NATIONAL CORN GROWERS ASSOCIATION

August 11, 2015
The Honorable Gina McCarthy
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, N.W.
Washington, DC 20460

Re: Request for Extension of the effective date of the "Clean Water Rule: Definition of 'Waters of the United States'"

Dear Administrator McCarthy,

On June 29, 2015, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (collectively, the Agencies) published the final "Clean Water Rule: Definition of 'Waters of the United States'." For the reasons given below, we believe it is imperative that you postpone the effective date of the rule until sound guidance is completed, Agency staff trained, and the Agencies can work with the regulated community to develop a clear understanding of their obligations and responsibilities under the law.

We appreciate your clear conviction in your statements at the July 16 Corn Congress that the final rule addresses farmers' concerns and that no new risks are created by the rule. That said, we are convinced these assurances are based on an inaccurate reading of the rule, the preamble, and the recent applicable field record of Agencies' actions on these issues. As a result, corn farmers are seriously concerned they will face severe legal and financial risks as of August 28, 2015, the rule's effective date. Our concerns are exacerbated by the fact that the Agencies' field staff have yet to develop a shared understanding of the rule and how it will be implemented. Furthermore, the Agencies' leadership and field staff have yet to develop with farmers a similar understanding of their responsibilities under the Clean Water Act in light of this rule. This lack of training and a shared understanding creates a vacuum that will assuredly result in many wrongheaded field decisions and spur exploratory citizen suit enforcement actions against farmers. This is unacceptable.

Adding to our concerns is the clear disagreement on several fundamental policy matters between the drafters of the final rule and the Corps' career and technical staff responsible for implementing the rule. These disagreements have only recently come to light as a result of communications between Congress and the Assistant Secretary of the Army for Civil Works. These disagreements involve substantive matters that go to the heart of our concerns including how the Agencies understand what are adjacent and neighboring waters and whether isolated waters can properly be considered jurisdictional. Given these disagreements, we lack confidence in the Agencies' ability to implement the rule sensibly, soundly, and uniformly across the country at this stage. We cannot comprehend how you can make assurances that the final rule will not result in new permitting requirements for farmers given this degree of technical and operational disagreement among the implementing field staff.

One of the several substantive concerns we have with the final rule and its implementation involve its treatment of erosional features like gullies and rills. The final WOTUS rule defines "tributaries" for the first time and excludes from this definition "erosional features" such as gullies and rills if they do not have a bed, bank and ordinary high water mark. But the Agencies state in the rule's preamble how easily a gully could be deemed a tributary ("some ephemeral streams are colloquially called "gullies" or the like even when they exhibit a bed and banks and an ordinary high water mark; regardless of the name they are given locally, waters that meet the definition of tributary are not excluded erosional features"). In fact, within this past year, the Corps has made several rulings to this effect. When examining a farm field with common gully-like features for agricultural drainage purposes, the Corps determined the gullies were jurisdictional streams, and the wetter areas next to them were jurisdictional wetlands.

None of these features appear as streams in the U.S. Geological Survey/Environmental Protection Agency's National Hydrography Dataset (NHD+) at the highest resolution available. The center of this field is more than a half a mile from the nearest unnamed stream in the NHD+, almost 2 miles to the nearest named stream, and 10-12 miles to the nearest river. How does a farmer work such a field and use pesticides without running afoul of the Clean Water Act's NPDES permitting requirements?

Despite the legal hurdles facing the rule that could change its ultimate course, there is a very real possibility that these policies will be with us for decades. An EPA staff member told us last year that this is a "once-in-a-generation" rulemaking. We hope you would agree that such a set of policies, which will create severe risks and liabilities for farmers, should not be rushed. NCGA and others believe the rulemaking process should have taken more time and allowed for more input from the regulated community. Our views are validated by the news of the depth of technical concerns the Corps' career staff had with the final rule – a mere two weeks before the prepublication copy was made public. We urge you not to rush the rule's effective date until all these implementation matters are properly addressed. Your personal good intentions and assurances that farmers' concerns will not materialize cannot serve as substitute for taking the necessary time to ensure implementation is handled properly.

We remain committed to work with your program leadership and field staff over the next few months, both in the field and in the board room, to address the practical implementation details of this rule. We urge you to take the time necessary to educate and train the Agencies' field staff and to engage with us so that all of the relevant issues can be addressed **before** implementation.

Thank you for your consideration.

Sincerely,

Chip Bowling

Chip Bowling
President
National Corn Growers Association