Clarifying EPA's Muddy Water

In a well-publicized blog post, EPA's Acting Assistant Administrator for Water, Nancy Stoner, Recently made a number of assertions questioning the credibility of questions that AFBF and other members of the ag community are raising regarding the Waters of the U.S. rule. While a comprehensive response to the myriad of inaccuracies and misrepresentations in that blog was much lengthier, following is a version that hits several of the most egregious transgressions related to the controversial proposed rule. At the American Farm Bureau Federation, we #ReadTheFinePrint. #DitchTheRule!

What EPA Said	AFBF Response
There's been some confusion about EPA's proposed "Waters of the U.S." rule.	That's because the rule doesn't CLARIFY anything except that almost any low spot where rainwater collects could be regulated. The proposed rule defines "tributaries" and "adjacent" in ways that make it impossible for a typical farmer to know whether the specific ditches or low areas at his or her farm will be "waters of the U.S."— but the language is certainly broad enough to give agency field staff plenty of room to find that they are!
The rule keeps intact all Clean Water Act exemptions and exclusions for agriculture that farmers count on. But it does more for farmers by actually expanding those exemptions.	It has to! Congress provided those exemptions in the statute, and the agencies can't take them away by regulation. The categories of exemptions are still there, but because of the expansion of jurisdiction over more small, isolated wetlands and land features like ditches and ephemeral (occasional) drains, fewer farmers will benefit from the exemptions. The exemptions for activities occurring in "waters of the U.S." have been interpreted by the agencies to be ridiculously narrow (in other words, you can plow and plant in a wetland, but only if you have been farming there since 1977, and only if you do not alter the hydrology of the wetland, and you cannot apply fertilizer or herbicide there without an NPDES permit).
(Confusion caused by Supreme Court rulings created confusion that) added red tape, time, and expense to the permitting process under the Clean Water Act. The Army Corps of Engineers had to make case-by-case decisions about which waters were protected, and decisions in different parts of the country became inconsistent.	The Supreme Court rulings didn't complicate the permitting process. That was already a morass of red tape. The court only made it more difficult for the Corps and EPA to assert jurisdiction over small, isolated waters and "waters" that are dry most of the time. The proposed rule will make it easier for the Corps and EPA to enforce strict new regulations by making "desktop determinations" that any wetlands across huge swaths of the countryside are categorically jurisdictional.

The proposed Waters of the U.S. rule does not regulate new types of ditches, does not regulate activities on land, and does not apply to groundwater.	Ditches - Current rules DO NOT INCLUDE ditches. But, agencies have informally interpreted rules to include ditches as "tributaries." We disagree! Now, the new rule would categorically define almost all ditches as "tributaries." Activity on land - Yes, this rule does regulate activities on land that is usually dry but where water channels and flows or ponds when it rains. The rule calls these areas "ephemeral streams" and "wetlands" and "seasonal ponds"—but to most people, they look a lot like LAND.
The proposal does not change the permitting exemption for stock ponds, does not require permits for normal farming activities like moving cattle, and does not regulate puddles.	Stock ponds - The proposed rule makes the exemption for stock ponds meaningless because it would regulate the low spots where farmers typically build ponds. The rule would only allow farm ponds built by diking "upland." This is a farm pond that only a Washington bureaucrat would build. Normal farming activities - This is false. Under the rule, Section 402 permits would be necessary for common farming activities like applying fertilizer or pesticide—or moving cattle—if materials (fertilizer, pesticide, or manure) would fall into low spots or ditches. Section 404 permits would be required for earth-moving activity, such as plowing, planting, or fencing, except as part of "established" farming ongoing at the same site since 1977. Puddles - The rule would not categorically regulate all puddles—but it would regulate low spots that puddle often enough to meet the broad definition of "wetlands" if those low spots are in a "floodplain" or a "riparian area" or if they, combined with other low spots in the region, have a "significant nexus" to any other "water of the U.S." Clear as mud, right?
Federal agencies are NOT asserting regulatory authority over land use.	False. When federal agencies have the power to grant, deny, or VETO a federally enforceable permit to plow, plant, build a fence, apply fertilizer, or spray pesticide or disease control products on crops, that IS regulatory authority over land use. If a landowner cannot construct a house on, build a fence over, or plow through a jurisdictional wetland or ephemeral drain that runs across his or her land, then that is regulating land use. If a farmer cannot redirect a ditch to improve drainage on his soybean farm, then that is regulating land use. In addition, note the following quote from Secretary Darcy during a hearing on June 11 before the House Transportation and Infrastructure

	Water Resources and Environment Subcommittee – *"Once implemented, this rule will enable the Army Corps of Engineers to more effectively and efficiently protect our nation's aquatic resources while enabling* ***appropriate*** *development proposals to move forward."* Congress did not give either EPA or the Army Corps the authority to determine "appropriate" land uses.
The Clean Water Act protects waters, the life blood of communities, businesses, agriculture, energy development, and hunting and fishing across the nation.	Yes—and the Clean Water Act created non-regulatory programs to address water quality impacts of land uses like farming. Those programs have been and can continue to be very effective. We don't need to protect waters by requiring a federal permit for everything.