AGRICULTURAL RETAILERS ASSOCIATION

April 15, 2019

U.S. Environmental Protection Agency
EPA Docket Center, Office of Water Docket
Mail Code 28221T
1200 Pennsylvania, Avenue, NW
Washington, DC 20004

RE: Docket ID No. EPA–HQ–OW–2018–0149; Revised Definition of Waters of the United States; Proposed Rule

On behalf of the Agricultural Retailers Association (ARA), I submit the following comments supporting the Environmental Protection Agency's (EPA) and Army Corps of Engineers' (Corps) (collectively the "agencies") proposed rule for a revised definition of "Waters of the United States (WOTUS)."

Statement of Interest

ARA is a not-for-profit trade association that represents America's agricultural retailers and distributors. ARA members provide goods and services to farmers and ranchers which include: fertilizer, crop protection chemicals, seed, crop scouting, soil testing, custom application of pesticides and fertilizers, and development of comprehensive nutrient management plans. Retail and distribution facilities are scattered throughout all 50 states and range in size from small family-held businesses or farmer cooperatives to large companies with multiple outlets.

Overview

ARA writes to support the proposed rule redefining the term WOTUS for the purposes of the Clean Water Act (CWA). These comments should be read in conjunction with the comments of the Water Advocacy Coalition (WAC). ARA is an active participant in the WAC coalition and a signatory to those comments.

ARA supports the proposed rule for two primary reasons. First, the proposed rule establishes environmental protections for waters within the scope of the CWA. Agricultural retailers are dependent on clean water. Agricultural retailers comply with the EPA's Spill Prevention, Control, and Countermeasure (SPCC) regulation. This regulation works in conjunction with the proposed rule as it is intended to prevent, prepare for, and respond to any accidental spill of oil from making its way to a "water of the United States." Above ground storage tanks located at facilities have strict secondary containment requirements and are regularly inspected. ARA worked closely with the EPA on the development of the SPCC regulations and has continually helped promote regulatory compliance through outreach materials and webinars. Just as is the

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case with the SPCC regulations, ARA and its members, support common-sense regulations that protect the community and nation's water supply, such as this proposed rule, while being equitable to all stakeholders.

Second, the proposed rule provides much needed clarity for the agricultural community. Under the 2015 WOTUS rule, it was estimated the EPA's control over state lands could have increased as much as 400 percent. Many of ARA member companies provide application services of pesticide products to fields in order to help produce an abundant food supply. These pesticide products go through a rigorous regulatory process to be approved for commercialization under EPA's Federal Insecticide Fungicide Rodenticide Act (FIFRA). This process includes the approval of products for aquatic application. In 2009, the Sixth Circuit Court of Appeals decided a CWA National Pollutant Discharge Elimination System (NPDES) permit was required even though the product had already been approved for aquatic application under FIFRA. *See Nat'l Cotton Council v. EPA*, 553 F. 3d 927 (6th Cir. 2009). This unnecessary, duplicative permitting requirement remains in place today. If the 2015 rule were to be fully implemented, there would be great risk and liability to any applicator of pesticides without an NPDES permit regardless of where the spraying occurred because almost any piece of land could be considered jurisdictional. This is simply not workable, and the proposed rule goes a long way to correcting the 2015 rule.

ARA applauds the proposed rule's elimination of the "significant nexus" test and case-by-case scenarios that were created by the 2015 rule. As previously mentioned, the 2015 rule created great uncertainty. Much of the uncertainty was derived by case-by-case applications of the rule which would require many consultants and lawyers to decide if a piece of property was considered jurisdictional or not. Even then, one may still not be certain if it was jurisdictional. ARA supports the goal of the proposed rule to provide clarity to help landowners understand the scope of the CWA.

Comments

The proposed rule defines WOTUS to encompass "relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific connection to traditional navigable waters, as well as wetlands abutting or having a direct hydrologic surface connection to those waters." 84 Fed. Reg. 4154 (Feb. 14, 2019). This definition is not only grounded in common sense but gets back to the congressional intent of the CWA and is within the limits of the Commerce Clause of the Constitution of the United States. *See* 33 U.S.C. § 1251(b). For those reasons, ARA supports the general definition of WOTUS in the proposed rule.

Furthermore, ARA is extremely supportive of the proposed rule explicit elimination of the case-by-case application of Justice Kennedy's "significant nexus" test… 84 Fed. Reg. at 4175, 4183, and 4186. The application of the "significant nexus" test was simply not workable for agricultural retailers and agriculture generally. The elimination of that application is most welcome.

Traditional Navigable Waters and Territorial Seas

ARA is supportive of the agencies maintaining the category of Traditional Navigable Waters (TNW) and territorial seas. However, the definitions of TNW should be maintained within the limits of the CWA and returned to the traditional understanding of navigability. Appendix D to the *Rapanos* Guidance should be amended to narrow the view of TNW and reflect the statutory limits.

Interstate Waters

The agencies are proposing to remove interstate waters and interstate wetlands as a separate category. *Id.* at 4171. ARA supports this approach. Simply because a water flows across state lines does not necessarily make the water "navigable" for the purposes of the CWA. As the proposed rule points out, interstate waters could still be jurisdictional if the water satisfies one or more of the other categories in the proposed rule. *Id.* at 4172.

The approach of eliminating interstate waters and interstate wetlands would go a long way to increasing the rule's clarity while still providing strong environmental protections for the country's navigable waters. Maybe most importantly, this change would also be in line with the agencies' statutory authority and relevant caselaw.

Impoundments

While the agencies are proposing to keep impoundments as a separate category, it is suggested that impoundments are not needed as a separate category. *Id.* at 4172-4173. ARA recommends eliminating the impoundment category. Impounding a water would not, in and of itself, change its jurisdictional status. For example, an impoundment that was jurisdictional would still satisfy the jurisdictional requirements of a lake or pond if the impoundment category no longer existed. Eliminating the impoundment category would not cause any regulatory gap, but it would add important and essential regulatory clarity to the rule while still protecting otherwise jurisdictional waters.

Tributaries

The proposed rule defines "tributary" as "a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a traditional navigable water or territorial sea in a typical year either directly or indirectly through other jurisdictional waters…" *Id.* at 4173. ARA is particularly supportive of the fact that under the proposed rule "tributary" does not include surface features that flow only in direct response to precipitations, such as ephemeral flows. *Id.* Such waters are so limited and unpredictable it would be a nightmare to subject them to federal jurisdiction.

Furthermore, ARA finds the proposed definition of tributary to be much more workable than the 2015 rule because physical indicators, such as bed and banks and ordinary high-water mark (OHWM), are no longer used to define tributaries. *Id.* at4174-4175. These physical indicators were impracticable and problematic because of inconsistencies and uncertainty. By not utilizing these indicators as defining tools, the proposed rule would create more clarity and predictably for ARA members and the regulated community.

The limitation of perennial or intermittent flow is appreciated and the definition of perennial to mean continuously flowing water year-round makes much sense. *Id.* at 4173. However, the term "intermittent flow" and its distinction from "ephemeral waters or features that only flow during certain times of a typical year" needs more clarification. It is easily conceivable that the difference between intermittent flow and ephemeral flow in some instances will be very unclear. ARA is concerned the agencies will attempt to classify ephemeral flow as intermittent after a final rule has been published and expand their jurisdiction beyond what is intended today.

Although it may be helpful to define intermittent by certain flow characteristics and/or seasonal flow, certainly more clarity is needed surrounding the phrase "typical year" to better distinguish intermittent from ephemeral. A "typical year" is defined to mean "within the normal range of precipitation over a rolling thirty-year period for a particular geographic area." *Id.* Questions will inevitably follow including: how are the geographic areas divided? And how is the rolling thirty-year period counted? When do you considered a new year has started?

Finally, the proposed rule's definition of "tributary" would eliminate the case specific "significant nexus" analysis which came out of Justice Kennedy's concurring opinion in *Rapanos v. U.S.* and was expanded upon in the 2015 rule. *Id.* at 4175. ARA is particularly supportive of the elimination of the significant nexus analysis and believes the elimination of the test is not only within the law, but also makes for a more vibrant rule. First, the *Rapanos* decision was limited to the fact that the water in question in that case was a wetland—not a tributary. Second, Justice Kennedy himself stated that the significant nexus test for wetlands was only needed "absent more specific regulations." *Rapanos v. U.S.*, 547 U.S. 715, 782 (2006) (Kennedy, J., concurring). In this proposed rule, the agencies are providing more specific regulations, which is well within their capacity under the CWA. The elimination of the "significant nexus" test is consistent with the plurality and Justice Kennedy's concurring opinion in *Rapanos* and is within relevant statutory and constitutional limits.

Ditches

The agencies proposed to add a new category for ditches. The agencies would define ditches as "simply artificial channels used to convey water." 84 Fed. Reg. at 4179. Ditches would be considered jurisdictional if they are: 1) TNWs; 2) meet the definition of tributary; or 3) are constructed in adjacent wetlands and meet the definition of tributary. *Id.* at 4179-4180. The agencies would exclude all other ditches from the WOTUS definition. *Id.* at 4179, 4190.

ARA is not convinced "ditches" needs to be its own category in the definition of "waters of the United States." ARA has concerns that doing so would do the exact opposite of the intended purpose of "provid[ing] regulatory clarity and predictability…" but instead will only create more confusion. *Id.* at 4179. It is understood that a ditch will be jurisdictional only if it meets the requirements of other jurisdictional waters—navigable waters, tributaries leading to navigable water, or adjacent wetlands. Why are these three jurisdictional categories not enough to cover jurisdictional ditches? If a ditch does not meet the definition of a navigable water, tributary, or adjacent wetland, it should not be considered jurisdictional.

As correctly mentioned in the proposed rule, ditches are utilized in agriculture to drain surface water from cropland. *Id.* at 4181. This is an important management tool within agriculture and should not be subject the heavy regulatory burden of the federal government unless it clearly fits into another category of WOTUS. Instead, as the proposed rule points out, ditches used as a tool to manage surface water roundoff has a clear policy directive from Congress for the states to have primary authority over such land and water resources within their borders. *Id.* at 4181 (citing 33 U.S.C. §§ 1251(b), 1370).

If the agencies were to maintain ditches as a separate category, ARA suggests the recommendation from the Waters Advocacy Coalition by addressing ditches through the proposed exclusion provision of the WOTUS definition. The Coalition recommends that the agencies include the following language in the ditch exclusion:

> **All ditches are excluded unless they convey perennial or intermittent flow to downstream TNWs and were constructed in a tributary, relocate or alter a tributary, or were constructed in an adjacent wetland.**

If the agency were to adopt such an exclusion, it would provide clarity by maintaining that ditches built in upland would be exempt unless there is a connection that would make the ditch a navigable water, a tributary, or an adjacent wetland. This is exclusion would be simple and comprehensive.

Lakes and Ponds

The agencies are proposing a separate category of WOTUS to include certain lakes and ponds. Lakes and ponds would be jurisdictional if 1) it meets the criteria of a TNW; 2) contributes perennial or intermittent flow to a TNW; or 3) flooded by another jurisdictional water. 84 Fed. Reg. at 4182. The agencies are also proposing to eliminate the case-specific "significant nexus" analysis for this category. *Id.* at 4183.

ARA is supportive of the elimination of the "significant nexus" test for lakes and ponds for the reasons mentioned in the *tributary* section of these comments. The "significant nexus" test is unworkable and only adds confusion to the CWA.

As discussed above, the phrase "typical year" needs to be further defined. Furthermore, more details are needed on specific parameters for lakes and ponds that are flooded by other jurisdictional waters. The agencies should clarify in their final rule how they will determine when a lake and/or pond is flooded. ARA recommends consistency throughout the rule should the agency decide to use terms such as "inundated." As is noted in the proposed rule, agriculture often uses artificial lakes and ponds to discard unwanted water. *Id.* at 4183. The final rule should be clear enough that those landowners that utilize such features should be certain when they might have a jurisdictional lake and/or pond.

Wetlands

The agencies are proposing to include all adjacent wetlands to others jurisdictional waters as WOTUS. *Id.* at 4184. "Wetlands" is to mean "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." *Id.* The term "adjacent wetlands" is to mean:

> [W]etlands that abut or have a direct hydrologic surface connection to other 'waters of the United States' in a typical year. 'Abut' is proposed to mean when a wetland touches a water of the United States at either a point or side. A 'direct hydrologic surface connection' as proposed occurs as a result of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland and jurisdictional water.

Id. The agencies are proposing that when wetlands are physically separated from jurisdictional waters and also lack a direct hydrologic surface connection to jurisdictional waters, those wetlands are not adjacent and are thus not jurisdictional. *Id.*

The proposed definition of adjacent wetlands is logical and threads the narrow needle of all three United States Supreme Court cases on point, *Riverside Bayview, SWANCC,* and *Rapanos;* including Justice Kennedy's concurring opinion in *Rapanos*. Just as an adjacent wetland is "inseparably bound up with" jurisdictional water, 84 Fed. Reg. at 4186 (citing *U.S. v. Riverside Bayview*, 474 U.S. 121, 134 (1985)), conversely, wetlands that do not abut or have a direct hydrologic surface connection to other waters of the United States in a typical year are not "inseparably bound up" with waters of the United States and are not jurisdictional. ARA agrees that all isolated wetlands that do not abut (touch) another jurisdictional WOTUS nor have hydrologic surface connection are not jurisdictional and are excluded from the agencies' jurisdiction.

Furthermore, *SWANCC* held that the agencies do not have jurisdiction over non-navigable, isolated, intrastate wetlands with no connection to TNWs. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001). This proposed rule is consistent with *SWANCC* in that isolated wetlands would not be jurisdictional.

Finally, the proposed rule is consistent with both the plurality and concurring opinion in *Rapanos*. The plurality opinion rejected any sort of "Land Is Waters" approach to the statutory interpretation of the CWA. *Rapanos*, at 734. Instead, it found that WOTUS "includes only those relatively permanent, standing or continuously flowing bodies of water…" *Id.* at 739. Only wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, are jurisdictional. *Id.* at 742. The proposed rule is consistent with these conclusions and interpretation of the CWA. The proposed rule makes wetlands jurisdictional if they have a continuous surface connection to another WOTUS. 84 Fed. Reg at 4184.

Justice Kennedy's concurrence advised, "When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish jurisdiction." *Rapanos,* at 782 (Kennedy, J., concurring). Here, the agencies followed the concurring opinion by making abutting wetlands jurisdictional. 84 Fed. Reg. at 4184. Abutting wetlands will be jurisdictional with or without a direct hydrological connection. *Id.* at 4187.

However, Justice Kennedy also warned that more than adjacency was needed for a wetland analysis. *Rapansos,* at 786 (Kennedy, J., concurring). The proposed rule satisfies Justice Kennedy's concurrence by allowing wetlands with direct hydrological connections to be jurisdictional regardless of if they abut other jurisdictional waters. The proposed rule would create jurisdictional wetlands if the wetlands abut *or* if there is a direct hydrological connection. 84 Fed. Reg. at 4184 (*emphasis added*). The direct hydrological connection is more than just adjacency but is still reasonable to protect the other jurisdictional waters. The agencies are within their bounds and Justice Kenney's concurring opinion in *Rapanos* when they create two distinct avenues in which a wetland may be jurisdictional—abutting wetland or direct hydrological connection.

The definition of abut and the direct hydrologic surface connection is clear and there is no need for the terms "bordering, contiguous, or neighboring" to be included in the definition. Historically, these terms have only added more confusion than clarity. ARA agrees they should be left out of the definition.

As discussed above in the *tributaries* and *lakes and ponds* sections, the elimination of the case-by-case application of WOTUS wetlands will provide stakeholders with better clarity. The "significant nexus" test from Justice Kennedy's concurring opinion in *Rapanos* was only needed because of lack of specific regulations. *See Rapanos* at 782. This proposed rule will fill the void and eliminate any legal necessity of the significant nexus test, not to mention provide greater clarity for the regulated community.

However, the concerns with the *tributary* category are concerns for the *wetland* category as well. There should be more clarification on the term "typical year" and there needs to be further differentiation between the terms "intermittent" and "ephemeral." Furthermore, there should be greater clarity in the terms "normal circumstances" and "inundated"—what does it mean for an area to be "inundated" mean? How long and how frequent?

Waters and Features that are not Waters of the United States

From ARA's perspective, one of the most important parts of the proposed rule is the fact that it explicitly excludes all waters that are not enumerated in paragraphs (a)(1) through (6). 84 Fed. Reg. at 4190. Such explicitly exclusion will help add clarity and certainty to the regulated community.

The proposed rule goes on to exclude ten other specific features from potential WOTUS classification. The fact that the agencies list specific features that are excluded in addition to all waters that are not enumerated in paragraphs (a)(1) through (6) adds clarity and will likely prevent any agency creep that may occur once enforcement of the rule begins. However, ARA suggests the agencies make clear that the specific list of features that meet the requirements of any of the listed exclusions are not WOTUS even if they could otherwise be considered an (a)(1) through (6) categories of WOTUS.

Below are comments regarding a few of the listed exclusions that ARA has particular interest in:

Groundwater

ARA is encouraged that the agencies continue to exclude groundwater in the proposed rule. ARA is strongly supportive of the agencies' decision to include groundwater drained through subsurface drainage systems in the exclusion. *Id.* at 4190. As the proposed rule states, the agencies have never interpreted waters of the United States to include groundwater. *Id.* This has included groundwater drained through subsurface drainage systems.

In the past few years, we have seen creative attempts to regulate groundwater and attempts to ignore the CWA's ag storm water runoff exemption. *See Hawaii Wildlife Fund v. Cnty. of Maui*, 886 F.3d 737 (9th Cir. 2018) (cert. granted); *Kentucky Waterways Alliance v. Kentucky Utilities Company*, 905 F.3d 925 (6th Cir. 2018); and *Board of Water Works Trustees of the City of Des Moines v. Sac County Board of Supervisors*, No. C15-4020-LTS (N.D. Iowa Mar. 17, 2016). ARA is supportive of the alternative language the agencies suggest— "groundwater, including diffuse or shallow subsurface flow and groundwater trained through subsurface drainage systems." 84 Fed. Reg. at 4195. To include the phrase "…diffuse or shallow subsurface flow and.." would provide more clarity to the exemption and possibility prevent future creative attempts to avert the exemption for groundwater.

Ephemeral surface features and diffuse stormwater run-off

The agencies propose to exclude "ephemeral surface features and diffuse stormwater run-ff such as directional sheet flow over upland." *Id.* at 4190. ARA supports the explicit exclusion of ephemeral features and stormwater run-off. This approach is consistent with the plurality opinion in *Rapanos* when it stated the CWA does not grant a "'Land is Water' approach to federal jurisdiction." 547 U.S. at 734.

All ditches not identified as WOTUS

As discussed above, ARA believes ditches should not be a category of WOTUS. Instead, a ditch should be jurisdictional only if it meets the requirements of another jurisdictional category. As such, ARA suggests the agencies expand the scope of this exclusion and eliminate references to "jurisdictional ditches."

Prior Converted Cropland

The proposed rule excludes prior converted cropland ("PCC") from jurisdictional waters. 84 Fed. Reg. at 4190. The proposed rule would:

> [C]larify that the prior converted cropland exclusion would no longer be applicable when the cropland is abandoned *and* the land has reverted to wetlands… [P]rior converted cropland is considered abandoned if it is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years… Th[e] proposed rule would also clarify that cropland that is left idle or fallow for conservation or agricultural purposes for any period of time remains in agricultural use, and therefore maintains the prior converted cropland exclusion.

Id. at 4191. ARA appreciates that fallow land will maintain the PCC exclusion. However, there are concerns with the provision in the proposed rule that abandoned cropland that has reverted to wetlands for the previous five consecutive years will be not be exempt. The concerns stem from uncertainty between the term "fallow" and "abandoned." The proposed rule hints that only land enrolled in USDA NRCS conservation programs can be considered fallow ground. *Id.* This is simply not true. ARA is concerned that bonafide fallow ground not enrolled in a USDA NRCS conservation program will be construed as abandoned and be considered jurisdictional by the agencies. More distinction is needed to avoid confusion. ARA suggests stating in the final rule that ground may be considered fallow regardless of its enrollment status with a USDA program.

Artificially irrigated areas that would revert to upland should irrigation cease

ARA support the exclusion of artificially irrigated areas. It makes sense, especially with crops that require the flooding of field such as rice and cranberries, to exclude these areas from jurisdictional waters because they would revert to upland should irrigation stop. Often times flooded fields are used from purposes other than the primary crop. For instance, typically rice fields are also used to farm crayfish. ARA suggests that the final rule not make the list of crops—or agricultural practices—that might be artificially irrigated for the purpose of this exclusion exhaustive.

Artificial lakes and ponds

As the proposed rule alludes to, agriculture often uses artificial lakes and ponds as a means to control and collect excess water on fields. *Id.* at 4190. ARA supports the exclusion of artificial lakes and ponds. ARA agrees with the proposed removal of language regarding "use" of ponds, *Id.* at 4192, and believes that the exclusion should not be based on the use of the feature.

ARA suggests the agencies not tie the exclusion for artificial lakes and ponds to the (a)(4) (lakes and ponds) and (a)(5) (impoundments) categories. Instead, artificial lakes and ponds built in upland should be excluded regardless of if they could qualify as another jurisdictional category. ARA recommends removing the clause "…which are not identified in paragraph (a)(4) or (5) of this section" in paragraph (b)(7). *Id.* at 4204.

Codification of the rule

ARA believes the proposed rule should be codified in just two places in the Code of Federal Regulations (CFR) for the sake of simplicity—one in Title 33 for the purposes of the Corps and one in Title 40 for the purposes of the EPA. This small action of simplifying the CFR would go a long way in making it much easier for the layperson to comply and achieve the stated purpose of "help[ing] landowners understand whether a project on their property will require a federal permit or not, without spending thousands of dollars on engineering and legal professionals." Press Release, U.S. Envtl. Prot. Agency, EPA and Army Propose New "Waters of the United States" Definition (Dec. 11, 2018) (quoting Acting Administrator Andrew Wheeler).

Conclusion

The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" while "recogniz[ing], perserv[ing] and protect[ing] the primary responsibilities and rights of States…" 33 U.S.C. §§ 1251(a), (b). The proposed rule set out to increase predictability and consistency in compliance with the CWA by increasing clarity to the scope of the term "waters of the United States." 84 Fed. Reg. at 4154. The proposed rule achieves all of the above goals and the recommendations provided here will further enhance the accomplishment of those goals.

ARA appreciates the opportunity to provide comments for the proposed rule. Much like the agencies, all of agriculture has an interest and responsibility in preserving the waters and environmental integrity of our communities and nation for the next generations. For the forgoing reasons, the proposed rule is a great step in achieving those goals together.

Sincerely,

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