United States Senate
WASHINGTON, DC 20510

July 31, 2014

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, DC 20460

The Honorable John M. McHugh
Secretary
U.S. Department of the Army
The Pentagon, Room 3E700
Washington, DC 20310

The Honorable Thomas J. Vilsack
Secretary
U.S. Department of Agriculture
1400 Independence Ave, SW
Washington, DC 20250

Dear Administrator McCarthy, Secretary McHugh, and Secretary Vilsack:

We are writing regarding the Clean Water Act jurisdictional rule and interpretive rule jointly proposed by the Environmental Protection Agency and the U.S. Army Corps of Engineers that intend to clarify the scope of waters protected by the Clean Water Act (CWA). While we have long been supporters of the Clean Water Act protecting our nation's water resources, we want to make sure that the proposed jurisdictional rule and the interpretive rule do not have unintended effects on agriculture and on the conservation practices currently used by many of our nation's farmers and ranchers.

Voluntary conservation practices supported by USDA and expanded in the 2014 Farm Bill are the federal government's largest investment in the conservation of private working lands and critical to maintaining clean water, clean air, wildlife habitat, and other benefits. The proposed "waters of the US" rule and the interpretive rule could undermine progress made in the 2014 Farm Bill if they create an atmosphere of uncertainty that results in fewer conservation practices or significant new burdens for our nation's farmers and ranchers. We are glad to see the existing exclusions and exemptions for normal farming activities are maintained in the current proposed rule. However, based on concerns and questions that we are hearing from agricultural stakeholders, we would like clarification on a number of issues surrounding both the proposed

rule and the interpretive rule so we can ensure the continued promotion of conservation in farming and ranching practices.

It is our understanding that the purpose of the interpretive rule is to promote conservation practices and provide regulatory certainty for farmers and ranchers. After speaking with stakeholders across the country, many are concerned that the intent of the interpretive rule will not be met. As a measure to address the concerns we have heard from farmers and ranchers, we identified specific issues that we would ask you to address regarding both the proposed rule and the interpretive rule.

1) Agency documents and congressional testimony state that the purpose of the interpretive rule is to provide certainty to farmers and ranchers by stating in advance that specific conservation practices are exempt from CWA permitting. However, before the release of the interpretive rule, the idea that conservation practices could ever trigger CWA permitting did not exist. By carving out a specific exemption for a certain number of conservation practices, an assumption has been created that but for this list, these certain conservation practices would have required a CWA permit. Is this true?

2) Privacy is of great concern to farmers, ranchers and forest owners. Many groups we have heard from are worried the interpretive rule could expose farmers and ranchers to citizen suits if they are not in compliance with NRCS standards. Can you tell us if the increased threat of citizen suits is real and if there are steps that EPA can take to insulate agriculture from unnecessary citizen suits?

3) The interpretive rule has also raised questions over requirements for conservation practices not included on the list. Many farmers and ranchers believe conservation practices have always qualified for the Section 404 "normal farming" activity exemption. However, issuing an interpretive rule with a finite number of conservation practices suggests that this was not always the case. Many stakeholders are concerned that conservation practices not included on the list of 56 practices automatically require a CWA permit. Can you clarify what the interpretive rule means for NRCS conservation practices not included on the list of 56 exempt practices? Did the EPA, Army Corps, and NRCS consider broadening the interpretive rule to cover more conservation activities?

4) Another question the interpretive rule raises is its effect on existing conservation efforts. NRCS provides important and valuable resources for conservation; but, as you know, there are many conservation efforts which do not involve NRCS financial or technical resources. Some stakeholders are concerned that requiring NRCS compliance in order to qualify for a CWA permit exemption could be damaging to existing conservation work not carried out with NRCS. For example, NRCS worked with the dairy industry to create the Dairy Environmental Handbook, which outlines best management practices for producers. Some of these practices are based on NRCS standards; however, they do not necessarily mirror NRCS requirements. If a producer follows guidelines in the Handbook, rather than guidelines from NRCS, will they be subject to liability under the CWA? Does the interpretive rule make this problem worse or does it help producers in this situation?

5) Switching attention to the proposed "waters of the US" rule, many questions have been raised about intermittent streams and low-lying areas on fields. Some concerned stakeholders believe that flow and runoff from fields may be categorized as tributaries, and thus regulated under the proposed rule. To this point, the proposed rule states that ephemeral features located on agricultural lands that do not possess a bed and bank are not tributaries. We believe defining the term *bed and bank* will significantly help resolve confusion as to which agricultural features can be classified as tributaries. Does the agency have plans to define these terms?

6) Farm drainage and ditches also raise significant concerns. EPA and the Army Corps clearly state in the proposed rule that upland ditches are exempt from permitting. In a guidance document on the EPA website, it states that the agency intends to include ditches collecting runoff or drainage from crop fields as upland ditches. However, the rule itself mentions only "ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow." Many producers are concerned because their farms contain fields in floodplains. Because the ditches on these low-lying fields would not be considered upland ditches, they are concerned that these ditches are now jurisdictional. Can you please address this concern?

We appreciate the challenge of crafting rules designed and intended to protect our nation's waters in a manner that is both consistent with the original purpose of the Clean Water Act, but also protects farmers and ranchers from unnecessary regulations that inhibit their ability to produce food and fiber for our nation and the world. Given the many uncertainties that remain regarding the effects this rule may have on agriculture, some of which are identified in this letter, we request that you reach out to stakeholders, both small and large, to better understand their concerns as you continue to consider this rule.

We look forward to your responses, and also working with you to better meet the interests of our nation's farmers and ranchers.

Sincerely,

Jim Johnson

Sherrod Brown

Bob Casey, Jr.

Sherrod Brown

Dianne Feinstein

Tammy Baldwin

Mark R Warner