# Statement of the American Farm Bureau Federation

**Statement to the Senate Environment and Public Works (EPW) Committee and the EPW Subcommittee on Fisheries, Waters, and Wildlife regarding the hearing:**

**A Review of Waters of the U.S. Regulations: Their Impact on States and the American People**

**June 12, 2019**

**Submitted By:**

**Todd Fornstrom**
**President, Wyoming Farm Bureau Federation**
**On behalf of the American Farm Bureau Federation**

600 Maryland Ave. SW | Suite 1000W | Washington, DC 20024 | p. 202.406.3600 | f. 202.406.3606 | www.fb.org

Chairman Barrasso, Chairman Cramer and Ranking Member Carper and Ranking Duckworth I am Todd Fornstrom, President of the Wyoming Farm Bureau Federation. I farm with my father and two brothers on the Fornstrom Feedlot near Pine Bluffs, Wyoming, where we maintain a diversified farm that produces irrigated corn, wheat, alfalfa, and dry beans as well as operating a cattle and sheep feedlot. An interesting fact – our farm only gets about 12 to 14 inches of rainfall a year – and we do our best to make use of every drop. My wife Laura and I have four kids: two who are seniors in high school, one who attends the University of Wyoming, and one who attends the U.S. Military Academy at West Point. I also serve as a member of the Board of Directors for the American Farm Bureau Federation.

I appreciate the opportunity to appear before this committee and would like to thank the members for the important role this committee plays in protecting the nation's water resources and our critical infrastructure. Farm Bureau believes effective and sound environmental and public works policies are those that balance economic, social, and environmental outcomes. Such policies create opportunity for farmers to improve net farm income, enhance the nation's economic opportunities, and preserve property rights while enabling farmers and ranchers to produce an abundant and affordable supply of food, fiber and energy.

Farm Bureau members own and operate businesses that produce or contribute to the production of the row crops, livestock, poultry, and forest products, which provide safe and affordable food, fiber, and fuel to all Americans. Over the years, Farm Bureau has participated in numerous rulemaking proceedings related to the definition of WOTUS, and we have a keen interest in the definition of WOTUS and the administration of the Clean Water Act. Farm Bureau members deeply value protecting water resources because their farms and ranches are water-dependent enterprises. On a personal level, I am deeply protective of water quality because I raised my family drinking from a well on our farm. Simply put, farmers and ranchers need water, which is why their operations typically are located on lands where there is abundant rainfall or at least adequate water available for irrigation.

Farm Bureau also participates in a coalition that represents a large cross-section of the nation's construction, real estate, mining, manufacturing, forestry, agriculture, energy, wildlife conservation, and public health and safety sectors – all of which are vital to a thriving national

economy and provide much-needed jobs. While the testimony I am delivering today represents the views of Farm Bureau members, I am confident that coalition members are all committed to the protection and restoration of America's wetlands and waters and believe that a regulation that draws clear lines between federal and state authority and responsibility for controlling pollution of the nation's waters will help further those goals.

Farm Bureau cannot overstate the importance of a rule that draws clear lines of jurisdiction that farmers and ranchers can understand without needing to hire armies of consultants and lawyers. The CWA carries significant fines and penalties for persons who violate the Act's prohibitions. Historically, farmers and ranchers have chosen to forfeit full use and enjoyment of their land rather than go down the onerous and expensive path of seeking CWA 404 permits. The cost to obtain a general permit can exceed tens of thousands of dollars and individual permits can cost hundreds of thousands of dollars. Farmers and ranchers know these costs exceed the value of their land, which leads them to simply stay out of the regulatory quagmire by foregoing the use of their land without compensation.

For years, EPA's and the Corps' regulations and guidance documents have attempted to expand the WOTUS definition beyond its constitutional and statutory limits, and the Supreme Court has twice had to rein in the agencies' power grabs. We believe this proposed rule will bring an end to this regulatory creep. It is an important step in re-aligning the WOTUS definition with Congress' intent for the scope of federal jurisdiction under the Act. The proposed rule gives meaning to the term "navigable" and recognizes that a defining policy underpinning the CWA is to preserve the states' traditional and primary authority over land and water use. Congress took care to strike a careful balance between state and federal oversight authority in this area, while pursuing the important goal of restoring and maintaining the integrity of the nation's waters.

The proposal also protects our nation's water. The CWA requires the federal government to work hand-in-hand with states, because the federal government cannot and should not regulate every single wet feature in every community. By drawing clear lines between waters of the U.S. and waters of the state, the proposal strengthens the cooperative federalism Congress envisioned and that the Supreme Court has long recognized as fundamental to the Clean Water Act.

Importantly, the CWA provides a wide array of protections against illegal dumping and water pollution that do not rely on treating every feature on the landscape as a water of the U.S. and would not be affected by the new proposal. Nor would the proposal weaken the stringent protections of the Safe Drinking Water Act or other federal laws that protect water resources and wildlife, nor does it limit the ability of state and local entities to protect sources of drinking water. Simply put, this rule is not about *whether* water is protected. The rule respects Congress's intent as to *which level of government* bears that responsibility and *through which programs*.

Farm Bureau supports the proposed rule, because it strikes a balance between regulatory clarity and transparency on the one hand, and the need for robust environmental protection of waters and wetlands on the other. It better aligns with the CWA and Supreme Court precedent than did the 2015 rule, and it reflects an effort to preserve states' roles in regulating the waters and natural resources within their boundaries. It is grounded in science but also reflects a legal and policy decision on the appropriate scope of the agencies' regulation under the CWA. Many of the proposed rule's critics have mischaracterized the scope and impact of the proposed rule. In reality, the proposal:

Provides Much-Needed Clarity. The scope of the agencies' jurisdiction under the Act has, in previous years, been marked by uncertainty, ambiguity, and inconsistency. The agencies' sweeping assertion of jurisdiction under prior definitions encompassed features with little or no relationship to navigable waters, raising serious federalism concerns and creating confusion among the regulated community. In particular, the agencies relied upon case-by-case subjective assessments, with little to no predictability as to which waters are jurisdictional and which are not. If finalized, the agencies' proposed rule would cure these issues by drawing clear lines between jurisdictional and non-jurisdictional features. Rather than "rolling back" the scope of WOTUS regulation, the proposed rule adds an element of clarity and transparency by setting clear categories to guide jurisdictional determinations.

Maintains Protections for Clean Water While Preserving States' Traditional Authority Over Local Land and Water Use. Congress never intended for *all* water in the country to be subject to federal regulation as WOTUS. Instead, Congress recognized that some waters were to be regulated by the federal government under the CWA and remaining water features would be

addressed through other federal, state, and local means. Indeed, the CWA itself provides a comprehensive scheme of non-regulatory protections and programs that apply to all of the nation's waters, coupled with federal regulation of the discharge of pollutants to a subset of waters identified as "waters of the United States." Preservation of the states' roles under the cooperative federalism regime is a hallmark of the Act. Under this regime, waters, wetlands, and related features are subject to robust protections even where they would not be designated as WOTUS. Moreover, other non-CWA regulatory programs contribute to the protection of aquatic resources, such as the federal Safe Drinking Water Act (SDWA), the Resource Conservation and Recovery Act (RCRA) and the Farm Bill[1], as well as the numerous robust state and local laws and programs that protect waters and related ecosystems. The agencies' proposal to refine and clarify the WOTUS definition is only one component of a holistic regulatory framework for the protection of aquatic resources that currently exists under federal, state, and local laws.

For example, in my home state of Wyoming, my operations require a livestock operating permit administered by the state. This permit required me to make structural changes to manage water quality that cost in the range of $350,000. As part of the program, the state has conducted yearly random inspections of my farm. Wyoming's ability to efficiently and thoroughly protect water resources within the state through its own regulatory regime is exactly what Congress intended to preserve through the CWA.

Reflects Legal and Policy Decisions Informed by Science. As part of the rulemaking effort leading up to the 2015 Rule, EPA developed a report titled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (the "Connectivity Report"). Rather than abandoning this previous work, the agencies relied upon the Connectivity Report to inform the jurisdictional categories set forth in the proposed rule. Specifically, the agencies recognized one of the fundamental scientific principles detailed in the Connectivity Report—that hydrologic connectivity occurs along a gradient. Informed by the Connectivity Report's analysis of the connectivity gradient, the agencies determined that federal regulatory jurisdiction should be extended only to those features on the gradient that have the strongest influence on downstream waters. The agencies continue to recognize that science

[1] Wetlands, Farmers, Just Ducky February 8, 2019 (Insert Link to Market Intel)

informs, but does not dictate, where to draw the line between federal and state authority over water bodies.

In the proposed rule, the agencies have properly recognized that the CWA is not a license for the agencies to regulate every water body in the United States. Rather, as the proposed rule recognizes, Congress has set up a mix of regulatory and non-regulatory approaches for addressing water pollution. Some of those mechanisms rely on localities, some rely on the states, and some rely on federal entities such as the agencies. Each regulatory and non-regulatory mechanism operates within a carefully delineated sphere. "Navigable waters," for example, are subject to federal regulatory requirements under the CWA, but many other classes of the "nation's waters" are not. The proposed rule respects the unique roles of federal, state, and local entities in this country's overall regulatory scheme.

But there are still opportunities for the agencies to improve the proposed rule. For example:

- The agencies should interpret traditional navigable waters in accordance with the traditional two-part test for navigability articulated in *The Daniel Ball* and subsequent cases applying that test. We recommend that the agencies revise the regulatory text corresponding to this category to cover, in pertinent part, waters used "to transport interstate commerce" and not waters used "in interstate commerce."

- The agencies could clarify key terms that are relevant to several of the jurisdictional categories of water, such as "intermittent." The agencies define "intermittent" as "surface water flowing continuously during certain times of a typical year." 84 Fed. Reg. at 4,173. A more precise and therefore clearer definition would replace the phrase "certain times of a typical year" with a minimum duration of continuous surface flow—for example, 90 days.

- The agencies should eliminate ditches as a standalone category of jurisdictional waters. We agree with the agencies' proposal to assert jurisdiction over certain types of ditches, such as those that are man-altered tributaries. But it would be

better to do that by clarifying either the ditch exclusion or the "tributary" category, rather than by establishing a category of jurisdictional ditches, which may create the misimpression that the default status of ditches is that they are jurisdictional.

- The definition of "wetlands" could be improved if the agencies expressly clarify that a wetland must satisfy all three of the delineation criteria set out in the proposed rule.

Farm Bureau believes these and other recommendations—contained in our detailed comments —will help eliminate potential ambiguities in whatever final rule emerges from the rulemaking process. The resulting clarity will benefit the regulated parties, government entities, and courts tasked with following and administering the CWA, and benefit the nation's water quality.

We appreciate the opportunity to provide this testimony. Overall, we are very supportive of the proposed rule, and we believe the proposed definitions will go a long way in providing much needed clarity and certainty for farmers and ranchers.

**The following attachments are included with this testimony:**

A. American Farm Bureau Federation, et al. Comments on Revised Definition of "Waters of the United States," 84 Fed. Reg. 4,154 (Feb. 14, 2019)

B. Wyoming Farm Bureau Federation Comments on the Proposed Rules Revising the Definition of "Waters of the United States" (Docket ID No. EPA-HQ-OW-2018-0149)

C. Wetlands, Farmers, Just Ducky February 8, 2019 (https://www.fb.org/market-intel/wetlands-farmers-just-ducky)

# ATTACHMENT

# A

April 15, 2019

*Submitted via www.regulations.gov*

U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OW-2018-0149

**Re: Comments on Revised Definition of "Waters of the United States," 84 Fed. Reg. 4,154 (Feb. 14, 2019)**

The undersigned agricultural organizations and their members appreciate the opportunity comment on the United States Environmental Protection Agency's ("EPA") and United States Army Corps of Engineers' ("Corps") (collectively "the Agencies") proposed rule revising the definition of "waters of the United States" ("WOTUS") under the Clean Water Act ("CWA" or "the Act"), 84 Fed. Reg. 4,154 (Feb. 14, 2019) ("the Proposed Rule").

## I. Introduction and Overview of Comments

The undersigned groups and their members own and operate facilities that produce or contribute to the production of the row crops, livestock, and poultry that provide safe and affordable food, fiber, and fuel to all Americans. Over the years, the undersigned organizations have participated in numerous rulemaking proceedings related to the definition of WOTUS. We have a keen interest in the definition of WOTUS, the administration of the CWA, and protecting water resources because our members' operations are water-dependent enterprises. Simply put, farmers and ranchers need water, which is why their operations typically occur on lands where there is abundant rainfall or at least adequate water available for irrigation.

We commend the Agencies for proposing a revised definition that goes a long way towards providing clarity and certainty through clear definitions. For too long, the Agencies have through regulations and guidance documents sought to steadily expand the definition of WOTUS beyond what Congress intended, and the Supreme Court has twice had to rein in the Agencies' power grabs. We believe the Proposed Rule will bring an end to the decades-long regulatory creep by appropriately giving effect to the statutory text and Congress's intent, while balancing the important goal of environmental protection with Congress's explicit policy to recognize, preserve, and protect the states' primary responsibilities over pollution control and over planning the use of land and water resources. The Proposed Rule does a good job of avoiding the sorts of difficult constitutional questions that prior Agency interpretations raised, and it respects the careful federal-state balance that Congress struck when it enacted the CWA in 1972.

In the Proposed Rule, the Agencies have properly recognized that the CWA is not a license for the Agencies to regulate every water body in the United States. Rather, as the Proposed Rule recognizes, Congress has set up a mix of regulatory and non-regulatory

approaches for addressing water pollution. Some of those mechanisms rely on localities, some rely on the states, and some rely on federal entities like the Agencies. Each regulatory and non-regulatory mechanism operates within a carefully delineated sphere. "Navigable waters," for example, are subject to federal regulatory requirements under the CWA, but many other classes of the "Nation's waters" are not. The Proposed Rule respects the unique roles of federal, state, and local entities in this country's overall regulatory scheme.

But there are still opportunities for the Agencies to improve the Proposed Rule. For example:

- The Agencies should interpret traditional navigable waters ("TNWs") in accordance with the traditional two-part test for navigability articulated in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871), and subsequent cases applying that test. We recommend that the Agencies revise the regulatory text corresponding to this category to cover, in pertinent part, waters used "to transport interstate commerce" and not waters used "in interstate commerce."

- The Agencies could clarify key terms that are relevant to several of the jurisdictional categories of water, such as "intermittent." The Agencies define "intermittent" as "surface water flowing continuously during certain times of a typical year." 84 Fed. Reg. at 4,173. A more precise and therefore clearer definition would replace the phrase "certain times of a typical year" with a minimum duration of continuous surface flow—for example, 90 days.

- The Agencies should eliminate ditches as a standalone category of jurisdictional waters. We agree with the Agencies' proposal to assert jurisdiction over certain types of ditches, such as those that are constructed in a jurisdictional tributary. But it would be better to do that by refining the ditches exclusion rather than by establishing a category of jurisdictional ditches, which may create the misimpression that the default status of ditches is that they are WOTUS. The Agencies should also codify in the regulatory text that a ditch would *not* be jurisdictional if the agencies lack evidence demonstrating that the ditch was constructed in a jurisdictional tributary or wetland.

- The Agencies need not include impoundments as a separate category of jurisdictional waters. The features that the Agencies intend to cover in this category should fall within the new lakes and ponds category. At a minimum, if the Agencies retain impoundments as a separate category, they should clearly define what an impoundment is.

- The definition of "wetlands" could be improved if the Agencies expressly clarify that a wetland must satisfy all three of the delineation criteria set out in the Proposed Rule.

- In implementing any final definition of WOTUS, we believe that field evaluations should be the presumptive approach. Thus, if a landowner requests a field evaluation, which may appropriately include an examination of comparable sites,

> the Agencies should not make jurisdictional calls using solely on desktop information. Likewise, we believe the burden is on the Agencies to establish jurisdiction. In other words, waters should not be WOTUS unless the agency can point to evidence solidly backing that designation. Many farmers and ranchers lack the means or opportunity to conclusively establish whether a feature was constructed in upland or a non-jurisdictional water feature in the distant past, as opposed to in a WOTUS. Between the agency and the regulated entity, the agency is in a much better position to make a conclusive showing.

We believe these and other recommendations—detailed in our comments below—will help eliminate potential ambiguities in whatever Final Rule emerges from this rulemaking process. The resulting clarity will benefit the regulated parties, government entities, and courts tasked with following and administering the CWA. It is in that spirit that we offer the following suggestions and observations.

## II. General Legal and Policy Considerations

Before commenting on the specific categories of jurisdictional waters, the undersigned organizations first touch upon some important legal and policy considerations, many of which are discussed in detail in the preamble.

### A. CWA Background and Relevant Supreme Court Precedent

The CWA's objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and Congress set forth several national policies and goals to achieve that objective. 33 U.S.C. § 1251. Of critical importance here, Congress intended for the task of controlling water pollution to remain largely a state function. Thus, in section 101(b), Congress announced its "policy to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and elimination pollution" and "to plan the development and use … of land and water resources." *Id.* § 1251(b).

A cornerstone of the CWA is the prohibition on discharges of pollutants to a subcategory of the Nation's waters known as the "navigable waters." Specifically, the Act prohibits discharges "to navigable waters from any point source," except "in compliance with" certain provisions of the Act. *See id.* §§ 1311(a), 1362(12)(A). Congress defined "navigable waters" simply as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). The precise scope of the terms "navigable waters" and "waters of the United States"—and hence, the jurisdictional reach of the CWA—remains unclear, which explains why those terms have been the subject of considerable litigation dating back to the Act's inception. The Supreme Court has, on three separate occasions, had to interpret the terms "navigable waters" and "waters of the United States," though in each case, the issue before the Court was whether the Corps reached *too far* in regulating beyond traditional navigable waters. Therefore, although those cases provide important guideposts concerning the permissible *outer* limits of federal jurisdiction, they offer scant insights concerning what water features Congress *clearly intended* the federal government to regulate under the CWA.

In *United States v. Riverside Bayview Homes*, the issue before the Court was whether the CWA "authorizes the Court to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries." 474 U.S. 121, 123 (1985). More specifically, the Court addressed whether non-navigable wetlands are "waters of the United States" because they are "adjacent to" and "inseparably bound up with" navigable-in-fact waters. *Id.* at 131–35. The Court upheld the Corps' assertion of jurisdiction over those wetlands as a "permissible interpretation of the Act" after finding that Congress intended "to regulate at least some waters that would not be deemed 'navigable.'" *Id.* at 133, 135.

In *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs* ("*SWANCC*"), the Court considered whether the federal government has jurisdiction over "seasonally ponded, abandoned gravel mining depressions" that are not adjacent to open water but "[w]hich are or would be used as habitat" by migratory birds. 531 U.S. 159, 162–64 (2001). The Court "read the statute as written" to not allow the Corps' assertion of jurisdiction over nonnavigable, isolated, intrastate ponds because to do so would read the term "navigable" out of the Act. *See id.* at 171–72. Although the Court acknowledged its previous statement from *Riverside Bayview* that the term 'navigable' was of limited import, it cautioned that "it is one thing to give a word limited effect and quite another to give it no effect whatsoever." *Id.* at 172. The Court explained that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172 (citations omitted). In reaching its holding, the Court emphasized "the text of the statute will not allow" it to hold "that the jurisdiction of the Corps extends to ponds that are not adjacent to open water." *Id.* at 168.

Importantly, *SWANCC* considered, but rejected, the government's argument "that Congress recognized and accepted a broad definition of 'navigable waters' that includes nonnavigable, isolated, intrastate waters." *Id.* at 169. Accepting the government's position would have required the Court to "assume that 'the use of the word navigable in the statute . . . does not have any independent significance." *Id.* at 172. The Court also rejected the government's argument that the Corps' assertion of jurisdiction could be upheld based on "Congress's power to regulate intrastate activities that 'substantially affect' interstate commerce." *Id.* at 173. In so doing, the Court reversed the lower court's holding that the CWA reaches as many waters as the Commerce Clause would allow. *See id.* at 166 (quoting 191 F.3d 845, 850-52 (7th Cir. 1999)). Because the government's expansive view of jurisdiction would "raise significant constitutional questions" by "result[ing] in a significant impingement of the States' traditional and primary power over land and water use," the Court refused to uphold the Corps' assertion of jurisdiction absent a clear statement from Congress. 531 U.S. at 172-74. But "[r]ather than expressing a desire to readjust the federal-state balance in this manner, Congress 'chose to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resource." *Id.* at 174 (quoting 33 U.S.C. § 1251(b)).

Most recently, in *Rapanos v. United States*, a majority of the Court rejected the Corps' assertion of jurisdiction over intrastate wetlands located twenty miles from the nearest navigable water. *See* 547 U.S. 715, 720-21 (2006). A four-justice plurality of the Court held that "waters of the United States" encompasses "only relatively permanent, standing or flowing bodies of water" and "wetlands with a continuous surface connection to" those waters. *Id.* at 732, 739, 742. In

reaching that holding, the plurality stressed that the regulation of "development and use" of "land and water resources" is a "quintessential state and local power." *Id.* at 737–38.

Justice Kennedy, concurring in the judgment, held that the federal government has jurisdiction over wetlands only if there is a "significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 779. In so holding, Justice Kennedy disavowed the possibility that "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it" would meet his "significant nexus" standard. *Id.* at 781, 778. In a separate concurring opinion, Chief Justice Roberts pointedly stated that "[g]iven the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority." *Id.* at 758.

As noted above, *Rapanos* must be read in its proper context: that case focuses on what *limits* Congress placed on the federal government's jurisdiction over non-navigable water features. Nonetheless, several courts have held that the "significant nexus" test from Justice Kennedy's concurring opinion in the *Rapanos* case is the controlling test for what is or is not WOTUS. *E.g.*, *United States v. Robison*, 505 F.3d 1208, 1221–22 (11th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724–25 (7th Cir. 2006). It is important to bear in mind that Justice Kennedy's concurring opinion does *not* stand for the proposition that any water feature with a "significant nexus" to traditional navigable waters is *per se* jurisdictional. What Justice Kennedy's opinion instead makes clear is that *if* the Agencies want to assert jurisdiction over non-navigable features and adjacent wetlands, there must, at a minimum, be a "significant nexus." *See Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring). In his words, "[a]bsent a significant nexus, jurisdiction under the Act is lacking." *Id.* at 767. But that is different from saying that the Agencies must apply a "significant nexus" test, let alone that they must assert jurisdiction over any water feature that meets such a test. Like the Supreme Court's other pronouncements on the meaning of WOTUS, Justice Kennedy's *Rapanos* concurrence (and the plurality for that matter) provides little instruction on the water bodies and features over which the Agencies' *must* assert jurisdiction.

### B. The Agencies' Proposal Rests on a Sound Reading of the Statute and is Consistent with Supreme Court Precedent.

The Agencies' essential task in the Final Rule is to give meaning to key elements of the statutory text and structure, particularly the terms "navigable," "waters," and "of the United States." The Proposed Rule appropriately identifies the starting points for that endeavor. Beginning with the term "navigable," the Agencies correctly note that Congress intended to assert authority over more than simply waters that are traditionally understood to be navigable. Among other things, the text of section 404(g)(1) makes this clear by requiring the federal government to retain jurisdiction over certain adjacent wetlands even when a state assumes authority over aspects of the 404 permitting program. *See* 33 U.S.C. § 1344(g)(1). Nonetheless, as the Agencies recognize, *SWANCC* reinforced that the term "navigable" still retains independent significance: it shows that, in promulgating the CWA, Congress had in mind "its traditional jurisdiction over waters that are or were navigable in fact or that could reasonably be so made." 531 U.S. at 167.

Staying with the text, the law strongly suggests that the term "waters" should not be interpreted to include ordinarily dry channels or features that are better characterized as "point sources." *See Rapanos*, 547 U.S. at 733–36 (plurality opinion). The Proposed Rule is therefore correct to read the statute in a way that, by and large, does not create overlap between the terms "navigable waters" and "point sources." *See* 33 U.S.C. § 1362(12); *see also Rapanos*, 547 U.S. at 735 ("[T]he CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from 'navigable waters,' by including them in the definition of 'point source.'"). Finally, the phrase "of the United States" reflects that "navigable waters" are distinct from "waters of the states." Thus, the preamble to the Proposed Rule correctly explains that waters of the States are part of the "Nation's waters," but not all of the "Nation's waters" are "navigable waters." *See* 84 Fed. Reg. at 4,169.

Turning to the structure and purpose of the Act, the Proposed Rule correctly recognizes that CWA section 101(b) is a fundamental guidepost in any rulemaking defining WOTUS. The Proposed Rule respects Congress's intent "that States should maintain responsibility over land and water resources." 84 Fed. Reg. at 4,196. That intent is most clearly articulated in CWA Section 101(b). Unlike the 2015 Rule, the Proposed Rule carefully adheres to this express policy, while trying to accomplish the objective and goals of the Act. Consistent with the express 101(b) policy, the Proposed Rule avoids interpreting "waters of the United States" in a way that pushes the limits of Congress's commerce power. As the Supreme Court clarified in *SWANCC*, the closer the Agencies get to those limits, the more likely they will "significant[ly] impinge[] [upon] the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. In this regard, the *SWANCC* decision is not as narrow as merely rejecting the assertion of jurisdiction over isolated waters based on use as habitat by migratory birds. The majority opinion in *SWANCC* announces a broader principle: that *any* assertion of jurisdiction over such waters (and comparable features) would read "navigable" out of the Act in ways that would impermissibly adjust the federal-state balance. *Id.* at 172, 174. The Proposed Rule comports with that principle.

Implicit in the CWA Section 101(b) policy is the recognition that States are effective guardians of their own water resources. As the Proposed Rule explains, the CWA takes on the broader problem of pollution of the "Nation's waters" through various regulatory and non-regulatory approaches. Among those approaches are the CWA Sections 402 and 404 permit programs, which are led by EPA and the Corps, respectively. Many other sections of the CWA protect both navigable waters and the rest of the Nation's waters through cooperation between the federal government and state governments. Congress provided EPA and the Corps with several tools to indirectly persuade state authorities to protect water quality, such as the award of grant money and other incentives. *E.g.*, 33 U.S.C. §§ 1255(b) (providing for grants to states to research treatment and pollution control from point and nonpoint sources in river basins), 1255(c) (authorizing grants for research and demonstration projects "for prevention of pollution of any waters by industry"), 1314(f) (directing EPA to issue guidelines and other information regarding pollution from, among other things, "changes in the movement, flow, or circulation of any navigable waters or ground waters").

Congress also gave EPA ultimate approval authority over various state management plans, water quality standards, and total maximum daily loads. CWA sections 208 and 303(e), in particular, require states to develop comprehensive Water Quality Management Plans including

best management practices that can control significant nonpoint sources of pollution. *See* 33 U.S.C. §§ 1288, 1313(e). And in 1987, Congress added CWA Section 319 to provide additional incentives in the form of grant funding for states to address nonpoint sources, while also requiring more detailed nonpoint source management programs. *See id.* § 1329. Fundamentally, however, the regulation of state land and water resources resides with state regulatory authorities, *not* with the federal government. Congress deliberately gave States the lead role—not a subservient one—in protecting upstream non-navigable waters and regulating land use. This is why the CWA limits federal regulatory programs to addressing point source discharges of pollutants to "navigable waters," *id.* §§ 1311, 1362(12), while leaving state-led programs free to address many other forms of point and nonpoint pollution.

State and local officials have a long history of working with landowners to improve water quality. Working under the CWA's cooperative federalism structure, state programs have been, and can continue to be, very effective in protecting water resources. *See, e.g.*, US EPA, "Nonpoint Source Success Stories," *available at* https://www.epa.gov/nps/nonpoint-source-success-stories (detailing how restoration efforts have led to documented water quality improvements in hundreds of primarily nonpoint source-impaired waterbodies nationwide). And EPA has not held back in using its bundle of sticks and carrots to persuade state authorities to follow EPA's lead.

All of this is to say that the protection of "navigable waters" does not require federal control over every feature that can conceivably be characterized as "water." Not only is stretching the definition of "waters of the United States" unnecessary to achieve the CWA's goal of protecting water quality, it would directly contradict the clear congressional policy announced in CWA section 101(b). *See SWANCC*, 531 U.S. at 173 (quoting 33 U.S.C. § 1251(b) to conclude that "[r]ather than expressing a desire to readjust the federal-state balance … Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States … to plan the development and use … of land and water resources"). To the extent section 101(a) of the CWA embraces a goal of eliminating discharges into the Nation's waters, the Proposed Rule properly recognizes that Section 101(a) is purely aspirational, and is therefore distinct from the fixed policy statement set out in Section 101(b). *See* 84 Fed. Reg. at 4,169 & 4,163 n.18.

### C. The Revised Definition of "Waters of the United States" Should Include Clear Terms that are Easy to Apply in the Field.

The Agencies are right to acknowledge the vagueness and due process concerns in the preamble. *See* 84 Fed. Reg. at 4,169. The undersigned organizations cannot overstate the importance of a rule that draws clear lines of jurisdiction that farmers and ranchers can understand without the need to hire consultants and lawyers. The CWA is a strict liability statute that carries hefty civil fines as criminal penalties for persons who violate the Act's prohibitions. Civil penalties can now equal up to $54,833 per day, per violation. *See* 33 U.S.C. § 1319(d); *see also* 84 Fed. Reg. 2,056, 2,058 T.2 (Feb. 6, 2019). A "knowing" violation carries potential penalties of up to $100,000 and six years imprisonment. *See* 33 U.S.C. § 1319(c)(2). Even a "negligent" violation can result in fines of $50,000 per day and two years in jail. *Id.* § 1319(c)(1). The permit application process presents further peril: a false statement, representation, or certification can result in fines up to $20,000 per day and four years in jail. *Id.* § 1319(c)(4).

In the past, EPA has touted the severity of CWA criminal penalties and the fact that a farmer can not only lose the farm, but lose his or her liberty. In July 2013, EPA issued a "Criminal Enforcement Alert" notifying livestock and poultry operations know that EPA was ramping up and targeting concentrated animal feeding operations ("CAFOs") in its criminal enforcement of the CWA's discharge prohibitions. *See* U.S. EPA, "Criminal Enforcement Alert, July 2013," *available at* https://www.epa.gov/sites/ production/files/documents/cr-cafo-06-13.pdf (providing numerous examples of farmers facing criminal penalties and substantial fines). For all of the foregoing reasons, farmers and ranchers must know, before engaging in agricultural activities, what features on the farm are, or are not WOTUS.

Prior regulatory interpretations of "waters of the United States" were unclear and confusing on their face, which allowed the Agencies to continue marching toward a more broad interpretation of the scope of the CWA. And although the Supreme Court has twice rejected overly broad assertions of federal jurisdiction, the scope of CWA jurisdiction remains far from clear, so "[l]ower courts and regulated entities [have had] to feel their way on a case-by-case basis." *Rapanos*, 547 U.S. at 757-58 (Roberts, J., concurring).

A growing number of Supreme Court justices have become more vocal in expressing their concerns about the CWA's reach in the past few years. Seven years ago, in *Sackett v. EPA*, Justice Alito lamented how "the combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA's tune." 566 U.S. 120, 132 (2012) (Alito, J., concurring) ("In a nation that values due process, not to mention private property, such treatment is unthinkable."). And nearly three years ago, in *U.S. Army Corps of Engineers v. Hawkes Co.*, Justices Thomas and Alito joined Justice Kennedy's concurring opinion, which warned that the CWA "continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation." 136 S. Ct. 1807, 1817 (2016) (Kennedy, J., concurring).

To ensure that law abiding farmers and other landowners can understand and comply with the CWA, the Final Rule's definition of WOTUS must provide clarity and certainty. Indeed, the need to clearly define and precisely limit the reach of the federal government under the CWA is something the Agencies should cite to support the Proposed Rule's more limited view of federal jurisdiction.

The same basic concerns provide a reason why the Agencies should avoid including vague terminology that landowners and regulators will be unable to apply without having to undertake burdensome scientific determinations. While the Proposed Rule provides more clarity than prior definitions of WOTUS, there are still some terms and concepts that cause concern among the undersigned organizations and our members. Later in these comments, we provide some suggestions for providing additional clarity regarding certain terms that are integral to the Proposed Rule's definition of WOTUS.

### D. The Proposed Rule Rightly Accounts for, but Is Not Dictated by, the Science.

Science alone does not dictate how the Agencies are to draw the boundaries of CWA jurisdiction. The prior administration recognized as much. *See* Clean Water Rule, 80 Fed. Reg.

37054, 37,060 (June 29, 2015) ("the 2015 Rule") (proclaiming that the "science does not provide bright line boundaries with respect to where 'water ends' for purposes of the CWA"); *see also* Definition of "Waters of the United States" — Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899, 34902 (July 27, 2017) (quoting 2015 Rule).

While the rulemaking record that was established for the 2015 Rule purportedly "demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters," it was and is ultimately the Agencies' "[interpretive] task to determine where along that gradient to draw lines of jurisdiction under the CWA." 80 Fed. Reg. at 37,057. This will involve "policy judgment" and "legal interpretation" on the Agencies' part. *Id.*; *see also id.* at 37,060 ("[T]he agencies' interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but not dictated by them."). Again, the Agencies have "plenty of room to operate" when interpreting the statutory text and exercising their policy-making authority. *See Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring); *see also San Francisco Baykeeper v. Cargill Salt Division*, 481 F.3d 700, 704 (9th Cir. 2007) ("By not defining further the meaning of 'waters of the United States," Congress implicitly delegated policy-making authority to the EPA and the Corps, the agencies charged with the CWA's administration.").

The Proposed Rule accounts for the gradient concept, which shows that certain waters (*e.g.*, perennial and intermittent streams) have a stronger influence on downstream waters than others (*e.g.*, isolated wetlands and ephemeral streams). *E.g.,* 84 Fed. Reg. at 4,175-76. The science does not and cannot tell us that the mere fact that a water might have *some* influence on downstream waters is a sufficient basis to deem it a WOTUS and assert federal jurisdiction. Rather, the Agencies have balanced the relevant concerns, including the objective to protect navigable waters and the need to construe the Act to avoid raising significant constitutional questions, and appropriately proposed to define WOTUS in a way that leaves ephemeral and isolated features as parts of the Nation's waters that remain under state control. And this finds support in the science. *E.g.*, 84 Fed. Reg. at 4,175-76 (discussing gradient concept and explaining the decreased probability that ephemeral streams will impact downstream waters compared to perennial and intermittent streams); *id.* at 4,177 (explaining how connections become less obvious as the distance between wetlands and flowing waters increases).

## III. Comments and Recommendations on Proposed WOTUS Categories

In general, the undersigned organizations support the revised definition of WOTUS, and we believe it is protective of water resources, while respecting the careful federal-state balance that Congress struck when it enacted the CWA. Nonetheless, we do have recommendations for providing additional clarity, which we set forth in the following sections.

### A. Traditional Navigable Waters

At the heart of the Proposed Rule's definition of WOTUS is what the Agencies call the traditional navigable waters ("TNWs") or the "(a)(1) waters." The scope of this category is of critical importance because all other categories of WOTUS tie back to it. The Proposed Rule does not change the longstanding regulatory text in (a)(1), with the exception of including territorial seas in the same category. *See* 84 Fed. Reg. at 4,170. Thus, the proposed regulatory

text would define TNWs as "waters which are currently used, or which were used in the past or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide." *Id.* at 4,203 (proposed 33 C.F.R. § 328.3(a)(1)). The preamble makes it clear that the Agencies are carrying forward prior, overly broad interpretations of TNW. In the Agencies' view, this category encompasses all waters subject to Rivers and Harbors Act jurisdiction, *plus* waters that court decisions would define to be TNWs, *plus* any other waters that are navigable-in-fact. *Id.* at 4,170. We strongly urge that the Agencies correct this overreaching interpretation and limit the TNW category to just waters subject to Rivers and Harbors Act jurisdiction.[1]

*First*, the TNW category should be limited to the traditional test for navigability that the Supreme Court articulated in *The Daniel Ball,* 77 U.S. 557 (1871), as later expanded by decisions in *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921) and *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940). The following two-part test governs what waters are subject to Rivers and Harbors Act jurisdiction: (i) waters that are or were navigable-in-fact or are capable of being made so with reasonable improvements; and (ii) waters that, alone or in combination with other waters for a continuous highway to transport goods in interstate commerce. Importantly, in finding that the term "navigable" in the CWA shows that Congress had in mind its traditional jurisdiction over navigable waters in *SWANCC*, the Court cited to *Appalachian Elec. Power. See* 531 U.S. at 172 (citing *Appalachian Elec. Power Co.*, 311 U.S. at 407-08). And although the plurality and Justice Kennedy referred to "traditional interstate navigable waters" and "navigable waters in the traditional sense," respectively, both opinions cited to *The Daniel Ball* and *Appalachian Elec. Power* to clarify what waters they were referring to. *See Rapanos*, 547 U.S. at 723, 734, 760-61 (citations omitted).

Rather than adhere to the traditional two-part test for navigability, the Agencies have expanded the traditional meaning of navigability by referring to "*use in* interstate or foreign commerce" in the regulatory text of (a)(1), as opposed to the phrase "use to transport interstate or foreign commerce" or similar language. This subtle but important difference means that TNWs need not be highways to transport commerce; it is enough for them to be subject to any use in interstate commerce. To be clear, this expansion is not theoretical. In the past decade or so, the Agencies have issued TNW determinations for waters based merely on their potential to support recreation. For example, EPA declared portions of the Santa Cruz River (AZ) that carry no significant flow in dry seasons to be TNWs. Flow in the Santa Cruz River is primarily in direct response to precipitation or because of sewage effluent that is discharged from upstream sources. Despite a lack of evidence that the portions of the river in question could be used as highways to transport interstate or foreign commerce, EPA nevertheless made a TNW determination based on recreational use. *See* Letter from Benjamin H. Grumbles, EPA Region 9 Assistant Administrator,

[1] Waters that do not fall within this more limited TNW category could still be jurisdictional under one of the other categories of WOTUS; they just would not be TNWs.

to John Paul Woodley, Assistant Secretary of the Army on Santa Cruz Traditional Navigable Waters Determination (Dec. 3, 2008).[2]

*Second*, the undersigned organizations are concerned that the Agencies' interpretation of TNWs encompasses waters found to be navigable "by numerous decisions of the federal courts" in any context. *See* 84 Fed. Reg. at 4,170. To be clear, the CWA does not contain the term TNW. Nor do any other federal statutes to our knowledge. Further complicating matters, the term "navigable" does not have a fixed meaning across all statutes and can vary with context, as the Supreme Court has recognized. *See PPL Montana, LLC v. Montana*, 565 U.S. 576, 592–93 (2012); *Kaiser Aetna v. United States*, 444 U.S. 164, 170 (1979). All of this underscores that any analysis of navigability "must be predicated upon [a] careful appraisal of the *purpose* for which the concept of 'navigability' was invoked in a particular case." *Kaiser Aetna*, 444 U.S. at 170. These decisions illustrate why it is improper for the Agencies to interpret TNWs as all waters defined by "numerous decisions of the federal courts." 84 Fed. Reg. at 4,170. That a water body may qualify as a navigable water under, say, the Federal Power Act, should not be dispositive of whether that water body is a TNW for purposes of the CWA.

Appendix D to the 2008 *Rapanos* Guidance illustrates the impropriety of relying on decisions of the federal courts to establish whether a water body is a TNW. In that document, the Agencies cite two courts of appeals decisions to try to show when a water is a TNW. *See FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151 (D.C. Cir. 2002); *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989). The Agencies should not be relying on those cases to make TNW determinations in the CWA context. Neither of those cases explained why experimental canoe trips or recreational use demonstrate that a water body can meet the two-part test from *The Daniel Ball*.

For the reasons explained above, the Agencies should limit their interpretation of TNWs to waters that satisfy the traditional test for navigability in *The Daniel Ball*. We therefore recommend the following changes:

- Revise the proposed regulatory text by replacing "use in" with "transport." Thus, the (a)(1) provision would read, as follows: "waters which are currently used, or were used in the past, or may be susceptible to transport interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide." This would better align the regulatory text for the TNW category with the statutory text in CWA § 404(g)(1), which refers to the waters the Corps would retain jurisdiction over in the event a state assumes the 404 program.

- Rescind Appendix D to the *Rapanos* Guidance. By revising the regulatory text that corresponds to the TNW category, there is no longer a need for Appendix D.

[2] http://www.spl.usace.army.mil/portals/17/Docs/Regulatory/JD/TNW/SantaCruzRiver_TNW_EPALetter.pdf.

### B. Interstate Waters

We support the Agencies' proposal to eliminate "interstate waters" as a standalone category of jurisdictional waters. *See* 84 Fed. Reg. at 4,171. The CWA provides for federal jurisdiction over "navigable" waters, not "interstate" ones and thus, elimination of this category is consistent with the statutory text. In fact, as the Proposed Rule explains, Congress deliberately removed the term "interstate" from the CWA when it overhauled the Federal Water Pollution Control Act in 1972. *See id.* (tracing the history that led to the replacement of "interstate waters" with "navigable waters").

There is no statutory or constitutional basis for regulating waters merely because they happen cross state lines, regardless of whether the waters are TNWs or connected to TNWs. Regulating waters solely on that basis goes far beyond what Congress had in mind in enacting the CWA: "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172 (citing *Appalachian Elec. Power Co.*, 311 U.S. at 407-08). It would allow federal assertions of jurisdiction over isolated ponds or primarily dry channels even though such features are not navigable, cannot be made navigable, have no connection or influence to a navigable water, are not adjacent to a navigable, and contribute no flow to a navigable water. Such an assertion of jurisdiction reads the term "navigable" out of the statute and thus, the Agencies have appropriately proposed to remove this category.

### C. Tributaries

Under the Proposed Rule, tributaries of TNWs are jurisdictional. The Proposed Rule defines "tributary" as "a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a [TNW] or territorial sea in a typical year either directly or indirectly through other jurisdictional waters …." *Id.* at 4,173. The Proposed Rule further provides that (i) tributaries do not lose their jurisdictional status if they flow through a natural or artificial break, so long as the break conveys perennial or intermittent flow to a jurisdictional water at the downstream end of the break; and (ii) alteration or modification of a tributary does not affect its jurisdictional status so long as the other elements of the Proposed Rule's definition are satisfied. *See id.*

The proposed definition of "tributary" contains several terms that are further defined to help distinguish between waters subject to federal regulatory authority and those subject to state authority. Specifically, "perennial" is defined to mean "surface water flowing continuously year-round during a typical year," whereas "intermittent is defined to mean "surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (*e.g.*, seasonally when the groundwater table is elevated or when snowpack melts)." 84 Fed. Reg. at 4,173. "Snowpack" in turn is defined to mean "layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes." *Id.* Finally, "typical year" means "within the normal range of precipitation over a rolling thirty-year period for a particular geographic area." *Id.*

We support the Agencies' proposal to define tributary as a stream, river, or "similar naturally occurring surface water channel" contributing more than just ephemeral flow to a

downstream (a)(1) water. We also support defining "tributary" in a way that avoids the need for "case-specific determinations of a "significant nexus." And we support omitting from the definition the concepts of "ordinary high water mark" and "bed and banks." Indeed, we strongly urge the Agencies *not* to add those terms to the definition of "tributary." Because occasional storm events are enough to establish a bed, banks, and ordinary high water mark, countless features on otherwise dry land without any significant nexus to a TNW would become jurisdictional. For too long, regulators have overreached when applying the ordinary high water mark concept and consequently, reliance on its use has proven to be disastrous for landowners. It is easy to see why both the plurality and Justice Kennedy criticized the Agencies' heavy reliance on the ordinary high water mark concept in *Rapanos*. *See, e.g.*, 547 U.S. at 725 (plurality) (describing how the Corps has used this concept to extend jurisdiction "to virtually any land features over which rainwater or drainage passes and leaves a visible mark—even if only the presence of litter and debris"); *id.* at 780-81 (Kennedy, J., concurring) (noting that the ordinary high water mark provides "no such assurance" of a reliable standard for determining significant nexus). Put simply, "ordinary high water mark" is not a reliable means of distinguishing jurisdictional streams from non-jurisdictional erosion features, and reincorporating it into the Final Rule would only exacerbate the vagueness and uncertainty the Agencies seek to eliminate.

Furthermore, the Agencies' discussion of the Connectivity Report appropriately recognizes that the line-drawing that the Agencies must engage in with respect to tributaries is inherently a policy choice. *Id.* at 4,187. We agree with the Agencies that the choice should be "informed by, though not dictated by, science." *Id.* The Connectivity Report suggests that all waters are connected, but that report at least acknowledged that those connections occur along a gradient. Where to draw the line between federal and state waters within that gradient should not strictly be a matter of the extent of the impacts to downstream waters. Ecological considerations must also be balanced with other legal and policy considerations, such as the states' traditional authority over land and water resources and the need for a clear rule that provides fair notice to landowners concerning whether their conduct is legal. The Agencies therefore have rightly drawn the line in the Proposed Rule in a way that should avoid raising difficult constitutional questions.

While the undersigned organizations generally support the Proposed Rule's approach to tributaries, we are concerned that the definition of "tributary" leaves some important terms undefined and thus, we offer some recommendations to provide additional clarity. For instance, the Proposed Rule does not say how often a tributary must flow to meet the "certain times of a typical year" threshold. "Certain times of a typical year" is a phrase that, according to the Agencies, is "intended to include extended periods of predictable, continuous seasonal surface flow occurring in the same geographic feature year after year." *Id.* The Agencies should provide further clarification about how those terms will be applied. We recommend including some sort of quantitative measure of what qualifies as intermittent or an extended period—*e.g.*, at least 90 days of continuous surface flow in a typical year.

Our recommended bright-line approach would be consistent with the statutory text. The term "waters" must be given effect, and it would be permissible for the Agencies to interpret it in a way that encompasses only rivers, streams, and other hydrographic features conventionally identifiable as waters, as opposed to ordinarily dry channels that are only episodically wet following precipitation events. *See Riverside Bayview*, 474 U.S. at 131. Requiring 90 days of

continuous flow would also help avoid the difficult constitutional questions that would arise from asserting federal jurisdiction over episodically wet features. Finally, such an approach would be consistent with prior practice. In the *Rapanos* Guidance, the Agencies asserted jurisdiction over non-navigable tributaries that typically flow year-round or have at least seasonal flow, with seasonal defined as "typically three months." The Agencies have implemented that guidance since December 2008, and it continues to apply in 28 states.

We further recommend that the Agencies provide a more definite means of identifying what constitutes a "typical year." For instance, the Agencies could specify particular sources of data and methodologies for determining what a "typical year" is. Although the preamble explains that the Agencies currently compare observed rainfall amounts and tables that the Corps develops using data from the National Oceanic and Atmospheric Administration (NOAA), it is not clear, for instance, how observed rainfall amounts are determined, how the Corps develops its tables, or how reliable the NOAA data sources are. *See* 84 Fed. Reg. at 4,177. The Agencies further state that they consider a year to be "typical" if observed rainfall from the previous three months falls within the 30th and 70th percentiles established by a 30-year rainfall average generated at NOAA weather stations, but the Agencies do not explain, for instance, how the 30-year averages are calculated or why it is reasonable to use percentiles that exclude over half of the data points.

Similarly, we recommend that the Agencies more carefully differentiate between flow that results from melting "snowpack" and flow that results from snow melt. The preamble to the Proposed Rule suggests that snowpack accumulates for extended periods of time only in certain parts of the country. Indeed, the preamble refers to sources of information on snowpack such as NOAA and NRCS databases, though the Agencies do not articulate whether they intend to rely on specific sources of information over others. The Agencies should clarify this in the final rule because it is not clear to the undersigned organizations and our members whether these various sources of information are using the term "snowpack" consistently with one another or with how the Agencies define "snowpack" in the Proposed Rule. Specifically, we recommend that the Agencies clarify that the definition of "intermittent" does not broadly encompass all features in which water pools or flows as a result of melting snow and that "snowpack" is a more limited term of art that applies only in certain parts of the country. Thus, we recommend that for clarity and predictability, the Agencies explain that snowpack accumulates only in those twelve states for which NRCS compiles "snowpack" basin data reports.[3]

Finally, in defining what qualifies as a tributary, the Proposed Rule refers to a litany of different tools that regulators might use, ranging from visual observations, to trapezoidal flumes and pressure transducers. *See id.* at 4,176–77. We remain concerned about the Agencies' ability to make crucial jurisdictional determinations based on an array of desktop analyses. Vesting the Agencies with that authority invites more uncertainty and confusion in a process that carries life-changing consequences for regulated parties.

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[3] *See* https://www.wcc.nrcs.usda.gov/snow/snotel-wereports.html (compiling reports for Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming).

### D. Ditches

The Proposed Rule adds a new category of jurisdictional ditches. *Id.* at 4,179. The rule defines ditch as "an artificial channel used to convey water," but the Proposed Rule only asserts jurisdiction over three classes of ditches: (1) those that would also fall within the category of TNWs; (2) those that are constructed in or that relocate or alter a tributary; and (3) those that are constructed in an adjacent wetland, so long as they also satisfy the definition of tributary. *Id.* The preamble to the Proposed Rule clarifies that a ditch is constructed in a tributary "when at least a portion of the tributary's original channel has been physically moved." *Id.* at 4,193.

We agree with the Agencies' goal to exclude most ditches and artificial channels from federal jurisdiction, such as the various types of ditches that are commonplace on agricultural lands. But we recommend that the Agencies accomplish this goal through different regulatory text. Rather than define WOTUS in a way that includes a separate category of jurisdictional ditches, the Agencies should remove the standalone ditches category and instead address the question of which ditches are jurisdictional through language in the ditches exclusion.

- To the extent the Agencies intend to assert jurisdiction over ditches that are constructed in jurisdictional tributaries, in jurisdictional adjacent wetlands, or that are constructed by altering or relocating a jurisdictional tributary, the Agencies can revise the text of the ditch exclusion to state that such features would be considered WOTUS. The Agencies should, however, simultaneously clarify (e.g., in the preamble) that maintenance of such ditches would not require permits in accordance with CWA section 404(f).

- There is no need for a standalone ditch category to clarify that features like the Erie Canal are jurisdictional. To the extent a man-made or man-altered channel such as the Erie Canal is a TNW, the (a)(1) category already covers such channels, and it would be redundant to specify, in a standalone ditch category, that ditches that satisfy the (a)(1) requirements would be jurisdictional.

The undersigned organizations have a significant interest in ensuring that this rule provides as much clarity as possible over the regulatory status of ditches. As background, farmers rely on ditches for a broad variety of purposes, which is why they are found everywhere on farmlands. To assert jurisdiction over most agricultural ditches would be a significant departure from longstanding practice and would seriously alter the federal-state balance that Congress struck in the CWA. We appreciate the Agencies' recognition in the preamble that, since the 1970s, the Agencies have generally excluded non-tidal ditches from CWA jurisdiction.

Although we agree that it would be appropriate to assert jurisdiction over some ditches because they are constructed in WOTUS, we strongly feel it would be better for the Agencies to do so by clarifying the ditch exclusion, rather than to establish a standalone category of jurisdictional ditches. A standalone category of ditches risks creating the wrong impression that the default status of ditches is that they are jurisdictional. By eliminating the category and instead addressing which ditches would be jurisdictional elsewhere in the rule, the rule would better

align with the statutory text, which generally distinguishes between "point sources" and "navigable waters." *E.g.*, 33 U.S.C. § 1362(12); *see also* 84 Fed. Reg. at 4,179-80.[4]

Removing ditches from the categories of jurisdictional waters would also help underscore that the default status of ditches under the rule is that they are presumed to be non-jurisdictional regardless of their flow regime. The only exceptions to that default rule are for ditches that convey perennial or intermittent flow to downstream TNWs *and* that (i) were constructed in a jurisdictional tributary, (ii) relocate or alter a tributary, or (iii) were constructed in an adjacent wetland. Ditches constructed in upland are appropriately non-jurisdictional, even if they carry perennial or intermittent flow.

Finally, as noted in the preamble, whether a ditch is jurisdictional turns essentially on whether it was constructed in a jurisdictional tributary or adjacent wetland or whether it relocates or alters a jurisdictional tributary. On this point, the Proposed Rule properly puts the burden of proof on the Agencies to demonstrate whether a ditch was constructed in a jurisdictional tributary or wetland. *Id.* at 4,181. The preamble thus appropriately states that "[i]f the evidence does not demonstrate that the ditch was located in a natural waterway, the agencies would consider the ditch non-jurisdictional." *Id.* The undersigned organizations request that the Agencies consider codifying this burden of proof requirement in the regulatory text. We further request that the Agencies provide additional preamble discussion as to what types of "evidence" the Agencies will rely on to try to carry their burden, *e.g.*, aerial photos or historic documentation. These changes will help provide additional clarity and certainty for farmers and ranchers.

### E. Lakes and Ponds

The Proposed Rule establishes a new category of jurisdictional lakes and ponds. *See* 84 Fed. Reg. at 4,182. These waters are jurisdictional if they fall under one of three categories: (1) they are TNWs; (2) they contribute perennial or intermittent flow to a TNW in a typical year, either directly or indirectly; or (3) they are flooded by a TNW, tributary, ditch, lake, pond, or impoundment in a typical year. *See id.*

The undersigned organizations believe this is a reasonable definition, particularly to the extent it focuses on a lake's or pond's contribution of flow to and connection with TNWs. We especially support the Agencies' elimination of case-specific "significant nexus" determinations as the basis for asserting jurisdiction over lakes and ponds. As already noted, nothing in the CWA compels the use of that test, nor is it required under relevant Supreme Court precedent.

[4] We emphasize, however, that the regulation of ditches as point sources must not occur in a way that limits the statutory exclusions for "return flows from irrigated agriculture" or "agricultural stormwater." *See* 33 U.S.C. § 1342(l) (exempting the discharge of irrigation return flows into WOTUS from the CWA Section 402 permit program); 33 U.S.C. § 1362(14) (excluding agricultural stormwater discharges and irrigation return flows from the definition of point source).

We also appreciate that the preamble to the Proposed Rule appropriately ties the lakes and ponds category back to the CWA's text and Congress's intent, particularly to terms like "navigable" and Congress's commerce power over navigation. *See, e.g.*, *id.* at 4,183. Thus, the Agencies correctly point out that isolated, intrastate lakes and ponds cannot be deemed jurisdictional based on ecological connections for the reasons discussed in *SWANCC*. *Id.* An alternative interpretation would effectively read the term "navigable" out of the statute and would raise serious constitutional issues. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (cautioning against statutory constructions that render any part of the statutory language "inoperative, superfluous, void or insignificant").

Our principal remaining concern with this category relates to the meaning of "intermittent" and "typical year," terms that are relevant to this category in essentially the same ways they are relevant to the category for tributaries. As explained above in our comments on the proposed tributary definition, the Agencies should be more clear about how those terms will be defined and implemented.

### F. Impoundments

The Proposed Rule continues to assert jurisdiction over impoundments of other jurisdictional waters, which the Agencies explain reflects their longstanding view that impounding a WOTUS does not change the jurisdictional status of the WOTUS. *See* 84 Fed. Reg. at 4,172. In the Agencies' view, retaining this category is "consistent with longstanding agency practice unless jurisdiction has been affirmatively relinquished," *e.g.*, "when an applicant receives a permit to impound a water of the United States in order to construct a waste treatment system (as excluded under (b)(11))." *Id.* at 4,172 & 4,192.

The undersigned organizations recommend that the Agencies eliminate impoundments as a standalone category of WOTUS. If the Agencies remove this category, there should not be a gap in jurisdiction because impoundments should still be covered under one of the other categories of WOTUS. For example, if an impounded water satisfies the requirements of the lakes and ponds category, it would be jurisdictional under that category. By contrast, if impounding an intermittent tributary means that there will be less than intermittent flow from the tributary to a downstream navigable water, then the impounded water would essentially be a non-jurisdictional, isolated pond. Eliminating jurisdiction over impounded waters under these circumstances would be consistent with the Agencies' practice of relinquishing jurisdiction over certain WOTUS after issuance of a valid 404 permit. Similarly, if a farm or stock watering pond was created before the enactment of the CWA by impounding a historic tributary, but the pond is now isolated, historic conditions should not form a basis to assert jurisdiction over the pond (as an "impoundment") because the tributary that was originally impounded is no longer a jurisdictional "tributary" within the meaning of this rule.

If the Agencies insist on retaining the impoundment category, we recommend that the Agencies provide some clarifications in the final rule. For instance, the Agencies should clearly define what constitutes an impoundment, *e.g.*, that it is a standing body of water created by blocking or restricting the flow of a WOTUS. Similarly, the Agencies should clarify that they would be asserting jurisdiction over the water feature that results from impounding a WOTUS, as opposed to the actual impoundment, whether it is a dam or some other structure.

### G. Adjacent Wetlands

Under the Proposed Rule, "adjacent wetlands" would be jurisdictional, and the rule defines that term to mean "wetlands that abut or have a direct hydrologic surface connection to a [jurisdictional water] in a typical year." The Proposed Rule further defines "abut" as "to touch at least at one point or side of a [jurisdictional] water," and clarifies that a "[d]irect hydrologic surface connection occurs as a result of inundation from a [jurisdictional water] to a wetland or via perennial or intermittent flow between a wetland and a [jurisdictional] water." 84 Fed. Reg. at 4,186–87. The Proposed Rule also clarifies that wetlands that are physically separated from a WOTUS—for instance, by dikes, barriers, or similar structures—*and also lacking a direct hydrologic surface connection* would not be jurisdictional as adjacent wetlands. *Id.* at 4,189. This of course means that natural or man-made breaks do not sever jurisdiction so long as the "direct hydrologic surface connection" requirement is satisfied.

The Proposed Rule's definition of "wetlands" remains unchanged from the longstanding regulatory definition. *See id.* at 4,184. To complement that definition, the Agencies have proposed a new definition for "upland" which means "any land area that under normal circumstances does not satisfy all three wetland delineation criteria (*i.e.*, hydrology, hydrophytic vegetation, hydric soils) . . . and does not lie below the ordinary high water mark or the high tide line of a [jurisdictional water or wetland]." *Id.* at 4,189.

Here, again, the Agencies rightly point out that their interpretation is informed but not dictated by science. *See id.* at 4,187. As explained above, the Agencies have ample authority to define "adjacent wetlands" in the manner they propose based on important policy and legal considerations.

The undersigned organizations support the Agencies' approach to adjacent wetlands. We agree with the Agencies that the proposed definition of "adjacent wetlands" is superior to the current definition ("bordering, contiguous, or neighboring"), which the Agencies note has led to considerable confusion in the field. *See* 84 Fed. Reg. at 4,187. Apart from causing confusion, the current definition of "adjacent" has allowed regulators to assert jurisdiction over isolated wet patches of land. *See Rapanos*, 547 U.S. at 728 (detailing how both the Corps and lower courts have determined that wetlands were "adjacent" based on hydrological connections "through directional sheet flow during storm events" or on location within the 100-year floodplain or within 200 feet of a tributary). Such an expansive view of adjacency improperly goes far beyond the "point at which water ends and land begins," *see Riverside Bayview*, 474 U.S. at 132, and raises the very statutory and constitutional concerns discussed in *SWANCC*. *See* 541 U.S. at 172–74. It also improperly reads the term "navigable" out of the statute and alters the federal-state balance that Congress struck in the CWA. *Id.* By contrast, we believe the Proposed Rule is consistent with the statutory text, Congress's intent, and applicable Supreme Court precedent.

We also support the Agencies' attempts to clarify that wetlands must satisfy all three wetland delineation criteria under normal circumstances, but we urge the Agencies to go further. To complement the new definition of "upland," the definition of "wetland" should be revised to clearly state that an area that does not satisfy all three wetland delineation criteria under normal circumstances is not a jurisdictional wetland. *See* 84 Fed. Reg. at 4,184. This clarification is necessary to ensure consistent implementation across Corps districts and EPA regions. We also

recommend that the Agencies provide additional clarity regarding the terms "intermittent" and "typical year," as discussed in our comments to the tributary category above.

## IV. Comments and Recommendations on Proposed Exclusions

The Proposed Rule also identifies certain features that are expressly excluded from the definition of WOTUS. The undersigned organizations support the Agencies' decision to expressly exclude certain categories of waters from WOTUS. We also support the proposal to exclude features from jurisdiction even if the excluded features develop wetland characteristics within the confines of the features. *See* 84 Fed. Reg. at 4,192. More specifically, we offer the following comments on some of the exclusions of particular interest to our members to help the Agencies clarify and improve them where appropriate.

### A. Prior Converted Cropland

The Agencies propose revised regulatory text on the longstanding exclusion for prior converted cropland ("PCC"). This revision would continue to exclude PCC from CWA jurisdiction but would ensure that the exclusion applies as the Agencies envisioned when they originally codified it in 1993. See 58 Fed. Reg. 45,008 (Aug. 25, 1993). Among other things, the Agencies clarified at the time that "[a]n area remains prior converted cropland even if it is no longer used in agricultural production or is put to a non-agricultural use." *Id.* at 45,032. The lack of a clear definition of PCC in the regulatory text, however, has given rise to some problems in the past, and we appreciate the Agencies' efforts to clarify their intent in the Proposed Rule.

The proposed revised text defines PCC as "any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible." *See id.* at 4,204 (proposed 33 C.F.R. § 328.3(a)(8)). The regulatory text expressly states that "EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture." *Id.* The regulatory text also discusses the concept of abandonment, stating that, "An area is no longer considered prior converted cropland for purposes of the Clean Water Act when the area is abandoned and has reverted to wetland…. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years." *Id.* Finally, the regulation continues to state that EPA has final authority to determine when PCC has been abandoned for CWA purposes. *Id.*

The preamble to the Proposed Rule recounts the history of the PCC exclusion, which dates back to the 1993 regulation. *Id.* at 4,191. That history unfortunately includes the Corps' attempts to narrow the scope of the PCC exclusion through a guidance memo, which was eventually declared unlawful by a federal court due to lack of notice-and-comment rulemaking. *Id.* (citing *New Hope Power Co. v. U.S. Army Corps of Eng'rs*, 746 F. Supp. 2d 1272, 1282 (S.D. Fla. 2010)). The preamble adds that the Corps will only apply abandonment principles consistent with the 1993 rule preamble and will no longer apply the change in use analysis that the Corps tried to introduce unsuccessfully and without notice-and-comment. *See id.*

We support the proposed regulatory text and the preamble text clarifying how the Agencies interpret the PCC exclusion. However, the Agencies should clarify—either in the text

or the preamble—that there is a broad array of uses of PCC "in support of" agricultural purposes, such as idling land for conservation purposes; idling land to protect wildlife; and allowing land to lie fallow following natural disasters such as hurricanes (for example, to offset saltwater intrusion). While these uses may look like the land has been abandoned, they are "in support of" agricultural purposes and should be expressly recognized as such. We also urge the Agencies to clarify in the final rule that PCC includes ditches, canals, and other features within PCC.

In connection with this rulemaking, the Agencies should also formally rescind the 2009 Issue Paper from the Corps' Jacksonville Field Office that was set aside by the court in the *New Hope Power* case. Corps districts should not be implementing this guidance, or any other guidance that purports to incorporate change-in-use principles, and trying to recapture lands based on broad interpretations of abandonment. As the Agencies originally explained in 1993, PCC are abandoned (and thus, the exclusion no longer applies) only if land is abandoned *and* the area has reverted to wetland.

### B. Groundwater

The Proposed Rule excludes groundwater, "including groundwater drained through subsurface drainage mechanisms." *Id.* at 4,190. We support that exclusion. The text, structure, and history of the CWA make it clear that Congress did not intend for groundwater to be WOTUS. There are numerous instances in the text where Congress plainly distinguished between "ground waters" and "navigable waters" and those distinctions must be given effect. *E.g.*, 33 U.S.C. § 1252(a) (referring to "pollution of the navigable waters and ground waters"); *id.* § 1256(e)(1) (referencing "the quality of navigable waters and to the extent practicable, ground waters"); *id.* § 1314(a)(2) ("all navigable waters, ground waters, waters of the contiguous zone, and the oceans"). Likewise, the legislative history confirms that Congress deliberately distinguished between navigable waters and ground waters and did not intend to subject groundwater to federal regulatory authority under the CWA. *See* S. Rep. No. 92-414, at 73 (1971) (explaining that a number of bills were introduced to establish federal standards for groundwaters, but that Congress did not adopt any of those proposals). Not surprisingly then, courts have uniformly agreed that groundwater is not WOTUS. *E.g.*, *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001) ("The law in this Circuit is clear that ground waters are not protected waters under the CWA."); *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 964–66 (7th Cir. 1994) (tracing legislative history and concluding that groundwaters "are a logical candidate" for exclusion from the CWA's scope).

The Agencies have invited comment on whether the groundwater exclusion could instead read "groundwater, including diffuse or shallow subsurface flow and groundwater drained through subsurface drainage systems." The undersigned organizations believe there is considerable confusion about whether groundwater encompasses shallow subsurface flow or whether and how those categories of water are distinct. Regardless of whether there is scientific consensus on that subject, neither groundwater nor shallow subsurface flow should be WOTUS and thus, we support an exclusion that would expressly exempt both from federal jurisdiction.

### C. Ephemeral Features and Diffuse Runoff

The Agencies propose to exclude "ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland." 84 Fed. Reg. at 4,190. "Ephemeral" is defined to mean "surface water flowing or pooling only in direct response to precipitation (*e.g.*, rain or snow fall)." *Id.* at 4,204 (proposed 33 C.F.R. § 328.3(c)(3)).

We support this exclusion. Interpreting the CWA to exclude ephemeral features is in line with the CWA's text. Navigable waters must be "waters," and it is reasonable to interpret that term to mean rivers, streams, oceans, and other hydrographic features more conventionally identifiable was "waters." *See Riverside Bayview*, 474 U.S. at 131. Moreover, the term "navigable" retains independent significance and, it reflects Congress's intent to exercise its traditional commerce power over navigation. *See SWANCC*, 531 U.S. at 172 & 168 n.3. The exclusion also respects the CWA section 101(b) policy and avoids significantly altering the federal-state framework by avoiding the assertion of jurisdiction over primarily dry features.

Our only recommendation regarding the proposed exclusion of ephemeral features is that the Agencies should make it clear that if a feature falls within the ephemeral exclusion, it is *per se* excluded and cannot be deemed jurisdictional under any of the six categories of jurisdictional waters. For instance, if water that flows through or pools in an ephemeral channel as a direct result of precipitation happens to flow or pool for an extended period of time (without intersecting the groundwater table), it should still be excluded as "ephemeral" and cannot be deemed to be intermittent.

### D. Ditches

The Agencies propose to exclude all ditches that are not identified as jurisdictional in paragraph (a)(3) of the definition. *See id.* at 4,190; *see also* Part III.D *supra*. The Agencies state that this exclusion should address the majority of irrigation and drainage ditches, including most agricultural ditches, but they clarify that the exclusion does not affect the possible status of a ditch as a point source. *See id.* at 4,193.

We support the Agencies' general approach to ditches, but as discussed above, we believe the Agencies should eliminate the standalone category of jurisdictional ditches and make revisions to the proposed ditches exclusion to accomplish their intent to assert jurisdiction over only ditches that are constructed in jurisdictional tributaries or adjacent wetlands and those ditches that alter or relocate a jurisdictional tributary.

Moreover, it is important that, in the Final Rule, the Agencies acknowledge that many ditches on agricultural lands are often constructed in low areas that have wetland characteristics or are ephemeral drainages (and hence, are not dry land). The Proposed Rule seems to reflect that understanding by not requiring that ditches be constructed on dry land. We also agree that irrigation ditches would and should remain excluded even if they draw water from a jurisdictional tributary and move that water to another jurisdictional tributary. *See* 84 Fed. Reg. at 4,195.

### E. Artificially Irrigated Areas

The Agencies propose to exclude "artificially irrigated areas," "including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease." *See id.* at 4,191. The Agencies have historically considered these areas to be non-jurisdictional, although they have previously considered them under the exclusion for artificial lakes and ponds. *See id.* at 4,194.

The Agencies invite comment on whether this exclusion should be "expanded" to cover areas flooded to support aquaculture or fields flooded to support the production of wetland crop species in addition to rice and cranberries. *Id.* at 4,195. We find this request for comment puzzling because nothing in the proposed regulatory text suggests that the exclusion is limited to fields flooded for rice or cranberry growing. Under the plain terms of the regulatory text—which we support—*any* artificially irrigated areas, not just those fields flooded for rice or cranberry growing, should be excluded. *See id.* at 4,204 (proposed 33 C.F.R. § 328.3(a)(6) (defining "Artificially irrigated areas" to *include*—but not be limited to—"fields flooded for rice or cranberry growing …")). The Agencies might wish to consider clarifying this point in the Final Rule, to eliminate any confusion caused by the request for comment on the subject.

### F. Artificial Lakes and Ponds

Under the exclusion for "artificial lakes and ponds," the Agencies propose to exclude features like farm and stock watering ponds, but only if they are constructed in upland and do not meet the criteria for jurisdictional lakes or impoundments. *See id.* at 4,191. The preamble clarifies that this exclusion applies to artificial lakes and ponds created as a result of impounding non-jurisdictional waters or features, as well as conveyances in upland that are physically connected to and are part of the proposed excluded feature. *Id.* at 4,194.

We generally support this exclusion, but we urge the Agencies to remove the requirement that these features be constructed in upland. Requiring that artificial lakes and ponds be constructed in upland puts the burden on landowners to try to prove historic conditions, rather than focusing on current conditions. It will be difficult, if not impossible, for landowners to demonstrate what conditions were like on the ground at the time a feature was created. Moreover, as the agencies have recognized in the past, areas that perhaps used to be WOTUS, but have been lawfully converted to dry land (whether because it was authorized by a permit or because it occurred before there was a permit requirement) should not be subject to regulation as WOTUS. For example, EPA has recognized that CWA Section 404 does not regulate existing "waters" and thus "[w]hen a portion of the [w]aters of the United States has been legally converted to fast land . . . it does not remain waters of the United States." 45 Fed. Reg. 85,336, 85,340 (Dec. 24, 1980). Likewise, the Corps has stated that "Section 404 . . . regulate[s] discharges of dredged or fill material into the aquatic system as it exists, and not as it may have existed over a period of time" and thus, the agency does not "assert jurisdiction over those areas that once were wetlands and part of an aquatic system, but which in the past, have been transformed into dry land for various purposes." 42 Fed. Reg. 37,122, 37,128 (July 19, 1977); *see also* Corps RGL 86-9, at ¶ 3 (Aug. 27, 1986) ("[I]f a former wetland has been converted to another use (other than by recent un-permitted action not subject to 404(f) or 404(r) exemptions) and that use alters its wetland characteristics to such an extent that it is no longer a "water of the

United States", that area will no longer come under the Corps regulatory jurisdiction for purposes of Section 404.").

Alternatively, if the Agencies insist upon retaining the "constructed in upland" requirement, they should at least codify in the text of the Final Rule that artificial lakes and ponds are *not* jurisdictional if they were "constructed in upland *or constructed by impounding non-jurisdictional waters or features*." *See id.* The Final Rule should also include a sentence stating that "Conveyances created in upland that are physically connected to and are a part of the excluded artificial lake or pond are also excluded." *See id.* As currently drafted, the proposed regulatory text suggests that the exclusion is quite narrow, because the text refers only to those features constructed in upland. Although the preamble shows that is not the Agencies' intent, *see* 84 Fed. Reg. at 4,194, we urge the Agencies to provide additional clarity in the regulatory text itself to avoid any risk that the exclusion would be narrowly interpreted or applied in the future.

For this exclusion to be meaningful to farmers and ranchers, it is important that it not be limited to features be constructed on dry land. The very purpose of ponds is to carry or store water, which means that they are not typically constructed along the tops of ridges. Often, the only rational place to construct a farm or stock pond is in a naturally low area to capture stormwater that enters the ditch or pond through sheet flow and ephemeral drainages. Depending on the topography of a given patch of land, pond construction may be infeasible without some excavation in a natural ephemeral drainage or a low area with wetland characteristics.

### G. Stormwater Control Features

The Agencies also propose to exclude features that are "excavated or constructed in upland to convey, treat, infiltrate, or store stormwater runoff." *See id.* at 4,190. The preamble states that this exclusion does not cover ditches, which the Proposed Rule addresses in a separate exclusion. *See id.* at 4,194.

In discussing this exclusion, the preamble focuses on urban and suburban settings such as curbs, gutters, sewers, retention and detention ponds, and urban green infrastructure. *Id.* at 4,192. The Agencies should either clarify that this exclusion encompasses conservation infrastructure found on agricultural lands—such as grassed waterways, treatment wetlands, and sediment basins—or that such infrastructure falls under another exclusion. Farmers rely on a variety of conservation infrastructure to support their operations, including grassed waterways, terraces, sediment basins, biofilters, and treatment wetlands. These features serve important functions such as slowing stormwater runoff, increasing holding time before water enters a stream, sediment trapping, increasing soil infiltration, and pollutant filtering. To avoid creating disincentives to water quality conservation practices and infrastructure, the Agencies should make it clear that these conservation features are *not* jurisdictional so long as they were not constructed in WOTUS. Moreover, for the reasons discussed above (in Part IV.F), the Agencies should remove the requirement that stormwater control features be "constructed in upland" to be excluded.

### H. Waste Treatment Systems

The undersigned organizations support the continued exclusion of waste treatment systems, which has been part of the regulatory text for decades. The Agencies propose to more clearly define what constitutes a "waste treatment system" in the regulatory text: "all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey, retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge." 84 Fed. Reg. at 4,205. This regulatory text is consistent with longstanding agency practice. We support the Agencies' proposed definition of waste treatment system, particularly the clarifications that such systems need not perform active treatment and that the system includes not just ponds and lagoons, but also conveyances to and from those ponds and lagoons.

## V. Implementation and Burden of Proof

In implementing any final definition of WOTUS, we believe that field evaluations should be the presumptive approach. We see no reason to limit such evaluations to certain circumstances. Use of desktop tools, by contrast, should be carefully scrutinized because they threaten to complicate and obscure the operation of any Final Rule the Agencies issue in ways that will impose potentially significant burdens on our members. Thus, if a landowner requests a field evaluation, which may appropriately include an examination of comparable sites, the Agencies should not make jurisdictional calls using solely on desktop information.

We agree with the Agencies that, when it comes to implementing any Final Rule, the landowner should have the benefit of the doubt with respect to determining jurisdiction. In other words, waters should not be WOTUS unless the agency can point to evidence solidly backing that designation. Keeping the burden of proof on the agency is especially important when it comes to making determinations about things like whether a ditch was, at some point in the distant past, constructed in a jurisdictional tributary or wetland. Many farmers and ranchers simply lack the means or opportunity to conclusively establish the answer. Similarly, farmers should not have to prove that farm and stock watering ponds were constructed in upland, as opposed to a jurisdictional wetland. Burdens like those properly fall on the agency because, as between the agency and the regulated party, the agency is in a much better position to make a conclusive showing.

## VI. Conclusion

The undersigned organizations appreciate the opportunity to provide these comments to the Agencies. Overall, we are very supportive of the Proposed Rule, and we believe the proposed definitions will go a long way to providing much needed clarity and certainty for farmers and ranchers. Furthermore, we applaud the Agencies for conducting an inclusive and transparent rulemaking process, and we look forward to the culmination of the Agencies' attempts to revise the definition of "waters of the United States." Thank you for your time and consideration.

On behalf of:

American Farm Bureau Federation
Agri-Mark
Agricultural Retailers Associations
Alabama Pork Producers
American Agri-Women
American Dairy Coalition
American Soybean Association
American Sugar Alliance
American Sugar Cane League
American Sugarbeet Growers Association
California Pork Producers Association
California Women for Agriculture
CHS, Inc.
Colorado Pork Producers Council
Compeer Financial
CropLife America
Dairy Producers of New Mexico
Dairy Producers of Utah
Edge Dairy Farmer Cooperative
GROWMARK, Inc.
Idaho Dairymen's Association
Illinois Corn Growers Association
Illinois Farm Bureau
Illinois Pork Producers Association
Indiana Pork Producers Association
Iowa Pork Producers Association
Iowa Poultry Association
Kansas Pork Association
Kentucky Pork Producers Association
Michigan Allied Poultry Industries
Michigan Pork Producers Association
Mid America Croplife Association
Minnesota Corn Growers Association
Minnesota Pork Producers Association
Mississippi Pork Producers Association
Missouri Agribusiness Association
Missouri Corn Growers Association
Missouri Dairy Association
Missouri Pork Association
Missouri Soybean Association
Montana Pork Producers Council
National All-Jersey Inc.
National Association of State Departments of Agriculture
National Association of Wheat Growers
National Barley Growers Association
National Corn Growers Association
National Cotton Council
National Council of Farmer Cooperatives
National Grape Cooperative Association, Inc.
National Pork Producers Council
National Sorghum Producers
National Sunflower Association
National Turkey Federation
Nebraska Pork Producers Association, Inc.
North Carolina Pork Council
North Dakota Pork Council
Northeast Dairy Farmers Cooperative
Ohio AgriBusiness Association
Ohio Corn and Wheat Growers Association
Ohio Pork Council
Oklahoma Agricultural Cooperative Council
Oklahoma Pork Council
Oregon Dairy Farmers Association
Pacific Egg & Poultry Association
Pennsylvania Pork Producers Council
Professional Dairy Managers of Pennsylvania
South Dakota Pork Producers Council
South East Dairy Farmers Association
Southwest Council of Agribusiness
St. Albans Cooperative Creamery, Inc.
Sun-Maid Growers of California
Tennessee Farmers Cooperative
Texas Association of Dairymen
The Fertilizer Institute
The Illinois Fertilizer & Chemical Association
U.S. Canola Association
U.S. Poultry & Egg Association
United Egg Producers
United States Cattlemen's Association
Upstate Niagara Cooperative, Inc.
USA Rice
Virginia Poultry Federation
Washington State Dairy Federation
Western Peanut Growers Association

# ATTACHMENT

# B

www.wyfb.org
WYOMING FARM BUREAU FEDERATION
800.442.8325 • 307.721.7719 • P.O. Box 1348, Laramie, WY 82073

12 April, 2019

U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket
Mail Code 28221T
Pennsylvania Avenue, NW
Washington, D.C. 20460

**Re: Docket ID No. EPA-HQ-OW-2018-0149**

The Wyoming Farm Bureau Federation would like to provide the following comments on the proposed rules revising the definition of "Waters of the United States."

The Wyoming Farm Bureau (WyFB) is providing these comments on behalf of over 2,600 agricultural members who will be impacted by the proposed rules. We concur with the American Farm Bureau Federation on the need to have clear rules. Clear rules will allow ranchers and farmers to avoid the issues associated with previous rules and avoid facing multi-million dollar fines and penalties from the Agencies. We commend the Agencies for proposing a revised definition that goes a long way towards providing clarity and certainty through clear definitions.

Our members produce agricultural products that help feed consumers and fiber to provide clothing both in the US and the world. Many of these ranchers and farmers have been doing this for over a century here in Wyoming. Due to Wyoming's arid conditions, many of our fodder crops must utilize irrigation to facilitate adequate growth. Wyoming farmers produce malt barley, dry edible beans and sugar beets for human consumption in addition to many other commodities. Ranchers produce beef and lamb for human consumption and the wool from the sheep is utilized in clothing manufacturing. All of these endeavors require water in adequate quantities as well as quality.

The intersection between water quantity and quality is critical for Wyoming, particularly as it relates to the regulatory process. Irrigators need to have the ability to modify or repair their water delivery structures without undue delay. Should restrictions and delays occur, the economic impact would be considerable, as would the loss of the water right necessary for the irrigation.

Having to seek a federal permit before repairs or upgrades to an irrigation system can have a significant economic and temporal effect on irrigators. In the *Rapanos* decision in 2006 it was noted that, ". . .the average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915. . " to obtain a permit. Undoubtedly, these costs have risen significantly in the last 13 years. The cost of a nationwide permit could very well be the profit for an operation for that year. The 313 day process could place a farmer or rancher in the untenable position of allowing their irrigation structure to continue to deteriorate or become destroyed, or violate the Clean Water Act (CWA). We don't believe this was the intent of

Congress in establishing the CWA.

Wyoming Farm Bureau members strongly support the concept of Federalism which these rules seek to address. In a June 19, 2017 letter to Administrator Scott Pruitt and Assistant Secretary of the Army Douglas W. Lamont, Governor Mead supported the idea, ". . . that federal jurisdiction under the Clean Water Act should be limited solely to navigable waters. *See* 33 U.S.C. § 1362(7). Indeed, prior to the enactment of the Clean Water Act, the Supreme Court interpreted interstate waters to be those that were 'navigable in fact' or readily susceptible of being rendered so" (June 19, 2017 letter from Governor Matt Mead). Governor Mead went on to reiterate the precepts articulated in the *Rapanos* decision.

We support the idea that jurisdictional waters should be limited in scope as outlined by the *Rapanos* decision. We would note that under this Federalism concept, the issue of regulation of water and water quality doesn't stop with the regulations established by the federal government. Shortly after the *SWANCC (Solid Waste Agency of Crook County)* decision, clearly limiting federal authority over isolated wetlands, Wyoming's Department of Environmental Quality established rules and regulations dealing with isolated wetlands under state statutes. This process allows for a more realistic regulatory process that addresses the conditions and circumstances in Wyoming.

The Federalism concept was clearly recognized by Congress in the Clean Water Act, with it's articulation and recognition of the role states play in regulation of water quality as well as land use within state boundaries. This concept has been upheld by the US Supreme Court. Many of the problems associated with the 2015 rule, which were a repudiation of *Rapanos and SWANCC* Supreme Court rulings, were to try and justify how the Agencies could draw a line so as not to ignore those decisions. The 2015 rules ignored Congressional language as well as state authority over water and land. The justification for the 2015 rules was to eliminate confusion by making virtually all land which might have some water touch them at one point a jurisdictional water and subject to federal control. The argument could have been made that this would then be clearer than previous guidance and rules, but it accomplished this by violating the law. Utilizing states and their authorities to address areas outside of federal jurisdiction provides the necessary flexibility and prevent the "one size fits all" issues associated with the 2015 rule.

We support limiting federal jurisdiction to "navigable-in-fact" or traditional navigable waters. By limiting federal jurisdiction to these types of waters, the EPA and Corp will allow states to regulate those waters outside of the federal jurisdiction. The Agencies should utilize the traditional two-part test for navigability outlined in *The Danial Ball* and other subsequent cases to apply the test. We feel the Agencies should revise the regulatory text corresponding to this category to waters that "transport interstate commerce" and not waters "used in interstate commerce." Adopting this text would help avoid regulatory creep in the future on federal jurisdiction and avoid the legal situation decided by *SWANCC* and *Rapanos*.

The Agencies are seeking comments on the establishment of a threshold for tributaries and whether the threshold should be limited to "perennial waters" only (F.R./Vol 84, No. 31/ Thursday, February 14, 2019/ Proposed Rules, page 4177). We strongly suggest and believe the Agencies could, under the Federalism concept, limit their jurisdiction to just **perennial water bodies** that are navigable-in-fact and allow states to address issues with non navigable perennial water bodies, intermittent waters and ephemeral waters. Under this concept, those intermittent and ephemeral waters that may contribute to impairments to the federal jurisdictional waters would then be addressed by cooperation between the states and the federal government. The Clean Water Act provisions for federal approval of state water quality control programs provides the necessary mechanism for the federal government to address

water impairment issues that impact navigable waters. In addition to the approval process, the CWA gives the federal government other tools which can be used to address the impairments.

Such a process would allow states the necessary flexibility to address such issues outside of a "one size fits all" federal process. By limiting federal jurisdiction to perennial water bodies the clarity for federal reach is even better defined. As mentioned earlier, Wyoming's water quality statutes are broader in scope than those of the federal government and the issue of what is jurisdictional and what isn't is less an issue than at a federal level (see W.S. §35-11-309).

The Agencies seek comments on whether there is a need to regulate impoundments (F.R./Vol 84, No. 31/ Thursday, February 14, 2019/ Proposed Rules, page 4173). We believe a proper definition of what is considered a jurisdictional water does not need a separate category for impoundments.

The Agencies are asking for comment on the interpretation of tributary that excludes ephemeral features (F.R./Vol 84, No. 31/ Thursday, February 14, 2019/ Proposed Rules, page 4175). While we feel the Agencies could eliminate intermittent waters and perennial waters which are not navigable, we strongly support the proposal to eliminate ephemeral water bodies from federal jurisdiction as well as the "significant nexus" analysis on those features. The concept of a relatively permanent water flow or body in Supreme Court cases supports this action. Necessary regulation of ephemeral bodies can best be carried out by the states under their authorities. By doing this, the Agencies will help clarify what are federally jurisdictional waters and what are not.

The Agencies are seeking information on the best way to implement this approach (F.R./Vol 84, No. 31/ Thursday, February 14, 2019/ Proposed Rules, page 4176). The line between intermittent and ephemeral can be a difficult one to draw and we'd reiterate our point about the line being clearer between intermittent and perennial and would serve clarity and still address impairments.

The Agencies are seeking comments on how to treat water flows from effluent-dependent streams ( F.R./Vol 84, No. 31/ Thursday, February 14, 2019/ Proposed Rules, page 4177). We believe that effluent-dependent waters should not be considered jurisdictional waters by the Agencies. One of the positive results of irrigation in Wyoming is the development of stream flows from irrigation activities where stream flows were not present prior to irrigation. Absent irrigation or even with a change in irrigation types, these stream flows would cease and the water would disappear. Regulation of these effluent-dependent flows can be accomplished via state regulations which can better address local conditions and circumstances.

We would also raise the issue that certain impoundments can create wetlands below the dam structure. This man-made wetland may have a ditch, which was established before a wetland was created, running away from the dam to upland irrigation structures. The man-made wetland will be created around the area of the ditch which, under the proposal for ditches, may establish that that portion (or all) of the ditch, which is in the effluent-dependent wetland as a jurisdictional water. We believe this may create a Catch-22 situation for irrigators.

If the Agencies limit the scope of their jurisdiction on effluent-dependent waters, the regulatory situation that occurred in Wyoming with Andy Johnson (See Andy Johnson v United States Environmental Protection Agency)would have perhaps been prevented. In this particular case Mr. Johnson developed a stock pond, which he felt was exempt from federal jurisdiction already, from an irrigation effluent-dependent water source and was subsequently charged with a violation of the CWA. The Agencies and Mr. Johnson eventually settled, but the impact on Mr. Johnson and his family

because of the potential fines of up to $37,000/day was significant.

The Agencies seek comment on whether the tributary definition should include streams that contribute less than intermittent flow to a traditional navigable water and additionally seek comments on whether less than intermittent flow in a channel breaks jurisdiction of upstream perennial or intermittent flows ( F.R./Vol 84, No. 31/ Thursday, February 14, 2019/ Proposed Rules, page 4177). Under the discussions in this notice, we note that perennial waters, intermittent waters and ephemeral waters have been identified and definitions provided. We've not seen what the Agencies feel constitute "less than intermittent". Whether this is a new classification or whether less than intermittent is the same as ephemeral is unclear. However, we feel that streams that contribute less than intermittent flow should be the purview of states to regulate. By placing these water bodies into federal jurisdiction the Agencies would go down the path of making all waters "waters of the U.S." which is beyond the authority of the CWA. Perennial water that flows into a less than intermittent areas should not be classified as federal jurisdictional waters.

For example, Wyoming has a number of waters with heavy flow volumes that will flow to an area and then disappear into the ground. The dry water course continues on past the area where the water disappears. These processes create long areas of dry streams which may only flow in an ephemeral fashion every few years. To require that entire length to be regulated under federal jurisdiction creates confusion for the public. These areas are better left to the states to address.

On page 4178 of the notice (F.R./Vol 84, No. 31/ Thursday, February 14, 2019/ Proposed Rules) the Agencies seek comment on possible other definitions of intermittent. The terminology is not as important as the definition. Much of the discussion centers around the gray areas which come into play when dealing with an intermittent or seasonal flow; or ground water intersecting the water body. This confusion on how to address these waters supports our assertion that federal jurisdiction should be limited to perennial waters and allow states to address the issue.

The Agencies are seeking comments on the inclusion of "ditches" directly into the rules ( F.R./Vol 84, No. 31/ Thursday, February 14, 2019/ Proposed Rules, page 4179). We question whether it is necessary for ditches to be considered because they are considered under section 33 U.S.C. 1362 which treat ditches as point sources.

However, should ditches be retained in the new rules we feel that further clarification should occur. The proposal seeks to include ditches that are jurisdictional if they satisfy any of the conditions identified in paragraph (a)(1), ditches that are constructed in a tributary as defined in paragraph (c)(11) or are constructed in adjacent wetlands as defined in paragraph (c)(1). The Notice provides two possible explanations for Congressional exemptions for ditches. We believe Congressional intent was to exempt from federal jurisdiction the discharge of dredged or fill materials from normal farming practices including maintenance, emergency reconstruction of recently damaged parts of currently serviceable structures and the construction or maintenance of farm or stock ponds or irrigation ditches and the Agencies should not seek regulatory authority over them.

The inclusion of ditches as a paragraph (a)(1) jurisdictional or a (c)(11) tributary jurisdictional water which includes paragraph (a)(1) through (a)(6) including (a)(3) ditches seems somewhat circular. In Wyoming many ditches will begin from a water source which may be jurisdictional. That ditch will then follow the gradient to move water into an upland which then is irrigated. We believe The Congressional exemptions in 33 U.S.C.§ 1344 exempt irrigation ditches and structures even in paragraph (c)(11) circumstances.

The proposed definitions for ditches seem to clearly exempt ditches in uplands from jurisdiction but those portions of a ditch which fall into paragraph (c)(11) appear to not be exempted by the proposed rules. It makes very little sense to exempt part of a ditch while requiring the most important part of the ditch, *i.e.* that portion which transfers the water for irrigation to the upland and laying in the flood plain to not be exempt. In order to divert the water from the tributary, the structures and a portion of the ditch necessary to move the water to areas to irrigate have to be located within the flood plain. Therefore, we believe that it should be expressly and clearly articulated that ditches, including the necessary structures and portions of the ditch which lay within the high water mark or flood plain of a tributary are exempt from being considered jurisdictional waters.

The Agencies also request comments on the definition of ditches ( F.R./Vol 84, No. 31/ Thursday, February 14, 2019/ Proposed Rules, page 4182). Again, if you retain ditches in the rules, it may be advisable to establish a definition for irrigation ditches, to clearly establish, within 33 USC § 1344 that this subset of ditches has been exempted from jurisdiction by Congress.

The Agencies request comments on the proposal to establish a distinct jurisdictional category for lakes and ponds ( F.R./Vol 84, No. 31/ Thursday, February 14, 2019/ Proposed Rules, page 4184). We will limit our comments to those sections defining those waters which **are not** waters of the United States. We support the inclusion of farm and stock watering ponds in this exemption as consistent with the Congressional exemption in 33 USC §1344.

The Agencies request comments on specific issues regarding wetlands (F.R./Vol 84, No. 31/ Thursday, February 14, 2019/ Proposed Rules, page 4189). Wyoming Farm Bureau supports the regulatory text requiring that wetland areas must satisfy all three wetland delineation criteria (*i.e.* hydrology, hydrophytic vegetation, and hydric soils) under normal circumstances. We urge the Agencies to go a step further. To complement the new definition of "upland," the definition of "wetland" should be revised to clearly state that an area that does not satisfy all three wetland delineation criteria under normal circumstances is not a jurisdictional wetland.

We also support the efforts to establish that wetlands are only jurisdictional when they abut a water of the U.S. We feel this definition is superior to the current definition. The previous definition lead to considerable confusion and allowed the Agencies to expand their reach to isolated wet areas.

The Agencies are seeking comments on the proposed exemptions (F.R./Vol 84, No. 31/ Thursday, February 14, 2019/ Proposed Rules, page 4196). As mentioned earlier in our comments, we support the exemption provided under subsection (7) for farm and stock watering ponds. We also support the exemptions under subsection (2) for groundwater. We support the exemption under subsection (3) for ephemeral features. We support the exemption for subsection (4) for ditches and would urge the Agencies to consider our comments previous on the concerns of irrigation ditches that have beginning portions in tributaries. We believe the subsection (5) exemption for prior converted cropland is consistent with Congressional intent. Subsection (6) discusses "artificially irrigated areas. This terminology is ambiguous since common usage for irrigation itself deals with moving waters to dry areas to support crop production. The term artificial merely confuses the issue and could lead to future conflict over what that term is supposed to mean. We also support the exemptions identified in subsections (8), (9) and (10).

We note that under Part 117.1 (1) The definition for subsection (v) is missing which was included in the

previous parts. We also note under §230.3(3)(xvi) should be (xiv).

**Additional comments:**

In several areas of the preamble it discusses processes dealing with identification of jurisdictional areas by utilization of maps, areal photos and other desk top tools. We support the landowner having the benefit of the doubt and feel that field evaluations should be the presumptive approach when determining jurisdictional issues.

Given the significant civil penalties that can be levied by the Agencies, we support efforts to provide clear rules that do not require significant expenditures of resources in order to determine what a landowner's regulatory exposure is for an action. We again note the issues raised with Andy Johnson when he built a stock pond and the threatened fines by the Agencies for violation of the CWA.

We believe the Federalism approach where areas not covered by federal jurisdiction can be adequately regulated by state or local governmental entities. Again we reiterate that Wyoming currently has adequate legal authority to cover state waters and with the cooperation with federal agencies, the process of protection of waters from pollution can be accomplished.

**Conclusion:**

On behalf of the over 2,600 ranchers and farmers in Wyoming we appreciate the opportunity to comment on these proposed rules. Overall we are very supportive of the the proposed rules. We cannot stress enough that the Federalism approach has the benefit of including state and local entities in this approach and recognizes Congressional intent to retain states as the primary entity to address water and land protection. Thank you for your consideration.

Sincerely,

Ken Hamilton
Executive Vice President

cc AFBF NER Chairmen SGA Chairmen Board
Congressional Delegation Governor's Office Wyoming Dept. of Agriculture

# ATTACHMENT

# C

# Wetlands, Farmers, Just Ducky

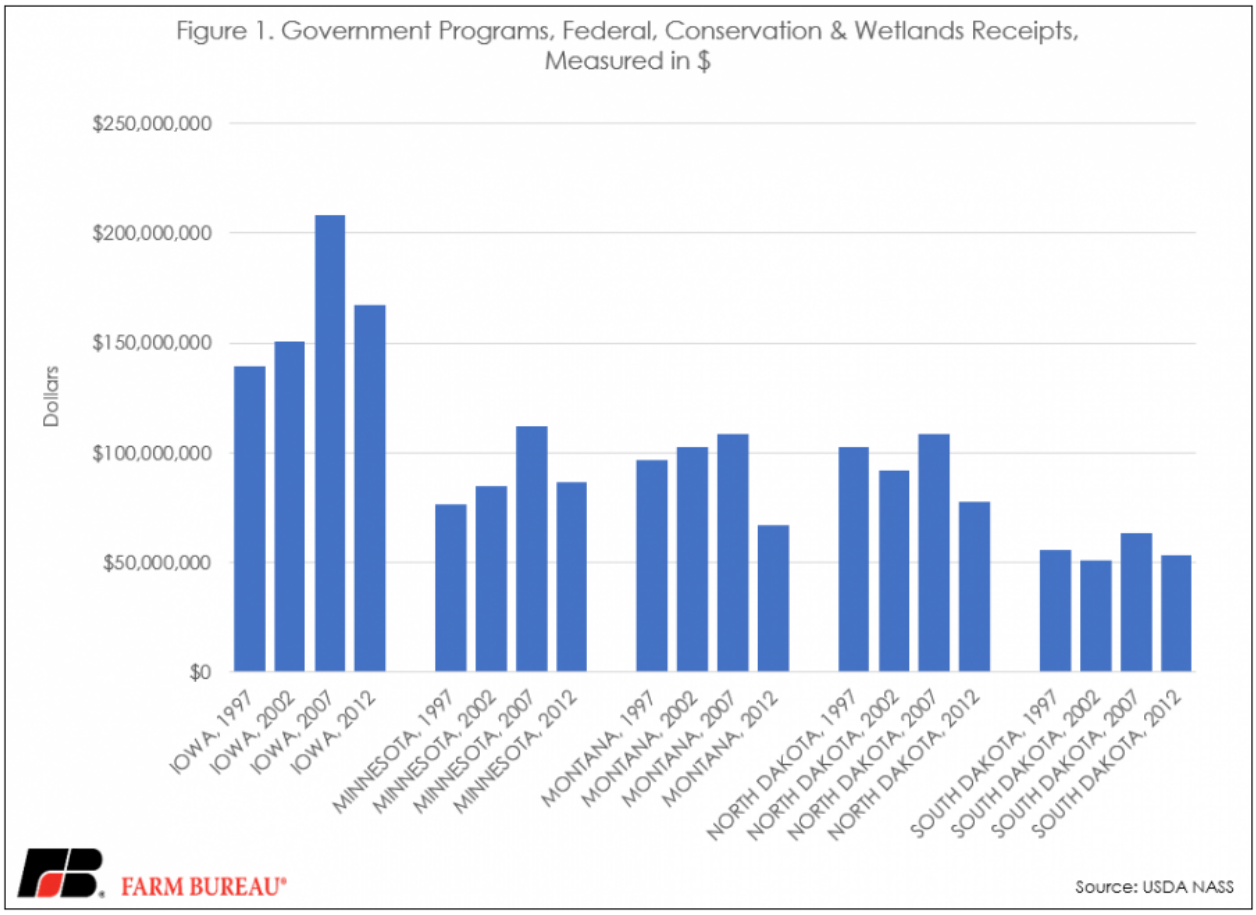
Market Intel / February 8, 2019

Between the 2018 Farm Bill, USDA's interim final rule for "Highly Erodible Land and Wetland Conservation" programs and the Environmental Protection Agency's revised Clean Water Rule we've been talking a lot about wetlands. So, what do we really know about wetlands in the U.S.? Are there more or less of them? Are private property owners or state or federal governments making investments to ensure wetlands are preserved? If efforts are underway, are they working or not? To the Prairie Pothole Region, an important stop in the migratory duck flyway, we go for answers!

According to Ducks Unlimited, each spring millions of ducks and geese pass through the PPR, which lies within Iowa, Minnesota, North Dakota, South Dakota and Montana. The PPR, with its wetlands and grasslands, provides important breeding habitat for the 10 most common species of ducks: mallards, gadwalls, American wigeons, green-winged teal, blue-winged teal, northern shovelers, northern pintails, redheads, canvasbacks and scaups. Nest success and hen mortality during breeding are the most important factors related to change in mid-continent duck populations.

Given the importance of the PPR to our feathered friends, it is no wonder that wetland inventories are so closely watched. Data from USDA and the U.S. Fish and Wildlife Service reveals that farmers, who are often also sportsmen, have taken habitat preservation seriously and the results are something to quack about.

Within the PPR, farmers have heavily participated in federal conservation and wetlands government programs. In fact, between 1997-2012 more than $2 billion was spent on these programs in the PPR alone.

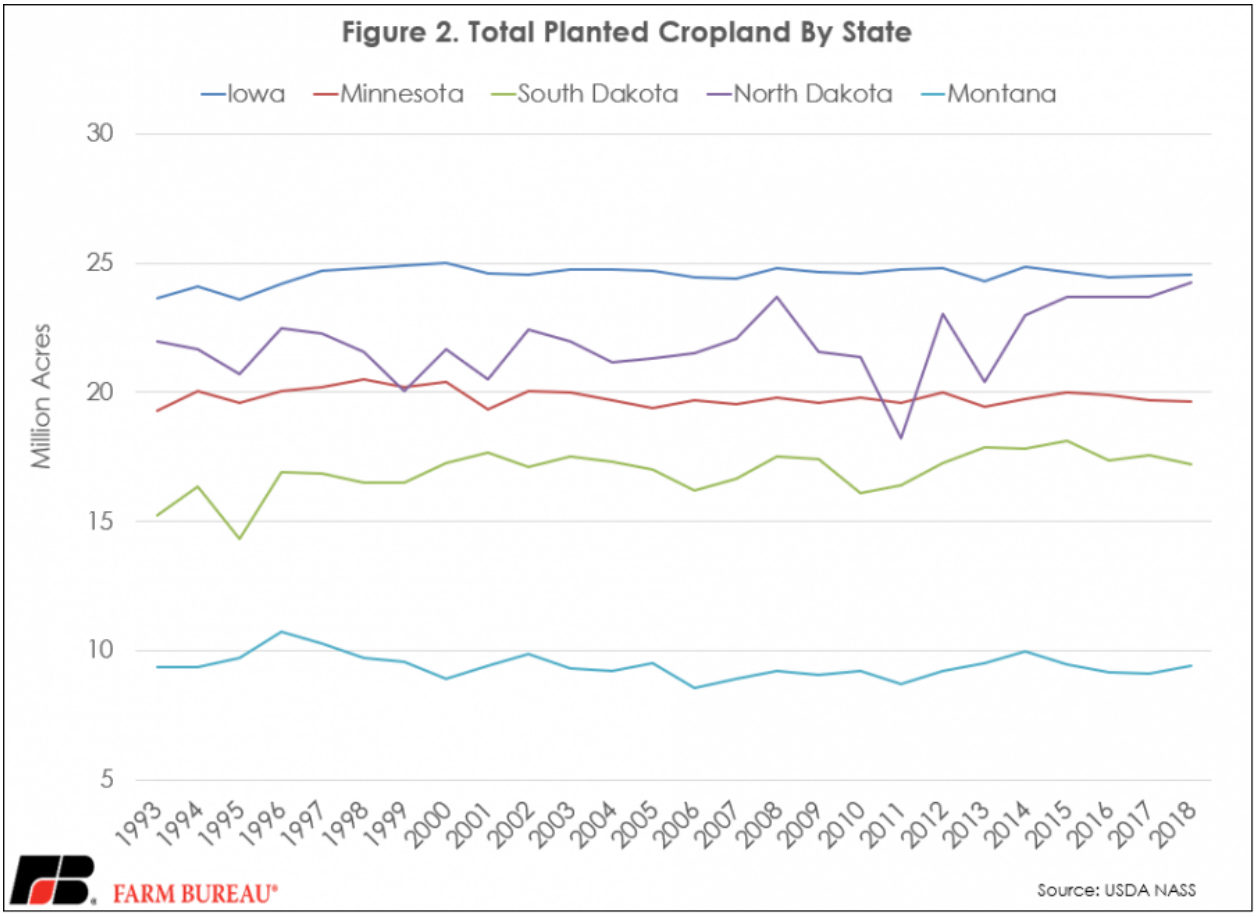



The largest federal program in which farmers have participated is the Conservation Reserve Program. CRP is the largest federally administered private-land retirement program, with annual outlays approaching $2 billion per fiscal year. Over the last 15 years, the number of CRP acres enrolled in wetland and buffer practices has more than doubled, from 2.5 million acres to nearly 5.3 million acres, despite an overall decline in CRP acres. In 2018, 23 percent of all CRP acres were enrolled in these practices, up from 7 percent in 2004. That means that today, nearly one in four acres enrolled in CRP has wetland and buffer

practices on the landscape. The 2018 Farm Bill will expand CRP acreage to 27 million acres by 2023, up from the current 24 million acres. If the trend of installing wetland and buffer practices on CRP lands continues, an increase in wetland acres is likely.

In addition to CRP, landowners have also utilized the Wetlands Reserve Program, which is a voluntary program that offers financial support to landowners for wetlands restoration and protection projects. Across the U.S., over the last decade, nearly $3 billion has been invested over 2.6 million acres in this program alone. Of those totals, over 300,000 acres and nearly $0.5 billion in funding has been directed to the PPR.

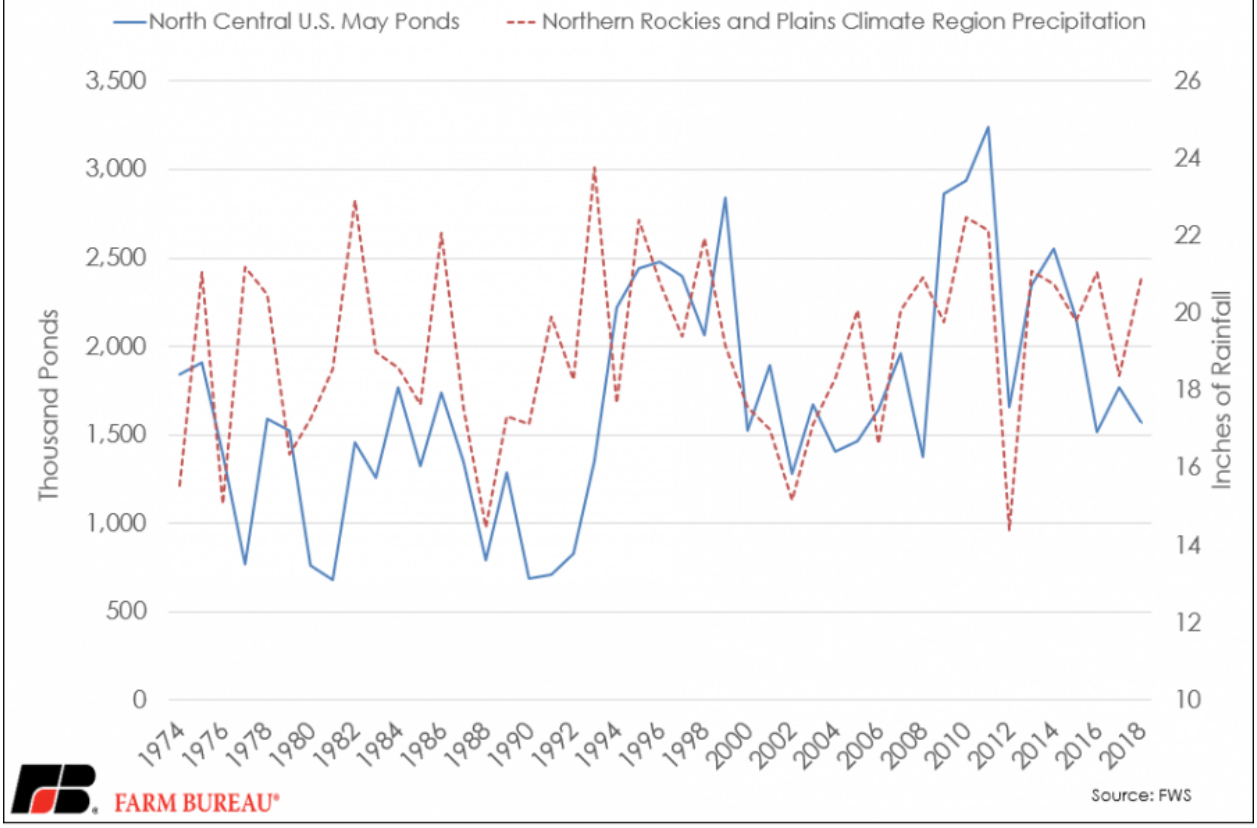
Meanwhile, although the mix of crops planted in the PPR may have changed over the years, the total number of acres planted to cropland has remained virtually the same. This means that in spite of high commodity prices a few years ago, farmers did not plow under their prairies or drain their wetlands en masse. Instead, they remained committed to maintaining conservation efforts, alongside their farming and ranching operations.



In addition to farmers and ranchers, the Fish and Wildlife Service is also doing its part to ensure that wetlands are prevalent. In the last 15 years, acreage under FWS control has increased by nearly 1.3 million acres in the PPR, an increase of 26 percent. This has brought total FWS acreage in the region to 6.2 million acres. Nationally, FWS controls more than 855 million acres across the U.S. and its territories.

So, how have our feathered friends fared? According to the U.S. Fish and Wildlife Service's Waterfowl Population Statistics, 2018, efforts to preserve wetlands seem to be working. The report estimates the number of ponds available to nesting ducks within the northcentral U.S. (Because nesting ducks are territorial, the number of ponds, not just the overall acreage of ponds is important.) Figure 3 reveals the number of ponds, which are highly dependent on rainfall, has averaged higher over the years since the 1996 farm bill was passed. This larger number of May ponds should mean a larger duck population. And indeed, according to the same FWS report, in the traditional PPR survey area, the total duck population estimate in 2018 was 41.2 million birds. This estimate is 17 percent higher than the long-term average (1955–2017). Figure 4 tracks the population of the top 10 duck species in the PPR since 1955.

**Figure 3. Estimated Number of May Ponds in North Central U.S. (thousands)**

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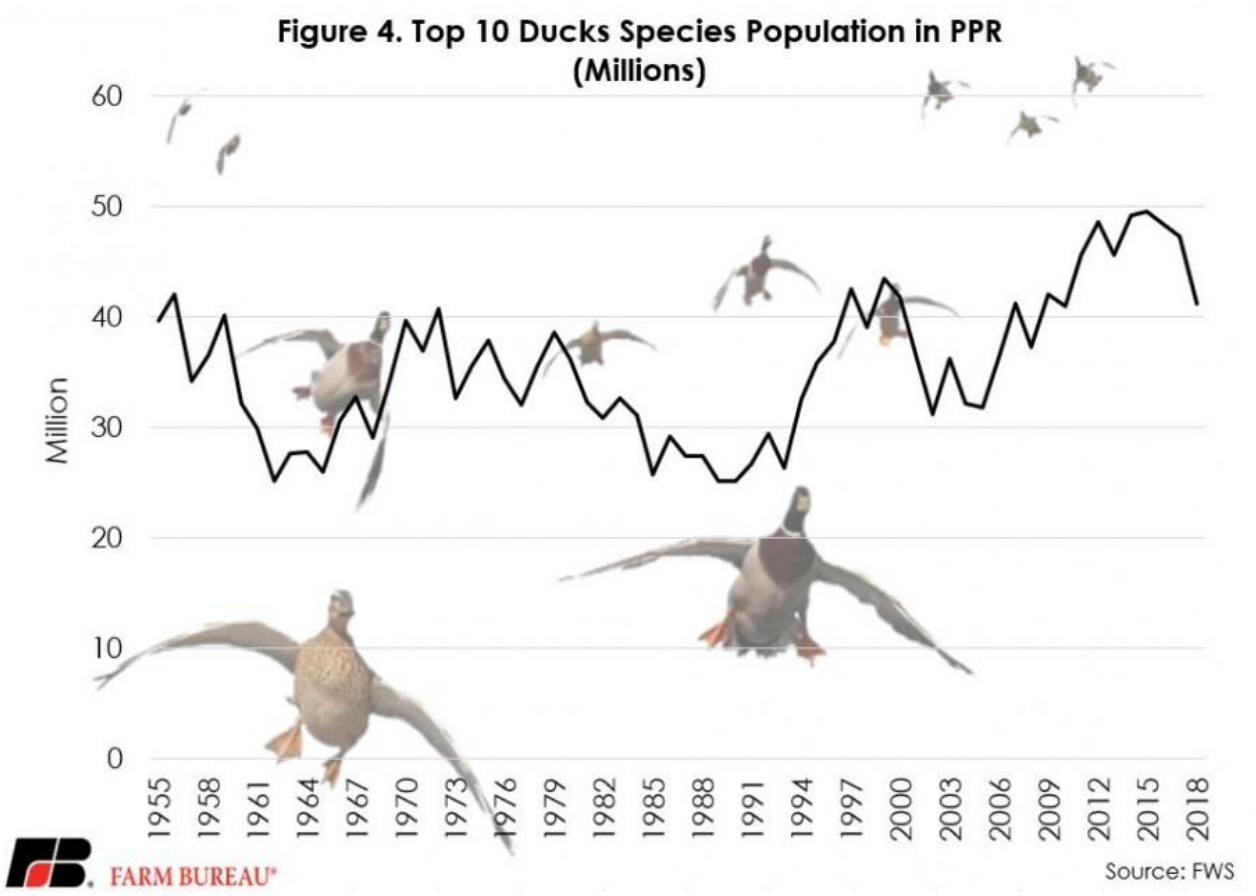
Source: FWS

**Figure 4. Top 10 Ducks Species Population in PPR (Millions)**

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Source: FWS

**Contact:**
Veronica Nigh
Economist
(202) 406-3622
veronican@fb.org

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