Wisconsin Farm Bureau Federation
1241 John Q. Hammons Drive P.O. Box 5550, Madison, WI 53705 1.800.261.FARM (3276) www.WFBF.com

TO: The U.S. Army Corps of Engineers, Department of the Army, Department of Defense and the Environmental Protection Agency

FROM: Karen Gefvert, Director of Governmental Relations

DATE: November 13, 2014

RE: Federal Register notice by the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) **(Docket ID Number EPA-HQ-OW-2011-0880)** Definition of "Waters of the United States" Under the Clean Water Act

The following comments are in response to the request for comments (Docket ID No. EPA-HQ-OW-2011-0880) published in the April 21, 2014 Federal Register by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers.

The Wisconsin Farm Bureau Federation (WFBF) appreciates the opportunity to provide comments to the Corps and Department's proposal and register the adverse impact these proposed rules would have on agriculture. On behalf of the Wisconsin Farm Bureau Federation, I will be addressing these critical proposals.

Wisconsin's rich agricultural tradition is diverse in practice, size, topography and commodity. This is complimented with an ethic of stewardship and conservation where farmers perform voluntary conservation practices that benefit water, air, soils and wildlife. In addition to voluntary practices, Wisconsin State Statutes require mandatory non-point conservation practices such as nutrient management planning, soil erosion controls, clean water diversions and manure storage.

The proposed rule by the EPA and the Corps is an expansion of federal regulatory authority. It was written without consultation of states that will be designated with enforcement authority. It lacks clarity regarding exemptions. It creates confusion by changing the scope of the definitions and terminologies found within the Clean Water Act.

We are concerned about the vulnerability of landowners to unwarranted citizen lawsuits. The Congressional intent of the Clean Water Act seems to be disregarded by the proposed definition and expansive overreach by the Corps and EPA.
The current proposal was written and published without consultation from key players:

- The state agencies who work with the unique land and water structures in their state.
- Landowners and users who work every day with the specific needs of their land.

These parties have an intimate understanding of what is happening in their state and on their land and they are the most qualified to preserve and provide conservation practices to protect those natural resources. The regulatory creep that EPA and the Corps demonstrate by publishing this proposal clearly demonstrates the disconnect between a federal agency with the actuality of what is occurring when the boots are on the ground.

Under the proposal, many current Wisconsin "Waters of the State" would no longer by regulated by the Wisconsin Department of Natural Resources (DNR), but instead would be considered a "Water of the United States" falling under the jurisdiction of the EPA or Corps. This change does nothing to better manage or protect our natural resources. This is solely a change in jurisdiction which is unnecessary, duplicative and adds an additional layer of federal bureaucracy to resource management that is already being well regulated by our state agency.

Wisconsin State Statute 283.01(20) defines "Waters of the State" *mean[ing] those portions of Lake Michigan and Lake Superior within the boundaries of Wisconsin, all lakes, bays , rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, water courses, drainage systems and other surface water or groundwater, natural or artificial, public or private within the state or under its jurisdiction, except those waters which are entirely confined and retained completely upon property of a person.*

This current state definition addresses many of the changes that are proposed in the new definition of "Waters of the United States" by the EPA and Corps. In Wisconsin, this authority is already delegated to the DNR. Therefore, the only significant change for the EPA and Corps is control over the jurisdiction of water regulations and enforcement. What it changes for farmers and landowners is an increased exposure to additional federal regulation, enforcement and oversight. It would also expose farmers to unwarranted and unfounded citizen lawsuits as allowed under the Clean Water Act.

The proposed rule would also, in some cases, create duplicative permitting and regulation, and in others, remove Wisconsin's ability to regulate waters that would fall under the "Waters of the United States" definition.

The proposed rule by EPA and the Corps was meant to expand the definition of "Waters of the United States" by broadening definitional terms like "tributary" and "adjacent" as well as expanding categories such as "adjacent wetland" to "adjacent waters". The proposed rule would also include jurisdiction to regulate ditches, farm ponds, dry stream beds, and ephemeral streams. In the same breadth, the EPA and Corps released an Interpretive Rule to clarify the 56 exempt farming practices. Why only 56? The Natural Resource Conservation Service (NRCS) currently recognizes several hundred approved conservation practices for farmers to implement. Not only do we question why the Corps and EPA selected the 56 farming practices that are exempt, but because they were included in the Interpretive Rule, they can be changed or all together removed at any time, leaving farmers in a continual state of regulatory uncertainty.

Likewise, the expanded definition of "tributary" leaves farmers with questions on commonly accepted farming practices on any area of a field that contains a tributary. Will they be able to plant treated seeds? Plow the soil? Apply manure or other fertilizers? Apply pesticides, herbicides or fungicides? Will they be granted a CWA permit to do any of these activities if their farm field does in fact contain a small "tributary"? How long will approval of this permit take? These questions are all left unaddressed and unknown under the proposed rule as well as the additional interpretive rule.

The publication of the interpretive rule was a response to the confusion from the proposed rule and indicates an increase, as opposed to a decrease, in confusion about the expectations, implementation and repercussions that farmers will face from this new definition of "Waters of

the United States”. The EPA has gone to great lengths to clarify their intent but have created more confusion, and ultimately, mistrust from the farming community.

Lastly, the method that EPA and the Corps have used in order to redefine the term “Waters of the United States” is contrary to the Congressional intent initially included in the Federal Water Pollution Control Act of 1948. There were exemptions for farms because of their importance to the economy, the necessity to have good stewards of our lands and natural resources as well as the unique challenges that each farm field presents; such as, soil type, water resources, land topography, etc. These concerns are just as relevant today as during the passage of the Federal Water Pollution Control Act in 1948 and subsequent Clean Water Act of 1972.

Wisconsin stands at the forefront of conservation and stewardship of natural resources in the United States. Our state standards protect water quality for a variety of designations for our groundwater, streams, lakes and wetlands. The proposed rule is an expansion of federal regulatory authority. It places an undue burden on agriculture in Wisconsin and does nothing to provide additional protections of our natural resources. Instead, it leaves farmers confused and exposed to litigation and will ultimately lead to a decrease in voluntary conservation and stewardship.

The Wisconsin Farm Bureau Federation requests that the rule be withdrawn and any future discussions should begin with complete transparency and collaboration with states.