evidence, Appendix B – Legal Analysis), Economic Analysis, and Draft Report on the “Connectivity of Streams and Wetlands to Downstream Waters.”

Additional time for comment on the proposed rule is warranted for the following important reasons:

1. The Agencies Have Not Reviewed the Adequacy of the Underlying Science, But Have Asked for Commenters to Provide Complex Technical Information. Additional Time Is Needed for the Agencies to Complete and Provide Their Assessment So the Public Can Effectively Respond.

The EPA's proposed rule purports to rely on the scientific conclusions of the EPA's draft connectivity report, which is currently under review by the Science Advisory Board (SAB). Indeed, the SAB Panel's discussions on recent public teleconferences demonstrate that the SAB Panel is still grappling with the proper criteria for determining under which circumstances a connection amounts to a significant nexus for the purposes of establishing CWA jurisdiction.

Moreover, in recent statements, the EPA has acknowledged that the SAB and the agency are still considering options for review of the adequacy of the science to support the proposed rule. Given the ongoing SAB Panel review, and that the EPA has not yet determined how to review the adequacy of the science to support the proposed rule, commenters should have at least 90 days from the time when EPA completes its review of the science and issues a final connectivity report to comment on the proposed rule.

There are numerous places throughout the preamble to the proposed rule wherein the agencies have asked the public to provide specific information regarding the proposed rule's scientific justifications. The purpose of the SAB Panel review of the draft connectivity study was to evaluate the "evolving scientific literature on connectivity of waters¹," and the public deserves the opportunity to comment on the conclusion of that review process. .

A significant amount of time and technical expertise will be required first to evaluate the report from the SAB Panel and agencies' scientific conclusions and responses and then to prepare substantive and thoughtful responses. The comment period should be extended to give stakeholders that additional time needed to review these lengthy, complex scientific analyses and provide meaningful feedback.

2. The Agencies Have Not Provided an Adequate or Comprehensive Economic Analysis, and the Regulated Community Needs Adequate Time to Undertake a More Complete Economic Analysis.

The EPA's Economic Analysis for the proposed waters of the United States rule fails to provide a reasonable assessment of the proposed rule's costs and benefits. The Economic Analysis suggests that the proposed rule will increase overall jurisdiction under the CWA by only 2.7 percent. But the EPA arrives at this percentage using a flawed methodology that only accounts for the Section 404 program, relies on figures extrapolated from statistics from FY 2009-2010 (a period of extremely low construction activity), and fails to account for the universe of waters and features for which landowners have not previously sought CWA permits. Relying on this percentage throughout the Economic Analysis, the EPA systematically and hugely underestimates the impact of the proposed rule's new definition of "waters of the United States."

¹ See 79 Fed. Reg. at 22,192.

The EPA's calculations of incremental costs and benefits are also deficient. The EPA's cost analysis is focused on costs associated with the section 404 program and largely ignores the cost impact of the changes to other CWA regulatory programs due to lack of data. Moreover, the benefit calculation is based on a flawed methodology that relies on studies that are largely irrelevant, do not provide accurate estimates of benefits, and were conducted 10-30 years ago.

As a result of the incompleteness and inaccuracies of the EPA's Economic Report, it is necessary for members of the public to provide their own economic analyses to project the impacts of the proposed rule, and identify effects that the EPA failed to consider. Additional time is required for commenters to gather the necessary data and develop sound economic methodology to properly assess the proposed rule's likely increase in jurisdiction as well as its projected costs and benefits. The comment period should be extended so that the public can adequately assess the economic implications of the proposed rule.

3. The Agencies Have Not Adequately Analyzed the Proposed Rule's Implications on the Multiple CWA Programs Affected by the Proposal, and the Regulated Community Needs Adequate Time to Analyze and Provide Comments.

The proposed rule will replace the definition of "navigable waters" and "waters of the United States" in the regulations for all CWA programs, including section 404 discharges of dredge or fill material, the section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the section 401 state water quality certification process, and section 303 water quality standards and total maximum daily load (TMDL) programs. The EPA and the Corps (together, the agencies) have not truly considered the complicated implications that this proposed rule will have for the various CWA programs.

Although the EPA's Economic Analysis purports to analyze the costs of importing this "waters of the United States" definition into other CWA programs, the analysis largely focuses on the section 404 program and essentially concludes that there will be no additional costs for other CWA programs. This cursory analysis is inadequate. The agencies have not considered, for example, that many stormwater ditches and features may now meet the definition of "waters of the United States," thereby requiring the features to achieve water quality standards, including numeric effluent limitations. The agencies have not looked at how this type of change may create confusion over whether an NPDES permit is required for certain features or may place an increased burden on states administering stormwater programs and setting water quality standards. The EPA and the Corps have not truly considered how the proposed rule may affect the states implementing the various CWA programs or the stakeholders regulated by these programs. Nor have the agencies analyzed how the proposed definition of "waters of the United States" will affect their own administration of each of the CWA regulatory programs.

Because the agencies have not fulfilled their obligation to consider the implications to the various CWA programs, it falls to the public to address these implications in comments so that these issues are fully addressed by the agencies during the rulemaking process. Analyzing these

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implications is complicated, will require additional time, and, therefore, warrants an extension of the comment period.

4. The Agencies Are Requiring the Public to Simultaneously Comment on the Interpretive Rule on Agricultural Conservation Practices, Which Will Require Additional Time and Effort.

At the same time that members of the public are asked to comment on the proposed rule to define “waters of the United States,” the agencies are also seeking comment on their Interpretive Rule Regarding Applicability of the Exemption from Permitting Under Section 404(f)(1)(A) to Certain Agricultural Conservation Practices. Many of the undersigned organizations are part of the agricultural community and are confused by the potential implications of the Interpretive Rule. It is unduly burdensome for these organizations to have to respond to two such complex and interdependent proposals within such a short time frame. Additional time is warranted to allow for the public to meaningfully respond to both rules.

In sum, given the scope and complexity of the proposed rule and its supporting documents, a 90-day comment period is simply insufficient. In light of the many important issues addressed by the proposed rule and the economic interests at stake, it is imperative that the EPA and the Corps allow all interested parties to have sufficient time to provide meaningful and fully developed comments. The undersigned organizations therefore request that the comment period be extended to either 90 days beyond the current comment deadline, or 90 days beyond the EPA’s release of the final connectivity report, whichever is later.

We appreciate your attention to this important matter. If you wish to discuss any of these concerns, please contact Deidre G. Duncan, counsel for the Coalition, at (202) 955-1919.

Sincerely,

Agricultural Retailers Association
American Coke & Coal Chemicals Institute
American Exploration & Mining Association
American Farm Bureau Federation
American Forest & Paper Association
American Iron and Steel Institute
American Petroleum Institute
American Public Power Association
American Road & Transportation Builders Association
Associated Builders and Contractors
American Gas Association
Associated General Contractors of America
CropLife America
Edison Electric Institute
The Fertilizer Institute

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Florida Sugar Cane League
Foundation for Environmental and Economic Progress (FEEP)
Independent Petroleum Association of America (IPAA)
Industrial Minerals Association – North America
International Council of Shopping Centers (ICSC)
Irrigation Association
NAIOP, the Commercial Real Estate Development Association
National Association of Home Builders
National Association of Manufacturers
National Association of Realtors
National Cattlemen's Beef Association
National Corn Growers Association
National Cotton Council
National Council of Farmer Cooperatives
National Industrial Sand Association
National Mining Association
National Multi Housing Council
National Pork Producers Council (NPPC)
National Rural Electric Cooperative Association
National Stone, Sand and Gravel Association (NSSGA)
Portland Cement Association
Public Lands Council
Responsible Industry for a Sound Environment (RISE)
Texas Wildlife Association
Treated Wood Council
United Egg Producers