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Re: Docket ID No. EPA-HQ-OW-2021-0328
Definition of "Waters of the United States"; Request for Pre-Proposal Recommendations

AFBF, along with the undersigned agricultural organizations, appreciates the opportunity to submit these recommendations to the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") (collectively, "the Agencies") in response to the Agencies' August 4, 2021 Notice soliciting pre-proposal feedback on the definition of "waters of the United States" ("WOTUS"). *See* 86 Fed. Reg. 41,911 (Aug. 4, 2021).

Stating the obvious, the definition of WOTUS is critically important to farmers and ranchers across the country, which is why AFBF and the undersigned groups have participated in numerous rulemaking and legislative proceedings and in litigation on this issue for decades. Farming and ranching are water-dependent enterprises. Whether they are growing plants or raising animals, farmers and ranchers need water. For this reason, farming and ranching tend to occur on lands where there is either plentiful rainfall or adequate water available for irrigation. There are many features on those lands that are wet only when it rains and that may be miles from the nearest "navigable" water. Farmers and ranchers regard these features as simply low spots on farm fields.

The regulation of low spots on farmlands and pastures as jurisdictional "waters" means that *any* activity on those lands that moves dirt or applies any product to that land could be subject to regulation. Everyday activities such as plowing, planting, or fence building in or near ephemeral drainages, ditches, or low spots could trigger the CWA's harsh civil or even criminal penalties unless a permit is obtained. The tens of thousands of additional costs for federal permitting of ordinary farming activities, however, is beyond the means of many family or small business farming or ranching owners. And even those farmers and ranchers who can afford it should not be forced to wait months, or even years, for a federal permit to plow, plant, fertilize, or carry out any of the other ordinary farming and ranching activities on their lands. For all of these reasons, farmers and ranchers have a keen interest in how the Agencies define "waters of the United States."

We were disappointed by the Agencies' recent announcement of their intent to revise the definition by first repealing the Navigable Waters Protection Rule ("NWPR") and second refining the pre-2015 definition of WOTUS. AFBF and the undersigned groups feel strongly that the NWPR was a clear, defensible rule that appropriately balanced the objective, goals, and

policies of the Clean Water Act ("CWA"). We would have liked to see the Agencies keep the NWPR in place,[1] rather than revert to definitions of WOTUS that test the limits of federal authority under the Commerce Clause and are not necessary to protect the Nation's water resources. The Agencies can ensure clean water for all Americans through a blend of the CWA's regulatory and non-regulatory approaches, just as Congress intended. It is unnecessary (and unlawful) to define non-navigable, intrastate, mostly dry features that are far removed from navigable waters as "waters of the United States" to try to achieve the Act's objective.

Nonetheless, because the Agencies have initiated pre-proposal outreach, we offer several recommendations below regarding (i) key legal and policy guideposts that the Agencies must adhere to any WOTUS definitional rule; and (ii) how the Agencies should define certain categories of jurisdictional and non-jurisdictional waters while adhering to those guideposts. AFBF and the undersigned organizations appreciate the Agencies' efforts to ensure a broad, transparent stakeholder engagement process, and we urge the Agencies to take the time to consider fully the perspectives offered by the agricultural community and other stakeholders before moving ahead on any rulemaking proposals.

I. The Agencies Should Retain the Navigable Waters Protection Rule.

As a threshold matter, AFBF and the undersigned groups remain highly supportive of the NWPR. The NWPR implements the "objective of the Clean Water Act to restore and maintain the integrity of the nation's waters." 85 Fed. Reg. at 22,250. In promulgating the rule, the Agencies relied on science to "inform[] [their] interpretation of [WOTUS]," while correctly recognizing that "science cannot dictate where to draw the line between Federal and State or Tribal waters, as those are legal distinctions that have been established within the overall framework and construct of the CWA." *Id.* at 22,271. To correct the fatal flaws in the 2015 WOTUS Rule, the Agencies carefully struck "a reasonable and appropriate balance between Federal and State waters" that is "intended to ensure that the agencies operate within the scope of the Federal government's authority over navigable waters." *Id.* The NWPR also brought an end to all of the uncertainty created by the Agencies' aggressive assertions of jurisdiction under prior definitions by including "categorical bright lines" to improve clarity and predictability. *Id.* at 22,273.

We believe the Agencies succeeded in crafting a rule that adheres to the key legal and policy guideposts (detailed below) and is easier to implement than prior definitions of WOTUS. While it is not perfect, the NWPR goes a long way toward providing clarity for farmers and ranchers, who are better able to identify what features on their land may be jurisdictional and

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[1] AFBF and the undersigned groups understand that the U.S. District Court for the District of Arizona just days ago "vacated and remanded [the NWPR] for reconsideration." *See Pasqua Yaqui Tribe v. EPA*, No. CV-20-00266 (D. Ariz. order dated Aug. 30, 2021). As the Agencies reconsider the NWPR, we urge that they retain various aspects of the NWPR discussed in these recommendations for the reasons provided below.

thus, avoid significant permitting costs or productivity losses associated with broader definition of WOTUS.

Rather than expend considerable resources on another rulemaking process—much less two rulemaking processes—the Agencies should focus their efforts on other regulatory and non-regulatory actions under the CWA to improve and protect water quality. To date, the Agencies' justification for initiating the process of repealing the NWPR lacks explanation and support. The Agencies rely heavily on anecdotal and often speculative assertions that the NWPR is already causing "significant, actual environmental harms." *See* EPA, Memorandum for the Record and Supporting Documentation, *available* at https://www.epa.gov/wotus/request-remand-and-supporting-documentation. Additionally, the Agencies' statistics on the increased percentage of negative jurisdictional determinations (JDs) in year one of the NWPR does not prove much. *See* Memorandum for the Record at 2 (comparing AJDs identifying non-jurisdictional aquatic resources between June 22, 2020 and April 15, 2021 with AJDs identifying non-jurisdictional aquatic resources under the 2015 Clean Water Rule and the pre-2015 regulatory regime between June 22, 2018 and April 15, 2020). There are many reasons why the Agencies may have made more "non-jurisdictional" findings during the first year of NWPR implementation compared to any given year under prior rules. For instance, given the NWPR's clearer definitions and elimination of case-specific assertions of jurisdiction, the Agencies may have front-loaded the clearest cases of no jurisdiction. Of course, stakeholders have no way of proving this, because we have no data on the outcomes of however many JDs remain pending. Finally, the Agencies place heavy emphasis on a list of 333 projects that would have required a Section 404 permit under prior definitions, but no longer require a permit under the NWPR, implying that these are causing or will soon cause environmental harm. But this list raises a number of questions. Just to use a few examples:

- What is the Agencies' basis for claiming that a permit would have been required under prior rules to conduct activities affecting ditches constructed in uplands?
- Why would a permit necessarily have been required for activities affecting isolated wetland features or ephemeral features?[2]
- Why would the fact that a permit is no longer required to implement environmentally beneficial projects such as constructing "grassed waterways according to NRCS design standards" or "fish & wildlife enhancement" support

[2] The AJDs for many, if not the vast majority, of these 333 projects do not appear to be associated with a prior JD, so the Agencies' basis for claiming that such projects no longer require permits under the NWPR is unclear. The Agencies cannot fairly assume that a permit would have been required under these features based on how they would have implemented the unlawfully broad 2015 WOTUS Rule. Apart from the fact that the rule was not in effect in nearly 30 states during the time period in question, the rule was invalidated and remanded by two different courts whose holdings covered over a dozen states.

the Agencies' claim that the NWPR is causing or could cause environmental harms?[3]

At bottom, the Agencies appear to assume that narrower federal jurisdiction means a complete lack of water quality controls and that third parties will rush to pollute water features that are no longer jurisdictional, without any state oversight and in quantities that will rapidly impair downstream features. This is pure conjecture. Importantly, the Agencies overlook that federal protections remain in place to prevent whatever destruction the Agencies (or other stakeholders) seem to fear. Among other things, if pollutants are "conveyed through an ephemeral stream to a jurisdictional water, an NPDES may likely still be required." *Resource and Programmatic Assessment for the Navigable Waters Protection Rule*, at 79 (Jan. 23, 2020).

For all of these reasons, the Agencies should not overhaul the NWPR. It is capable of being a durable, defensible rule. The rule thus far has survived opponents' attempts to preliminarily enjoin the rule. But because the Agencies have already announced their intent to initiate rulemaking proceedings to repeal the NWPR and in light of that vacatur order, AFBF and the undersigned agricultural groups offer the following recommendations for what a defensible, durable definition of WOTUS should look like.

II. The Agencies Must Adhere to All Relevant Supreme Court Precedents.

Congress defined "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The precise scope of the terms "navigable waters" and "waters of the United States"—and hence, the jurisdictional reach of the CWA—is unclear. Not surprisingly, the history of the Agencies' definitions of WOTUS has been marred by regulatory uncertainty, exacerbated by the Agencies' litigation losses.

In 1974 and 1977, the Corps issued initial regulations defining "waters of the United States." 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974); 42 Fed. Reg. 37,122, 37,144 (July 19, 1977). The Agencies' interpretation of the term "waters of the United States" and of their own regulations steadily expanded over the next few decades, even as the text remained the same. The Supreme Court confronted those increasingly aggressive interpretations in a series of decisions beginning in 1985.

In *United States v. Riverside Bayview Homes*, the Court addressed whether non-navigable wetlands constitute "waters of the United States" because they are "adjacent to" and "inseparably bound up with" navigable-in-fact waters. 474 U.S. 121, 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

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[3] *See* Addendum, "Actions Associated with an Approved Jurisdictional Determination in ORM2 (June 22, 2020-April 15, 2022) with the No Permit Required Closure Method of 'Activity occurs in waters that are NO longer WOTUS under the NWPR,'" *available at* https://www.epa.gov/sites/default/files/2021-06/documents/combined_4_thru_12_508.pdf.

'navigable.'" *Id.* at 133, 135. Though that case tied jurisdiction over wetlands to a close physical connection to navigable waters, the Agencies nonetheless continued to assert jurisdiction over an increasingly larger universe of waters bearing little or no relation to traditional navigable waters.

In *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs* ("*SWANCC*"), the Court rejected the federal government's assertion of 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 held that the text of the statute would not allow this because the Agencies' interpretation read the term "navigable" out of the Act. *See id.* at 168, 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. The 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). The Court then clarified that, even if there was ambiguity on the question of whether the federal government has jurisdiction over non-navigable, isolated, intrastate waters, it would nevertheless reject the Corps' interpretation of the Act because it impermissibly "alters the federal-state framework by permitting federal encroachment upon a traditional state power"—namely, the "States' traditional and primary power over land and water use." *Id.* at 173-74. In so holding, the Court pointedly reversed the lower court's holding that the CWA reaches as many waters as the Commerce Clause allows. *See id.* at 166.

In *Rapanos v. United States*, a majority of the Court rejected the Corps' assertion of jurisdiction over intrastate wetlands that were not abutting a traditional 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 his opinion, 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.

Together, these Supreme Court cases reinforce that Congress placed important limits on the scope of federal jurisdiction under the CWA by using the term "navigable" and by explicitly recognizing, preserving, and protecting the primary responsibilities and rights of States over land and water use and development. Any definition of WOTUS must be guided by all of these cases, rather than repeat the mistakes of the past. The Agencies need look no further than the poor track

record of the 2015 WOTUS Rule in the courts to recognize this. The 2015 Rule was preliminarily enjoined nationwide because it was "far from clear" that it could be squared with even the most generous reading of Supreme Court precedent. *In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804, 807 (6th Cir. 2015). And even though the Sixth Circuit ultimately lost jurisdiction over the court, several district courts issued preliminary injunctions covering over half of the country. Two of those district courts ultimately held the rule was unlawful and kept those injunctions in place. One court held that the rule "is not sustainable on the basis of the administrative record" and remanded it to the agencies. *Texas v. EPA*, 389 F. Supp. 3d 497, 506 (S.D. Tex. 2019). Another court went much further, holding the Rule's assertion of jurisdiction over all "interstate waters" impermissibly reads the term "navigable" out of the statute; its definition of "tributary" extends federal jurisdiction beyond that allowed under the CWA; and its categorical assertion of jurisdiction over all waters "adjacent" to tributaries was an impermissible construction of the CWA. *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1363-68 (S.D. Ga. 2019). Notably, that court emphasized that the Rule's "vast expansion of jurisdiction over waters and land traditionally within the states' regulatory authority" constituted a "substantial encroachment" into state power that "cannot stand absent a clear statement from Congress" under *SWANCC*. *Id.* at 1370, 1372.

III. Congress's CWA Section 101(b) Policy Is a Fundamental Guidepost in Any Rulemaking to Define "Waters of the United States."

Although the Agencies' pre-proposal Notice refers to the CWA's Section 101(a) objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and various policy priorities in E.O. 13990, it conspicuously neglects to mention the express policy in CWA Section 101(b) "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. § 1251(b). As the cases discussed above instruct, the Agencies cannot deemphasize Section 101(b) when defining WOTUS. The Section 101(a) objective of maintaining the integrity of waters is to be accomplished while implementing the Section 101(b) policy of preserving and protecting states' rights and responsibilities.

The CWA establishes multiple programs that, together, are designed to achieve the Act's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Those programs include (but are not limited to) the Section 402 and 404 permit programs, led by EPA and the Corps, respectively. Many other sections of the CWA protect waters through cooperative state/federal action. *See New York v. United States*, 505 U.S. 144, 167 (1992) (CWA depends on scheme of "cooperative federalism"). 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. 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 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* 33 U.S.C. § 1329. These provisions show that "[t]he Act envisions EPA's role in managing nonpoint source pollution and groundwater pollution as limited to studying the issue, sharing information with and collection information from the States, and issuing monetary grants." *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1471 (2020).

Equally important is the statutory distinction between "waters" generally and the subset of waters known as "navigable waters." Congress authorized EPA to make grants to states to develop techniques to control pollution in "any waters," 33 U.S.C. § 1251(a)(1), and to fund research "for prevention of pollution of any waters," *id.* § 1255(c). Thus, the federal government serves in a support role to states as they exercise their authority over the broader category of "any waters." In sharp contrast, federal regulatory authority extends not to "any waters," but only to "navigable waters," which is in turn defined as "waters of the United States." *Id.* § 1362(7). An interpretation of the CWA that recognizes that federal authority over WOTUS does not reach as far as state authority over "any waters" is faithful to the CWA's cooperative federalism scheme.

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, "Success Stories about Restoring Water Bodies Impaired by Nonpoint Source Pollution," *available at* https://www.epa.gov/nps/success-stories-about-restoring-water-bodies-impaired-nonpoint-source-pollution (detailing how restoration efforts have led to documented water quality improvements in hundreds of primarily nonpoint source-impaired waterbodies nationwide). And EPA does not hesitate to use its bundle of sticks and carrots to persuade state authorities to follow EPA's lead. Put simply, 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 clear congressional policy. *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[.]'").

Any suggestion that the CWA Section 101(b) policy merely clarifies that states can play a role in implementing the federal regulatory programs—*e.g.*, by obtaining approval to administer the section 404 permitting program—is meritless. Congress included the Section 101(b) policy in the 1972 Act. Five years later, the 1977 amendments added language defining certain roles for states in permitting programs under the Act. *See* 91 Stat. 1567, 1575, Public Law 95-217 (1977). This sequence of events illustrates that the express policy in the 1972 Act "plainly referred to something beyond the subsequently added state administration program of 33 U.S.C. § 1344(g)-(*l*)." *Rapanos*, 547 U.S. at 737. In reality, the 101(b) policy reflects that "Congress intended to leave substantial responsibility and autonomy to the States," and the Act's operative provisions

should not be interpreted in a way "that could interfere [] seriously with States' traditional regulatory authority—authority the Act preserves and promotes[.]" *County of Maui*, 140 S. Ct. at 1471.

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

Clarity and predictability are paramount. Farmers and ranchers need a rule that draws clear lines of jurisdiction that they can understand without hiring consultants and lawyers. The CWA is a strict liability statute that can trigger substantial civil fines as well as criminal penalties for persons who violate the Act's prohibitions. Civil penalties can now equal up to $56,460 per day, per violation. *See* 33 U.S.C. § 1319(d); *see also* 85 Fed. Reg. 83,818, 83,820 (Dec. 23, 2020). On the criminal side, 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). Because the stakes are so high, farmers and ranchers must know, before engaging in agricultural activities, what features on the farm are, or are not, "waters of the United States."

Prior regulatory interpretations of "waters of the United States" were unclear and confusing on their face, which allowed the Agencies to continue broadening their interpretation of the scope of the CWA over the years. *See Rapanos*, 547 U.S. at 726-29. And although the Supreme Court twice rejected overly expansive 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). As a result, 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. 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." 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring). More recently, in *U.S. Army Corps of Engineers v. Hawkes Co.*, Justice Kennedy, joined by Justices Thomas and Alito, 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, any definition of "waters of the United States" must provide clarity and certainty. The Agencies should avoid including vague terminology that landowners and regulators will be unable to apply without having to undertake burdensome scientific determinations.

V. Jurisdiction Over Non-Navigable Tributaries Should Be Limited to Those Tributaries with at Least Seasonal Surface Flow to Traditional Navigable Waters.

As noted above, the Supreme Court has repeatedly stated that the CWA's jurisdictional reach extends to some waters "that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview*, 474 U.S. at 133; *see also SWANCC*, 531 U.S. at 167, 171 (same); *Rapanos*, 547 U.S. at 731 (plurality opinion) (concluding that 33 U.S.C. § 1344(g)(1) "shows that the Act's term 'navigable waters' includes something more than traditional navigable waters"). None of those decisions, however, stand for the proposition that CWA jurisdiction *must* extend to a particular point beyond traditional navigable waters. *See California v. Wheeler*, 467 F. Supp. 3d 864, 873 (N.D. Cal. 2020) ("In the prior cases, the issue was always whether the agencies had gone *too far* in extending the scope of federal regulation.").

The Agencies must take care not to reach too far beyond traditional navigable waters in defining "waters of the United States." Federal regulation of isolated features, *e.g.*, ephemeral streams and wetlands adjacent to those streams, would encroach upon the states' traditional authority over land and water use in manner that is directly contrary to Congress's stated policy in CWA Section 101(b). Equally important, when federal regulation hinges upon subjective, case-by-case determinations such as what constitutes a "significant nexus" or when it opens the door to asserting jurisdiction based on desktop analyses of historical aerial photos or other remote imagery, the average landowner lacks fair notice and clarity about what conduct is lawful versus what might trigger the harsh penalties in the CWA. With all of these guideposts in mind, we support a definition of "tributary" that encompasses only those rivers and streams that carry seasonal surface flow directly into a traditional navigable water (including the territorial seas and waters subject to the ebb and flow of the tide). "Seasonal surface flow" in turn should be defined as having at least 90-days of continuous surface flow in years of normal precipitation.

Our recommended approach would focus on readily measurable, objective characteristics—surface flow for a specified period of time—to provide greater clarity and a lower likelihood that there will be complex factual disputes over CWA jurisdiction. For the most part, water features that carry only insubstantial volumes of water, such as ephemeral streams that flow only as a result of precipitation events, would *not* be jurisdictional, although there may be streams in some regions that satisfy the 90-day minimum duration of flow requirement due to seasonal snowmelt.

We urge the Agencies to avoid relying on problematic concepts such as the "ordinary high water mark" in defining which non-navigable water features are jurisdictional. That term captures virtually any physical sign of water flow, such as changes in the soil, vegetation, or debris. When rainwater flows through any path on the land, it tends to leave some sort of mark, even if flows are infrequent. For too long, regulators reached too far in 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. *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).

Undeterred by these criticisms, the Agencies built the definition of "tributary" in the 2015 WOTUS Rule heavily around the ordinary high water mark concept. Not surprisingly, this prompted a court to conclude that the tributary definition exceeded the Agencies' CWA authority. *See Georgia v. Wheeler*, 418 F. Supp. 3d at 1360-63. The Agencies should not repeat these mistakes by building a definition of tributaries around the ordinary high water mark concept. Relying on this subjective and vague concept as an indicator of sufficient volume and flow simply does not allow farmers and ranchers to readily determine whether regulators will agree that a particular low patch of land is just land, as opposed to a jurisdictional non-navigable tributary or wetland.

Last, the Agencies should avoid explicitly calling out ditches and canals in defining those tributaries that are "waters of the United States." The CWA defines ditches and canals as "point sources," which suggests that these sorts of water features "are, by and large, *not* 'waters of the United States.'" *Rapanos*, 574 U.S. at 735-36. As discussed in more detail below in Section IX of these Recommendations, ditches, canals, and other features commonly found on farmlands should *not* be jurisdictional *unless* they are constructed in a jurisdictional water.

VI. <u>The Adjacency Category Should Be Limited to Wetlands that Directly Abut Other WOTUS.</u>

Congress plainly envisioned that "navigable waters" would include at least some wetlands, such as those that are adjacent to waters that are currently used as a means to transport interstate or foreign commerce. *See* 33 U.S.C. § 1344(g)(1). Thus, the Supreme Court had no difficulty upholding the federal government's assertion of jurisdiction over wetlands "that actually abutted on a navigable waterway." *SWANCC*, 531 U.S. at 167 (summarizing the holding in *Riverside Bayview*). Neither the statutory text nor relevant Supreme Court precedents, however, provides clear direction over which wetlands *must* be subject to CWA jurisdiction, in part because Congress never defined what it means for a wetland to be "adjacent." AFBF and the undersigned groups recommend that the Agencies assert jurisdiction over only *wetlands* that are directly abutting other "waters of the United States."

Our recommended approach to adjacency is designed to further the Congressional policy in CWA Section 101(b) and to minimize uncertainty, complex factual disputes, and the improper expansion of federal jurisdiction through informal interpretations. For too long, the Agencies' definition of "adjacent" as "bordering, contiguous, or neighboring" left the door open to federal overreach. *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). Put simply, the Corps and lower courts wandered far beyond the

"point at which water ends and land begins" in determining whether wetlands are adjacent. *See Riverside Bayview*, 474 U.S. at 132. In doing so, they distorted the federal-state balance that Congress struck and encroached upon the states' traditional power over land and water use.

By asserting jurisdiction over only those wetlands that are directly abutting "waters of the United States," the Agencies would provide much needed clarity that is capable of easy application in the field. Only those wetlands that directly touch "waters of the United States" would meet our definition of "adjacent." The Agencies can clarify that otherwise "adjacent" (*i.e.*, directly abutting) wetlands would not lose their jurisdictional status due to the creation of a natural or man-made berm.

Our recommended definition of "adjacent" is faithful to the holding in *Riverside Bayview*, where the Supreme Court upheld the Corps' assertion of CWA jurisdiction over wetlands abutting a navigable-in-fact waterway upon finding that Congress intended to regulate wetlands "inseparably bound up with the 'waters' of the United States." *See* 474 U.S. at 134-35. The recommended definition would also eliminate the sort of uncertainty that would inevitably result from definitions of adjacency based on distance or floodplain thresholds. For instance, by defining "neighboring" in terms of location within the 100-year floodplain or location in relation to jurisdictional waters' ordinary high water marks, the 2015 WOTUS Rule provided little clarity. Moreover, that rule used open-ended language that would allow regulators to rely on whatever "other . . . means" they deem "appropriate" to identify an ordinary high water mark. *See* 80 Fed. Reg. 37106 (codified at 33 C.F.R. § 328.3(c)(6) (2015)). That might mean using desktop analyses and remote imagery to infer jurisdiction even when ordinary high water marks were invisible on the ground. *See* 80 Fed. Reg. at 37,077. Reliance on the 100-year floodplain fares no better. This is because, as the Agencies candidly acknowledged, "much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and may not accurately represent existing circumstances on the ground." *Id.* at 37,081. Without up-to-date maps, regulators could use "other available tools" to determine the boundaries of the 100-year floodplain. Although the pre-2015 definition of "adjacent" gave rise to far too much mischief (as discussed in the *Rapanos* plurality), the 2015 WOTUS Rule made things even worse.

Finally, any definition of "waters of the United States" should include the longstanding Corps' regulatory definition of "wetlands" and make it clear that all three wetlands criteria—prevalence of hydrophytic vegetation, hydric soils, and permanently or periodically inundated soils saturated to the surface at some time during the growing season—must be present for a wetland to be jurisdictional. Despite this seemingly clear definition, Corps Districts historically did not always consistently implement that definition. Some did not require that all three elements be satisfied when determining whether a particular feature constitutes jurisdictional wetlands or non-jurisdictional uplands, which is puzzling considering the Corps' 1987 Wetlands Delineation Manual defines uplands to mean an area where one or more of these attributes is not present. The NWPR sought to clear this up by reinforcing that "presence and boundaries of wetlands are determined based upon an area satisfying all three of the definition's factors (*i.e.,* hydrology, hydrophytic vegetation, and hydric soils) under normal circumstances." *See* 85 Fed.

Reg. at 22,315. The Agencies should maintain this clarification and ensure that only wetlands that meet all three criteria can be considered jurisdictional.

VII. There Is No Statutory Support for a Standalone Jurisdictional Category of Interstate Waters and Wetlands.

For decades, the definition of WOTUS extended to all "interstate waters, including interstate wetlands." 33 C.F.R. § 328.3(a)(2) (2014). Yet the legal basis for this standalone category was always suspect. The assertion of jurisdiction over all interstate waters and wetlands effectively rewrites the statute by substituting the term "interstate" for "navigable." Such a reading of the Act not only contradicts the statutory text, it undermines Congress's intent behind removing the term "interstate waters" from the Act. *Compare* Water Pollution Control Act, ch. 758, 62 Stat. 1155, 1156 (1948) ("interstate"), and Pub. L. No. 87-88, 75 Stat. 204, 208 (1961) ("interstate or navigable"), *with* 33 U.S.C. 1362(7) ("navigable"). Because the Agencies cannot read the term "navigable" out of the Act, no definition of WOTUS can include a standalone "interstate waters and interstate wetlands" category. *See Georgia v. Wheeler*, 418 F. Supp. 3d at 1358-59.

The fundamental flaw in this category is it allows for the assertion of jurisdiction over water features that are not navigable; cannot be made navigable, have no nexus ("significant" or otherwise) to a navigable water or commerce, are not adjacent to, and do not contribute flow to, a navigable water, merely because they cross a state line. To make matters worse, prior definitions of WOTUS expand jurisdiction even further by allowing for the assertion of jurisdiction over: (i) all tributaries of interstate waters and interstate wetlands; and (ii) wetlands adjacent to all interstate waters and interstate wetlands. 33 C.F.R. §§ 328.3(a)(5) & (7). As the *Georgia* Court recently explained, these overly expansive assertions of jurisdiction exceed the Agencies' CWA authority; run contrary to *SWANCC*; and violate the "significant nexus" test that Justice Kennedy articulated in his *Rapanos* concurrence.

VIII. AFBF and the Undersigned Agricultural Groups Strongly Support the Longstanding Exclusion for Prior Converted Cropland and the NWPR's Definition of Prior Converted Cropland.

Prior converted croplands ("PCC") are one of two longstanding exclusions codified in the regulations defining "waters of the United States," but until the NWPR, the text of the regulations did not expressly define what constitutes PCC. The rationale that the Agencies articulated in 1993 when they originally codified the exclusion remains sound: "due to the degraded and altered nature of [PCC] . . . such lands should not be treated as jurisdictional wetlands for purposes of the CWA." 58 Fed. Reg. 45,008, 45032 (Aug. 25, 1993). PCC no longer exhibits defining characteristics of a wetland (hydrology or vegetation) and no longer performs wetland functions and thus, such lands should not be considered WOTUS. Farmers and ranchers nationwide have relied on the PCC exclusion for decades, and it is of paramount importance that the exclusion be retained in any definition of WOTUS.

The NWPR brought much needed clarity to the PCC exclusion by codifying a definition in the regulatory text that is consistent with the 1993 rule. The lack of a clear definition of PCC

has presented problems in the past regarding when PCC can be "recaptured" and treated as jurisdictional. Indeed, although the preamble to the Agencies' 1993 regulation establishing the PCC exclusion plainly stated that areas remain PCC regardless of the use to which the land is put, nearly two decades later, the Corps did an about-face by issuing informal guidance, without notice-and-comment, proclaiming that PCC that is shifted to non-agricultural use is once again subject to CWA jurisdiction. *See New Hope Power Co. v. U.S. Army Corps of Eng'rs*, 746 F. Supp. 2d 1272, 1276 (S.D. Fla. 2010) (summarizing a 2009 Issue Paper from the Corps' Jacksonville Field Office that was based on a joint 2005 Corps-USDA guidance document and was adopted, implemented, and enforced nationwide). The Court in *New Hope Power* set aside the 2009 informal guidance and the "change in use" policy reflected therein after determining that the Corps unlawfully issued it without notice-and-comment rulemaking. *See id.* at 1283-84. Yet despite that holding, the Corps at times continued to try to implement the 2009 guidance to re-regulate land that shifted to non-agricultural use.

The new definition in the NWPR brought an end to this uncertainty by expressly rejecting the "change in use" approach and withdrawing the 2005 Memorandum that ultimately led to the *New Hope* decision. *See* 85 Fed. Reg. at 22,321; *see also* NWPR Public Comment Summary Document, Topic 10, at 27. Specifically, the NWPR reaffirms that "[a]n area is no longer considered *prior converted cropland* for purposes of the Clean Water Act when the area is abandoned and has reverted to wetlands[.]" *See* 85 Fed. Reg. at 22,339. This definition is faithful to the original 1993 regulation and the abandonment principle articulated in the preamble to that rule. *See* 58 Fed. Reg. at 45,032 & 45,034. Of utmost importance to farmers and ranchers, the new definition reinforces how the PCC exclusion is to be applied and puts an end to any improper attempts to narrow the PCC exclusion through the "change in use" policy that the *New Hope* court rejected.[4]

The NWPR also provided important guidance on how to assess "abandonment" by providing a non-exhaustive illustration of what constitutes agricultural purposes, *e.g.*, grazing; haying; idling land for conservation purposes. *See* 85 Fed. Reg. at 22,320-21 & 22,326. These clarifications are appropriate, easy to understand, and implementable, and they help ensure that farmers can make full use of their lands as appropriate and that lands do not unjustifiably lose their PCC status. Equally important, the clarifications are consistent with the 1993 rule. *See* 58 Fed. Reg. at 45,034 ("[I]n response to the request that a PC cropland not be considered abandoned if the area is used for any agricultural production, regardless of whether the crop is an agricultural commodity, we note that [USDA's] abandonment provisions do recognize that an area may be used for other agricultural activities and not be considered abandoned.").

Additionally, the NWPR's PCC definition codified the principle from the 1993 regulation that even if PCC has been abandoned, it is not automatically recaptured for CWA purposes. The

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[4] Following the decision in that case, the Corps asked the Court to limit its remedy to the plaintiffs in that case, but the Court rejected that request and maintained that its injunction applied nationwide. In accordance with that decision, the NWPR appropriately abandoned the "change of use" policy.

Corps must evaluate the present conditions and determine whether wetland conditions have returned before the land is recaptured. *Compare* 85 Fed. Reg. at 22,328 (stating that an area is no longer PCC if it is abandoned "*and* has reverted to wetlands, as defined in paragraph (c)(16) of this definition") *with* 58 Fed. Reg. at 45,034 ("[T]oday's rule will provide a mechanism for 'recapturing' into Section 404 jurisdiction those PC croplands *that revert back to wetlands* where the PC cropland has been abandoned."); *see also New Hope*, 746 F. Supp. 2d at 1276 ("The only method provided for prior converted croplands to return to the Corps' jurisdiction under this regulation is for the cropland to be 'abandoned,' where cropland production ceases and the land reverts to a wetland state."). This requirement that abandoned PCC also revert to wetlands makes perfect sense: if the lands in question no longer have wetlands characteristics or perform wetlands functions, it is not appropriate to regulate them as WOTUS. And as the Agencies correctly expect, "the majority of prior converted cropland in the nation [should] fall into this category and not be subject to CWA regulation, even after it is abandoned." 85 Fed. Reg. at 22,327. This recognition helps provide certainty as to how the Agencies will apply the PCC exclusion.

Finally, the NWPR's preamble helps give farmers and ranchers additional clarity and certainty by affirming that various types of documentation—*e.g.*, aerial photographs, topographical maps, cultivation maps, crop expense or receipt records, field- or tract-specific grain elevator records, and other records generated and maintained in the normal course of doing business—can be used to establish "agricultural purposes," as can documentation from USDA or other Federal or State agencies. *See* 85 Fed. Reg. at 22,321.

In conclusion, the PCC exclusion is a critical component of any WOTUS definition, as all prior administrations have all agreed since the Agencies first codified the exclusion in 1993. AFBF and the undersigned groups support the helpful clarifications in the NWPR's definition of PCC that help ensure the exclusion is implemented consistently with the Agencies' original intent.

IX. <u>The Agencies Should Retain Additional Exclusions in the NWPR.</u>

Waters that do not fit into any of the jurisdictional categories set forth in the Agencies' regulations should not be jurisdictional. Nonetheless, because there is always the potential for misapplication, whether by agency staff or citizen plaintiffs filing suit under the CWA's citizen suit provision, the codification of well-defined, clear exclusions helps provide regulatory certainty and aids implementation. Both the 2015 WOTUS Rule and the NWPR newly codified a number of exclusions for the first time in the regulatory text, though some of the exclusions in the 2015 WOTUS Rule were too limited in scope. We support several of the exclusions in the NWPR as set forth below, and we believe the Agencies should retain those exclusions:[5]

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[5] By focusing on certain exclusions, AFBF is *not*, by implication, suggesting that the Agencies should retain only these exclusions. We understand that additional exclusions, *e.g.*, the longstanding waste treatment system exclusion, are critically important to other sectors.

Groundwater: In the 2015 WOTUS Rule, the Agencies explained that they "have never interpreted 'waters of the United States' to include groundwater." 80 Fed. Reg. at 37,099. Nevertheless, regulations defining "waters of the United States" did not include an express exclusion for groundwater until 2015. Just like the 2015 WOTUS Rule, the NWPR again excluded "[g]roundwater, including groundwater drained through subsurface drainage systems" from the definition of WOTUS. *See* 85 Fed. Reg. at 22,338. For all of the reasons set forth in previous rules, the Agencies should continue to exclude groundwater in the text of the regulation.

Farm ditches, canals, ponds, and similar features: Water features commonly found on farms that are used to collect, convey, or retain water should be excluded from the definition of "waters of the United States," provided that the construction of such features in a WOTUS does not eliminate CWA jurisdiction. The definition of WOTUS should retain standalone exclusions for ditches and artificial ponds. The former should encompass features including, but not limited to, drainage ditches and irrigation ditches; the latter should encompass features including, but not limited to, stock watering ponds, irrigation ponds, and sediment basins. For these two exclusions to be meaningful, it is important that they not be limited to features constructed on dry land or upland. The very purpose of all of these features 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 ditch or 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, ditch or pond construction may be infeasible without some excavation in a natural ephemeral drainage or a low area with wetland characteristics.

The NWPR appropriately recognizes these practical realities by excluding ditches so long as they are not constructed in WOTUS and by excluding other water features found on agricultural lands (*e.g.*, farm, irrigation, and stock watering ponds) so long as they were "constructed or excavated in upland or in non-jurisdictional waters." *See* 85 Fed. Reg. at 22,338. AFBF and the undersigned groups strongly support these exclusions as codified in the NWPR. We also strongly support the NWPR's clarification that the Agencies bear the burden of proof "to demonstrate that a ditch relocated a tributary or was constructed in a tributary or an adjacent wetland." 85 Fed. Reg. at 22,299. To the extent there is uncertainty about the historical status of the ditch, the NWPR appropriately places the burden of proof on the government to prove its jurisdictional status. This clarification provides much needed certainty to farmers and ranchers as to how the Agencies will implement the ditch exclusion. Relatedly, the Agencies should make it equally clear that the Agencies bear the burden of proving that a farm pond or sediment basin—or any other feature that would qualify for the artificial lakes and ponds exclusion—was constructed or excavated in a WOTUS, as opposed to upland or a non-jurisdictional water.

To be sure, we do *not* advocate that construction of features such as ditches or farm ponds in "waters of the United States" should eliminate jurisdiction over that particular WOTUS. Thus, consistent with the NWPR, a ditch, canal, or pond constructed in a stream that is a "water of the United States" would still be jurisdictional. The text of CWA Section 404(f) reflects that Congress understood that some farm ponds and ditches would be constructed in navigable waters, which is precisely why Congress exempted such construction (as well as maintenance of farm or stock ponds and irrigation or drainage ditches) from the Section 404 permitting program.

See 33 U.S.C. § 1344(f)(1)(C). Although Congress intended to exclude these activities from Section 404 permitting, there is no indication in the statutory text that Congress contemplated that construction of farm ponds and ditches in "waters of the United States" would somehow remove those WOTUS from CWA jurisdiction. But when ditches, canals, farm ponds, and similar features are jurisdictional, it is important to remember that discharges to those features may still be exempt from permit requirements, *e.g.*, under Section 404(f).

Finally, AFBF and the undersigned groups believe the Agencies may have misunderstood its prior request to clarify in the NWPR that conservation infrastructure found on agricultural lands (*e.g.*, grassed waterways, restored wetlands, conservation ponds, sediment basins) should be non-jurisdictional *so long as such features were not constructed in "waters of the United States."* 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. AFBF and others previously requested this clarification to avoid creating any disincentives to these environmentally beneficial features. Nonetheless, in declining to expressly exclude certain conservation practices, the Agencies discussed statutory and regulatory exemptions from NPDES permitting requirements and stated that exempt activities "do not change the jurisdictional status of the waterbody as a whole, or the potential need for CWA permits for non-exempted activities in these waters or non-exempted discharges to these waters." NWPR Public Comment Summary Document, Topic 10, at 48. But it was never our position that *all* conservation infrastructure be excluded from WOTUS regardless of whether they were constructed in WOTUS. Again, the Agencies should clarify that such features are excluded *unless* they were constructed in a WOTUS.

CONCLUSION

AFBF and the undersigned organizations appreciate the opportunity to provide these recommendations to the Agencies. Thank you for your time and consideration.

On behalf of:

Agricultural Retailers Association
American Farm Bureau Federation
Florida Farm Bureau Federation
Illinois Corn Growers Association
Illinois Farm Bureau
Iowa Farm Bureau
Minnesota Agricultural Water Resource Center
National Association of Wheat Growers
National Council of Farmer Cooperatives
National Cotton Council
National Milk Producers Federation
National Pork Producers Council
The Fertilizer Institute
United Egg Producers