National Milk Producers Federation

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April 15, 2019

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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)

I. Introduction

The NMPF, established in 1916 and based in Arlington, Virginia, develops and carries out policies that advance the well-being of dairy producers and the cooperatives they own. The members of NMPF's cooperatives produce the majority of the U.S. milk supply, making NMPF the voice of dairy producers on Capitol Hill and with government agencies.

NMPF and its members are committed to protecting U.S. waterways through voluntary efforts, as well as through regulatory compliance with the Clean Water Act (CWA). Clean water is central to healthy ecosystems, secure water supplies for human and animal consumption, and to the production of milk and other dairy products. For this reason, we applaud the continued efforts of the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (COE) to keep our waters clean. We are committed to working with the EPA and COE to finding effective ways to achieve these important goals.

Because of the extensive efforts of our members to manage the natural resources on which they depend for their livelihoods, NMPF has a strong interest in the proposed rule to define "Waters of the United States" under the CWA (EPA-HQ-OW-2018-0149, 84 Fed. Reg. 4154 (February 14, 2019). The dairy industry and all of agriculture need a WOTUS rule with certainty that complies with the U.S. Constitution, applicable statutes, and Supreme Court decisions that interpret these laws.

The proposed rule addresses important natural features that are at the center of our members' operations. Eighty percent of the milk production in the U.S. occurs in thirteen states: Arizona, California, Colorado, Iowa, Idaho, Michigan, Minnesota, New

Mexico, New York, Pennsylvania, Texas, Washington, and Wisconsin.[1] In two of these states, Arizona and New Mexico, intermittent and ephemeral streams represent 95-96% of the streams in the state, according to the INDUS Corporation maps produced under contract to EPA and based on U.S. Geological Service (USGS) data.[2] In seven of these states, over 50% of the streams are intermittent or ephemeral.[3] In Minnesota and Michigan, ditches comprise 26% and 36%, respectively, of the streams.[4] Using a database of intermittent and seasonal streams from the National Hydrologic Database [specifically titled "USGS Small-scale Dataset – Global Map: 1:1,000,000-Scale Streams of the United States 20146"], 2727 dairy farms with 500 lactating cows or more may be impacted by the proposed rule.

We strongly support the basic jurisdictional line you have drawn around intermittent and more significant waters as being within the regulatory power of the United States. We believe this line reflects an accurate application of the U.S. Constitution, statutes, and court decisions interpreting the law. "Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, The Corps and the EPA [enjoy] plenty of room to operate in developing some notion of an outer bound to the reach of their authority." *Rapanos v. United States*, 574 U.S. 715, 758 (2006)

We are very eager for this effort of the Administration to lead to a stable regime for federal/state management of waters of the United States that will endure across Administrations and the inevitable changes in the political party running the government. The inability of landowners to have clarity on the rules governing implementation of projects on their own land has gone on too long.

Within this line, we urge you to adopt a protective position with respect to the disposition of more minor issues that arise with waters of the United States. In our view, you have correctly delineated the jurisdiction of the United States over these waters. Our next highest concern is to create public support for your policy and a therefore a stable policy position. Meeting this goal will require the Administration to show the public that it shares its concern for the integrity of the nation's water resources by defaulting towards protection of jurisdictional resources.

The Administration can build further support for its position by developing, pursuing, and publicizing a funding and policy plan to protect the waters of the United States that are within its jurisdiction. A corollary part of the plan will be to show how it

[1] Milk Production (January 2019). USDA, National Agricultural Statistics Service. ISSN:1949-1557. https://downloads.usda.library.cornell.edu/usda-esmis/files/h989r321c/44558m869/j3860f20k/mkpr0319.pdf

[2] EPA State and National Maps of Waters and Wetlands. U.S. House of Representatives Committee on Science, Space, and Technology. Accessed November 11, 2014. http://science.house.gov/epa-maps-state-2013#overlay-context

[3] *Ibid.*

[4] *Ibid.*

will work with States to ensure that waters within their jurisdiction are adequately protected. Such a plan may rest entirely on existing statutory authority or may require the enactment of new authorities. It may require additional financial resources to do the job right. Showing the public that the Administration is taking its water protection responsibilities seriously by developing and publicizing a comprehensive plan for the protection of all waters of the United States will go a long way to building the needed public and political support for the important policy proposal issued in this NPRM.

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.

We appreciate the opportunity to submit comments on this important proposal.

II. General Legal and Policy Considerations

A. CWA Background and Relevant Supreme Court Precedent

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." The underlying concern in each of the cases was whether the Corps had asserted jurisdiction over waters that fell outside the regulatory authority of the United States. While these cases provide important guideposts concerning the permissible *outer* limits of federal jurisdiction, they offer only 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.

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 does make clear is that minor tributaries must contribute a significant volume of water to, and be not too remote from, navigable waters to lie within the regulatory power of the United States. 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 specific water bodies and features over which the Agencies' *must* assert jurisdiction. It is for the Agencies to identify these waters consistent with the law.

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 correctly 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 normally 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. In this section Congress recognizes, preserves, and protects the rights of States to plan the development and use of land and water resources. The Proposed Rule respects this intent by asserting "that States should maintain responsibility over land and water resources." 84 Fed. Reg. at 4,196. 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. 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.

Congress integrated States into the overall program for protection the nation's waters in several ways. Federal-State sharing of responsibilities is built into section 401 and 402 certification and permit programs. 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. Congress intended through the Clean Water Act for States to play a central role in protecting our nation's waters.

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. NMPF members need a rule that draws clear lines of jurisdiction they can understand without hiring 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. 2056, 2058 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 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.

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, as well as clearly define the terms used to describe water features that are affected by the WOTUS delineation, is something the Agencies should cite to support the Proposed Rule's more limited view of federal jurisdiction.

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, NMPF supports 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 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)). We support this definition.

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 simply 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 the 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.

Even though the proposed definitions of tributaries and adjacent wetlands eliminate the need for "case-specific determinations of a "significant nexus", it does not eliminate the fact that the waters deemed jurisdictional in this proposal will have a "significant nexus" to traditionally navigable waters. As the Agencies are aware, some district courts have incorrectly found federal jurisdiction over waters based solely on the "significant nexus" test. *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).

To provide the strongest possible guidance to all courts about the jurisdictional test for waters of the United States under this rule, the Agencies may consider being even more explicit about the "significant nexus" between the waters it deems jurisdictional and traditionally navigable waters. So for example, the Agencies could add a definition for significant nexus under § 328.3(c) that emphasizes the contribution

of an intermittent or perennial flow of water to a § 328.3(a)(1) water. The definition of tributary under § 328.3(a)(2) could be amended accordingly to state:

Tributaries with a significant nexus to waters identified in paragraph (a)(1) of this section;

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 4187. 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.

We support the Agencies' approach to drawing the line around federal jurisdiction and 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 ephemeral 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.

Finally, we believe the Agencies' reference to "snowfall" and "snowpack" as parts of the definitions of "intermittent" and "ephemeral" serves to confuse the definition of these terms more than helps to clarify them. We support the basic definition of intermittent as surface water flowing more than in direct response to precipitation. The Agencies explained in the preamble that flow due to a "snowfall" is viewed as a direct response to precipitation, while flow due to the melting of a "snowpack" is something more substantial. While this distinction in the contribution of snow to flow makes some sense, it serves only to blur the distinction between a predictable and episodic flow because it will be very difficult to untangle when snow in a snowpack is snowfall and when it is part of the snowpack. Snow in a snowpack was a snowfall at some point in its snowy life.

Fortunately, this confusion can be avoided by simply eliminating any reference to "snowfall" and "snowpack" in the rule. The key concept to be captured is that a stream is intermittent if it continuously flows during certain times of a typical year and more than in direct response to precipitation. Flows at less than this frequency are ephemeral. The preamble identifies no reason why the source of that flow is material to the task making a determination of federal jurisdiction over such waters. We believe it is not material. Reference to "snowfall" and "snowpack" should be eliminated from the definitions in the rule making it easier to make jurisdictional determinations for these waters.

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 support the Agencies' effort to strengthen the clarity of the definition of ditches by creating a separate, discrete category of jurisdictional ditches. Administration of ditches has long been an area of uncertain federal regulation which plays out in the heart of producers' operations. This proposed rule will go a long way to clear this up. The creation of a new category for ditches is important and is very welcome.

At the same time, we believe the treatment of ditches in the proposed rule needs to be further clarified. We appreciate that the foundational scope for federal regulation of ditches is provided by the section 404(f)(1)(C) exemptions for construction and maintenance of irrigation ditches. Still, a question remains about the jurisdictional status of a certain kind of irrigation ditch in the West where transport of water is critical to agriculture production. The described scenario is very common throughout the region:

> *A point of diversion is created on a tributary to run water through a ditch constructed in the upland that is used to irrigate agriculture land. It was not created in the channel of an existing feature of water. The ditch then empties downstream on the same tributary.*

We do not believe that the ditch described in the above scenario should be considered jurisdictional. In considering the status of this real ditch, a number of issues are presented by the language in the proposed rule:

- Proposed § 328.3(a)(3) defines ditches that "alter a tributary" as being jurisdictional. It seems that our ditch example has "altered" the tributary in question by diverting an amount of its flow through the ditch, thereby making it jurisdictional. If this is not the case, then the section should be further clarified in both the language of the rule itself and in the preamble explanation of the section.

- Proposed § 328.3(c)(11) defines tributary as retaining its status if it flows through an "artificial break" so long as the artificial break conveys perennial or intermittent flows to a tributary or other jurisdictional water at the downstream end of the break. Is the upland ditch in question not such an "artificial break"? If not, this should be further clarified. Otherwise, it seems as if the ditch in question, or just the water in it, would be jurisdictional under the current proposed language.

- The Agencies explain in the preamble that waters flowing through an excluded structure may also convey flows to a downstream jurisdictional structure. 84 Fed. Reg. at 4194-95. The solution proposed in the preamble is to exclude the ditch

from jurisdiction, but to continue including the upstream and downstream portions of such break as waters of the United States. Id.

This explanation does not square with the proposed language in the rule that is cited above. Under §328.3(a)(3), the ditch arguably "alters" a tributary and is therefore jurisdictional. If the Agencies intend to exclude from jurisdiction such ditches, this should be made clear in the rule itself.

It also does not square with the definition of tributary flowing through an artificial break in § 328.3(c)(11). Nothing in this section indicates that the portion of the tributary flowing through the artificial break loses its jurisdictional status while flowing through the break as does the language in the preamble. Either the preamble or the rule itself, or both, needs to be clarified.

As noted in the preamble, whether a ditch is jurisdictional turns in part 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 4181. 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.* NMPF requests 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 jurisdictional water in a typical year. *See id.*

NMPF believes 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.

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").

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.

NMPF recommends 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.

NMPF supports 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. NMPF supports 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." We 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 Stormwater 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.

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.

Similarly, the stormwater exemption should be clarified by explaining that if some portion of stormwater has its source from a flooding of a jurisdictional ditch, and this water flows into a non-jurisdictional ditch, the non-jurisdictional ditch does not gain jurisdictional status because of the presence of jurisdictional water after a flooding event.

D. 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 recommend that the Agencies codify the preamble clarifications in the text of the Final Rule. In particular, the Final Rule should explicitly exclude lakes and ponds "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, 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 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.

V. Implementation and Burden of Proof

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

We 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.

Sincerely,

Jamie Jonker
Vice President
Sustainability & Scientific Affairs