



National Milk Producers Federation

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Agri-Mark, Inc.
Associated Milk
Producers Inc.
Bongards' Creameries
California Dairies, Inc.
Cayuga Marketing
Cooperative Milk
Producers Association
Dairy Farmers of
America, Inc.
Ellsworth
Cooperative Creamery
FarmFirst Dairy
Cooperative
First District Association
Foremost Farms USA
Land O'Lakes, Inc.
Lone Star Milk Producers
Maryland & Virginia
Milk Producers
Cooperative Association
Michigan Milk
Producers Association
Mount Joy Farmers
Cooperative Association
Northwest Dairy
Association
Oneida-Madison Milk
Producers Cooperative
Association
Prairie Farms Dairy, Inc.
Scioto Cooperative
Milk Producers'
Association
Southeast Milk, Inc.
Tillamook County
Creamery Association
United Dairymen
of Arizona
Upstate Niagara
Cooperative, Inc.

Submitted via www.regulations.gov

February 7, 2022

Office of Water (4504-T)
The Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, D.C. 20460

Re: Docket No. EPA-HQ-OW-2021-0602

Dear Sir or Madam:

The National Milk Producers Federation (NMPF) thanks you for the opportunity to comment on the proposed rule “Revised Definition of the Waters of the US.” NMPF, established in 1916 and based in Arlington, VA, 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 our 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.

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 “Revised Definition of the Waters of the US,” EPA-HQ-OW-2021-0602, December 7, 2021. The dairy industry and all of agriculture need a sustainable Waters of the U.S. (WOTUS) rule that will last and complies with the U.S. Constitution, applicable statutes, and Supreme Court decisions that interpret these laws.

NMPF has been active in the development of the several WOTUS rules, filing comments five times just over the past decade and has met with EPA on numerous occasions. NMPF was pleased with the development of the Navigable Waters Protection Rule (NWPR), which provided certainty to dairy farmers about what was and was not subject to NWPR jurisdiction. The NWPR rule provided long-needed clarity for dairy farmers. Unfortunately, we feel the agency took an “all too fast” approach and failed to truly understand how the NWPR was performing in protecting the nation’s water before moving forward with a new definition. Changing the definition of such an important rule every few years does service to no one and fails at protecting the waters of the United States.

Additionally, in following with the “all too fast” approach, the agency did not listen to our and others’ requests to extend the deadline for comments for this proposed rule, only allowing 60 days to review the proposed changes to the pre-2015 definition of WOTUS. This 60-day period does not provide a meaningful opportunity for stakeholders to review the proposed rule and supporting documents.

In addition to the extensive comments we have submitted in the past (appended at the end of these comments) which are still relevant today, NMPF supports the Farm, Ranch and Rural Communities Committee’s (FRRCC) recommendations to EPA and the Army Corps of Engineers which include¹:

1. Adhere to Clean Water Act (CWA) and relevant Supreme Court precedent. Important Supreme Court cases on this issue include *US v. Riverside Bayview Homes*, *Solid Waste Agency of Northern Cook County v. US Army Corps of Engineers*, and *Rapanos v. United States*. Together, the cases reinforce that Congress placed limits on the scope of federal jurisdiction under the CWA by using the term “navigable” and by recognizing, preserving, and protecting the primary responsibility and rights of states over land and water use and development. Any definition of WOTUS should be guided by these cases and should be limited to traditional navigable waters and territorial seas. Jurisdiction over non-navigable tributaries should be limited to those tributaries containing clearly discernable physical features, as well as consistent flow into traditionally navigable waters. Any consideration for adjacency must be limited to wetlands that directly abut WOTUS.
2. Define WOTUS using clear terms that are easy to interpret and apply. The most important aspect of any definition of WOTUS is it must be easily interpreted by farmers, ranchers, and leaders of rural communities and interpreted with clear lines of jurisdiction. It is necessary that a new WOTUS rule avoid vague terminology that both landowners and regulators cannot apply without engaging in burdensome analyses. Accurate and current online, interactive tools should be considered for the purpose of mapping jurisdictional waters to provide as an informal guide to farmers, ranchers, and leaders of rural communities. Agency determinations, however, must be made in the field to ensure a holistic approach in arriving at an accurate determination and provide for adequate due process.
3. Define jurisdictional features with an eye toward allowing farmers, ranchers, and rural communities the necessary flexibility to implement innovative environmentally beneficial projects that do not adversely impact the function or water quality of WOTUS.

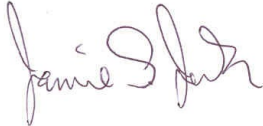
¹ Farm, Ranch and Rural Communities Advisory Committee Recommendations to U.S. Environmental Protection Agency Administrator Michael S. Regan. *December 2021*.

4. Retain exclusions that are critical to farmers, ranchers, and rural communities and recognized regional differences. Waters that do not fit into any of the jurisdictional categories within the new WOTUS rule should not be jurisdictional. There is, however, potential for misinterpretation and misapplication, so well-defined, clear exclusions are necessary for certainty and accurate and consistent implementation. The following exemptions are among the most important for farmers, ranchers, and rural communities:
 - Prior converted cropland (PCC) – PCC no longer exhibits defining characteristics of a wetland and no longer performs wetland functions, and thus, lands should not be considered WOTUS. The PCC definition included in the 2020 Rule codified the principle from the 1993 regulation. Farmers and ranchers nationwide have relied upon the PCC exclusion for decades, and as the agencies move forward with rulemakings, it must be retained as it was in the 2020 Rule.
 - Groundwater – EPA should continue to exclude groundwater in the text of the regulations.
 - Farm ditches, road ditches, canals, ponds, playas, stock ponds, prairie potholes and other isolated features – These are all features commonly found on farms and are used to collect, convey, or retain water for the purpose of agricultural use. Farmers and ranchers should not have the burden of proving the historical status of these features. That burden, instead, should be on the agencies.
 - Storm water detention, tail water recovery, or other environmentally beneficial practices should not be considered WOTUS.
 - Wastewater, reclaimed water, or recycle water systems should not be considered WOTUS.
5. In addition to the technical comments above, the FRRCC recommends to the agencies to reconsider the roundtable process. The agencies should retain previous public input processes to hear from the public to include all stakeholders. All parties should be allowed to provide public input and be heard equally. The FRRCC also wants to emphasize the importance of ensuring USDA is in lock step with the regulatory process surrounding WOTUS.

Finally, subsequent to the publication of this proposal, the United States Supreme Court granted Certiorari in *Sackett, Michael, et ux. V. EPA, et al.* NMPF believes it is in everyone's best interest to pause any and all WOTUS rulemaking until such time as the Supreme Court rules on this important case. In the interim time, we feel that EPA and the Department of the Army should take another look at the Navigable Waters Protection Rule which was a vast improvement over the 2015 WOTUS rule.

We appreciate the opportunity to submit comments on this important effort and look forward to continuing to work with the agencies on this.

Sincerely,

A handwritten signature in black ink, appearing to read "Jamie Jonker". The signature is fluid and cursive, with the first name "Jamie" written in a larger, more prominent script than the last name "Jonker".

Dr. Jamie Jonker
Chief Science Officer
Vice President, Sustainability and Scientific Affairs

Attachments:

NMPF Interpretive Rule Comment 7-07-14

NMPF WOTUS Comments EPA-HQ-OQ2017-0203 09-27-17

NMPF WOTUS Comments EPA-HQ-OW-2018-0149 04-15-19

NMPF-WOTUS-Comments 11-14-14

NMPF WOTUS Comments EPA-HQ-OW-2017-0203 8-13-18