COMMENTS TO PROPOSED DEFINITION OF

'WATERS OF THE UNITED STATES'

UNDER THE CLEAN WATER ACT

AS PUBISHED IN THE FEDERAL REGISTER

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COMMENT TO PROPOSED RULE _____

If adopted, the EPA's proposed definition of "waters of the United States" will subject almost all farming activities to the EPA's permitting requirements. Public response to this proposed rule change has properly focused on the huge costs and dangers of such a situation. In response to this concern, the EPA has repeatedly stressed that the proposed rule will "preserve current agricultural exemptions for Clean Water Act permitting."[1] Bob Brace and his family have spent the past 25 years of their lives experiencing the EPA's treatment of agriculturally exempt farmlands – it has cost them hundreds of thousands of dollars, they have been repeatedly forced into court to defend their rights, and they have lost many acres of farmland that had been historically farmed by their family. The Braces' experience is a cautionary tale of the true impact of expanding the EPA's control over farming activities.

The Braces are now, and always have been, farmers.

The Brace family has been farmers in Erie County, Pennsylvania since at least the 1930s. They have farmed property throughout Erie County for nearly a century. Located in Waterford, Pennsylvania – about 15 miles outside of the City of Erie – is a 69-acre parcel that the Braces call the "Homestead Farm." Bob Brace, who was born in 1939, was raised on that 69-acre parcel. Save for a brief period in the great depression when Bob's grandfather lost the farm for a short time due to illness. Bob's father, Charles, purchased the farm from Production Credit and both he and later Bob, have consistently used the Homestead farm to raise crops.

In 1948, Bob's father purchased the "Murphy Farm" which is a 58-acre parcel that immediately abuts the Homestead Farm's southeastern border. Bob's father then used both the Murphy and Homestead farms to raise cows and grow crops to feed those cows.

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[1] www2.epa.gov/sites/production/files/2014-03/documents/cwa_ag_exclusions_exemptions.pdf (accessed September 10, 2014).

In 1975, Bob's parents concluded that they could no longer operate their dairy farming operation in a sufficiently profitable manner. As a result, they decided to sell both the Homestead and Murphy Farms. Bob did not want to see these farms sold outside his family and believed he could make the farms more profitable if he used them for growing row crops. With these as his personal and business goals, Bob purchased the Murphy and Homestead Farms from his parents for the appraised price of $170,000.

Bob's Farming of the Murphy and Homestead Farms.

Shortly after purchasing the farms, Bob began the process of converting portions of the pastureland to land more appropriate for growing row crops. Like almost every other farmer in Erie County, Bob had to improve the drainage on both farms in order to make them more productive for growing row crops. Bob was also aware that his father had begun the process of utilizing government assistance in constructing a drainage system on the Murphy Farm. In about 1961, the Agricultural Stabilization and Conservation Service ("ASCS") and the Soil Conservation Service ("SCS"), both agencies within the United States Department of Agriculture, developed a drainage plan that involved the placement of underground tile on the Murphy Farm and surrounding land. Bob's father had begun implementing this plan, and Bob continued that work after purchasing the farms. Working with his local ASCS office and the SCS, Bob continued the construction of the drainage system developed by the ASCS and SCS in order to make the Murphy Farm into an effective and productive farm. Between 1977 and 1984, Bob made continuous efforts to provide improved drainage to the farms. All of his work was either initiated by or done in coordination with the ASCS and SCS. All told, Bob laid over 11,000 feet of pipe, tile and waterways. By 1979, Bob's work on the drainage system resulted in both the Murphy and Homestead Farms being dry, except for times of excessive rainfall. By

1984, Bob's drainage work was complete and he began growing additional crops on both the Murphy and Homestead farms.

The EPA's Notice of Violations Regarding the Murphy Farm

In 1987, the EPA issued an administrative order (the "1987 EPA Order") in which it notified Bob of its position that his activities associated with constructing and use of the drainage system on the Murphy Farm and adjoining land violated the Clean Water Act. The EPA issued this notice, despite the fact that Bob had done nothing more than continue the agricultural use of the Murphy and Homestead Farms that the Government helped him establish.

In fact, between 1975 and 1987, the applicability of the CWA to drainage systems installed on farms was far from clear. The ASCS and SCS took the position, until 1985, that the construction and operation of drainage systems, like the system installed on the Murphy Farm, did not violate the CWA. Bob reasonably relied on this interpretation and worked with these Government agencies to install the very drainage system that the EPA, in 1987, claimed violated the law. Further, in 1985, Bob made a request to the ASCS to "gain the status of 'commenced conversion from wetlands' prior to December 23, 1985"-- a so-called "Swampbuster Determination." This status would establish that Bob began converting any wetlands on either farm into usable farmland prior to December 1985 and, thereby, allow him to complete that conversion and "produce an agricultural commodity without losing USDA benefits." The ASCS granted Bob's request.

Notwithstanding the opinion of other government agencies, including the agencies that oversaw and partially funded Bob's drainage system, the United States pursued the 1987 notice of violation and filed suit against Bob in 1990 in an attempt to assess civil penalties against him and force him to "restore" the wetlands on the Murphy Farm that it believed had been affected adversely by his drainage system. In 1993, the United States District Court for the

Western District of Pennsylvania entered judgment in favor of Bob Brace, based on its conclusion that Brace's activities were exempt from the permitting requirements under the CWA. On appeal, however, the Third Circuit reversed and held that Bob's activities did violate the CWA. The Third Circuit reached this decision by concluding that, despite the District Court's findings that these farms were an established farming operation, it did not believe that the historic use Bob and his family had made of the Murphy Farm satisfied the requirements for an agricultural exemption. The Third Circuit concluded that the Homestead Farm was entitled to such an exemption, but the Murphy Farm was not. Despite the nearly 50 year history of using the Murphy Farm as part of an integrated farming operation, the fact that the drainage system between the Farms was connected and integrated, and the fact that Bob had received a Swampbusters determination in 1988, the Third Circuit ordered that the Murphy Farm was not entitled to an agricultural exemption.

The Consequences of the Third Circuit's Decision

The Third Circuit remanded this case to the district court to address the remedial measures necessary to correct the so-called violation. The United States Supreme Court denied Bob's petition for a writ of certiorari – thus leaving Bob with no further avenues to appeal the Third Circuits decision.

Realizing that the Third Circuit's decision would require him to engage in significant remedial measures regarding the Murphy Farm, on June 25, 1996, Bob, left with no real alternative, entered into a consent decree with the United States to resolve the 1987 Notice of Violation. Under the terms of the Consent Decree, Bob was required to engage in the following relevant actions:

1. refrain from "discharging any pollutants (including dredged or fill material) into the approximately 30 acre wetland site [on the Murphy Farm] . . ., unless such discharge is in compliance with the CWA;

2. "perform restoration in accordance with the wetlands restoration plan"

3. "record this Consent Decree in the applicable land records office."

Consistent with the Consent Decree, Bob proceeded to remove miles of tile and disassemble the drainage system that he, in coordination with the ASCS and SCS, had constructed over a period of twenty years. Removal of this drainage system resulted in the Murphy Farm becoming unsuitable for farming. The "restoration" actions that Brace was required to undertake included the construction of a concrete "check dam" on the Murphy Farm. The check dam, together with the removal of literally miles of drainage tile and waterways, resulted in regular flooding of the Murphy Farm, a condition that had not occurred since at least 1979. The increased saturation of the Murphy Farm caused the growth of vegetation and the migration of animals that compounded the lack of utility of the land for any productive farming. Further, the "upland" portions of the Murphy Farm that were not part of the 30-acre site referred to in the Consent Decree were rendered unusable by the Decree. Bob is not permitted to engage in any action that would cause the discharge of any pollutant, including fill, dirt, or soil side cast from ditch cleaning, into the wetlands on the Murphy Farm.

Having been deprived of his ability to use the Murphy Farm, Bob commenced a takings action against the United States to seek compensation for the consequences of the 1987 Notice of Violation. Bob believed he had a strong case for a taking, after all, the drainage system that he ultimately had to remove was partially paid for and designed by the United States Government. Certainly, thought Bob, his reliance on that drainage system being legal was reasonable. Further, the Third Circuit had decided to treat the Homestead and Murphy Farms differently. Thus, Bob

felt justified in arguing to the Federal Court of Claims that its takings analysis should focus only on the Murphy Farm.

Unfortunately, the Federal Court of Claims disagreed with Bob. Unlike the Third Circuit, the Federal Court of Claims treated the Murphy and Homestead Farms as one parcel for purposes of the takings analysis. This decision contributed to that Court's conclusion that the 30 acre wetland that the Consent Decree was supposed to create was not such an intrusion to rise to the level of a regulatory taking. Further, the Court made particular note of the fact that the EPA's representatives testified that the Consent Decree was only intended to return the Murphy Farm to the condition that existed in 1984 – when the Murphy Farm was dry and did not flood. Thus, according to the Court, it presumed that if the Consent Decree's results exceeded that intent, the EPA would work with Bob to reduce that impact.

Thus, despite the fact that by 2000, the Murphy Farm had been turned into a veritable swamp land due to the Consent Decree, the Court of Federal Claims decided that the EPA's actions did not entitle Bob to any compensation for his loss. Bob again appealed this decision as far as possible, including a request to the United States Supreme Court – but was unsuccessful in his appeals.

Bob's Most Recent Efforts to Regain the Use of the Murphy Farm

At the conclusion of his takings case Bob was left with only one practical choice – to try to get the EPA to honor its testimony in that case, and allow him to fix the over enforcement that had occurred with regard to the Consent Decree. Bob began a multi-year effort to have the EPA, and the state and local spiderweb of related regulatory agencies, to react to his requests to allow him to undo the aspects of the Consent Decree that turned his property into a swamp. At one point, Bob reached a point where he received verbal permission from an EPA representative to take many of the actions he requested. That representative promised a confirming letter –

however that letter never came. Instead, Bob was once again contacted by the EPA's lawyer to advise that this representative was mistaken and that the acts that had been verbally allowed were, in fact, not appropriate. Refusing to abandon his right to make meaningful use of his property, Bob continued his efforts to get the EPA to allow him nothing more than to make proper use of the Murphy Farm. Most recently, however, the EPA has advised Bob that he must obtain a "jurisdictional determination" for both the Murphy and Homestead Farms to be able to evaluate his rights regarding that property, even though both farms should be exempt under the farming exemption. Approximately 30 years since Bob completed the work on the Murphy Farm that the United States Government let him finish, that same government has told him that he now needs to hire yet another consultant to determine what parts of his nearly 120 acre farm he can use.

Suffice it to say that Bob's story is a clear illustration of how the EPA treats the supposedly exempt areas under the CWA and the agricultural use of property. Even though many individuals from all walks of life are concerned with the usurpation of property rights regarding the expansion of EPA's jurisdiction through the proposed rule change, Bob's case is a clear example that the EPA was, and has been, exercising those rights since the mid 1970's. Bob's case also shows how the EPA decision to selectively enforce those rules against a family that farms can have a devastating effect on that family and its business. Unfortunately, there are many landowners, farmers and non-farmers alike, whose lives have been drastically altered due to the over-zealous and unrelenting enforcement of the CWA by the EPA.

Conclusion

In conclusion, the proposed rule change would further expand the EPA's jurisdiction under an Act in which its jurisdiction is already too broad. The EPA's jurisdiction does not need to be expanded, it needs to be reined in.

1. **Expansion of the farming "exemption."** Currently, the exemption is so limited by the EPA that an exemption may as well not even exist. Most ordinary citizens, sometimes even those educated in the environmental field, believe that any farming is exempt from regulation. This could not be farther from the truth of how the EPA has applied this exemption. Farmers today are afraid of doing proper maintenance on their farms for fear of prosecution. No "new" lands meeting the definition of a wetland can be brought into production – even in a case like Bob's, where his family had consistently farmed all those lands for years, and he properly dealt with his local regulatory authorities to allow for the continued use of that property. Ditches cannot be cleaned and maintained without fear of fines. Plowing and cultivating can be viewed as causing "pollution" because dirt and soil are considered contaminants that, if allowed to enter a wetland, can result in fines or even imprisonment. Twenty-First Century American farms, armed with some of the best technology, equipment and production knowledge in the world, are truly living in a Twentieth Century, Soviet Style system of regulatory enforcement and government control of their land rights.

2. **Man made "ditches" should not be considered "streams."** The EPA and other government agencies should not be able to characterize a man made ditch as a stream in order to bring it within the CWA's jurisdiction.

3. **A realistic definition of wetland needs to be established**. Most individuals have no idea how much land the government (through the EPA) already controls. This expansive control is due to the EPA's woefully broad definition of a wetland. When dry corn fields and western deserts can be declared "wetlands," something is wrong. Nearly any parcel of land in America can meet the technical definition of a wetland. Soil can become anaerobic, or hydric, within 24 hours of being covered with water. The list of "wetland plants" is another component of this definition that must be reduced – many of these same plants can be found growing on upland soils. Fundamentally, however, an average landowner should not have to pay thousands upon thousands of dollars to have an environmental consultant test his or her land to ensure that he or she can legally plant crops.

4. **Agency overlap must be eliminated**. Bob's case is a perfect example of how the regulatory spider web of agencies makes it impossible for a person to safely use his or her property. Bob has worked with or been accused of violating laws by no less than 5 different local, state and federal agencies – often with one agency taking a position that is later contradicted by another agency. It is unfair when a farmer or other property owner receives and relies upon approval from one agency regarding his or her property, only to find out that a host of other agencies also have their regulatory foot in the door and over-rule the initial allowance. One area that Bob's story highlights as particularly bothersome involves the Swampbuster Provision. Many farmers have received a commenced determination from the U.S. Department of Agriculture's (USDA) Natural Resources Conservation Service (NRCS). This determination concluded whether or not a farmer had converted, or begun conversion, of a wetland prior to December 23, 1985. If so, under USDA guidelines, the farmer could finish that conversion while remaining eligible for USDA benefits. EPA and the Army Corps of Engineers (COE) often overlook this determination (as they did with regard to Bob), even though thousands of farmers rely on the advice of the NRCS.

5. **Fair compensation must be paid for regulator takings**. Currently, when a parcel of private land is declared a wetland, for all intents and purposes, that land is now impossible to use for economical benefit. The United States Constitution calls for compensation when the Government takes property . . . through regulation or other means. As Bob's case illustrates, receiving compensation under this rule is exceptionally difficult and an average farmer has neither the resources nor the time to trudge through years of litigation and expenses in the hope of navigating this complex area of the law. Stripping away the complexity and simply requiring the Government to pay for all regulatory takings will truly make the Government "get real" regarding the economic impact of these regulatory decisions. Individual citizens should not bear that cost of the federal policy decisions.

6. **Mitigation should be eliminated**. Currently, when a so-called wetland is permitted to be encroached upon, mitigation is often a requirement to obtain a permit to allow that encroachment. Mitigation costs can average upwards of $100,000. While some developers (such as large contractors and commercial developers) can pass these costs on as part of the ultimate sale price for homes and commercial space, farmers and other private landowners cannot. Mitigation, in this respect, ends up feeling like government sanctioned extortion – requiring individuals to pay tens of thousands of dollars in order to utilize their own property.