February 7, 2022

Submitted via www.regulations.gov
Docket ID No. EPA–HQ–OW–2021–0602

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RE: Revised Definition of "Waters of the United States"
86 Fed. Reg. 69,372 (Dec. 7, 2021)

AFBF and the undersigned agricultural organizations (collectively, "Agricultural Groups") appreciate the opportunity to submit these comments to the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") (together, "the Agencies") in response to the Agencies' December 7, 2021 Proposed Rule entitled "Revised Definition of Waters of the United States" ("Proposed Rule"). *See* 86 Fed. Reg. 69,372 (Dec. 7, 2021). AFBF, as a founding member of the Waters Advocacy Coalition ("WAC"), also incorporates by reference the comments submitted by WAC. The purpose of these separate comments is to provide particular emphasis on those aspects of the Proposed Rule that most directly affect farmers and ranchers.

It should be obvious by now that the definition of "waters of the United States" ("WOTUS") is very important to farmers and ranchers across the country, which is why AFBF and many of the Agricultural Groups have participated in rulemaking, legislative proceedings, and litigation related to this issue for decades. Whether they are growing plants or raising animals, farmers and ranchers need water. For that reason, farming and ranching tend to occur on lands where there is either plentiful rainfall or adequate water available for irrigation. Often there are features on those lands that are wet only after it rains and that may be miles from the nearest "navigable" water. These features would be unrecognizable to farmers and ranchers as regulable waters of the United States; to them, these features are simply low spots on fields.

Put plain, we are disappointed by the Proposed Rule. The Navigable Waters Protection Rule ("NWPR") was a clear, defensible rule that appropriately balanced the objective, goals, and policies of the Clean Water Act ("CWA"), and the Agricultural Groups feel strongly that the Agencies should have kept it in place,[1] rather than refuse to defend it and revert to definitions of

[1] AFBF understands that the federal courts in Arizona and New Mexico vacated and remanded the NWPR for reconsideration, *see* 86 Fed. Reg. at 69,382, but neither of those courts actually ruled on the merits of the rule or conducted any severability analysis. Regardless, neither ruling should be given nationwide precedential effect. As the Agencies reconsider the definition of

WOTUS that: test the limits of federal authority under the Commerce Clause; cast significant uncertainty upon property owners' understanding of the jurisdictional status of their land; and, ultimately, 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, and through the proper exercise of authority under other statutes related to water resources such as the Safe Drinking Water Act, 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.

The Agricultural Groups are also disappointed by the lack of meaningful outreach prior to the Agencies' issuance of the Proposed Rule, as well as by the extremely abbreviated comment period. We believed that the Agencies would conduct these proceedings in good faith and with full consideration of all stakeholder views, but we are now concerned that the Agencies do not intend to provide the open and dialogue-driven process promised. Nonetheless, we offer several recommendations below regarding: (i) key legal and policy guideposts that the Agencies must adhere to in any WOTUS definitional rule; and (ii) how the Agencies should define certain categories of jurisdictional and non-jurisdictional waters while adhering to those guideposts. 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.

As explained in more detail below, the Agricultural Groups have significant concerns with the Agencies' Proposal to codify both the "relatively permanent" and "significant nexus" approaches in a radical expansion of the Agencies' jurisdiction as compared with the NWPR and even as compared to the pre-2015 regulatory regime that the Agencies are currently implementing. Again, AFBF and other undersigned organizations that are members of WAC fully support and adopt the WAC's comments; the specific comments below reinforce and elaborate on those comments as to those aspects of the proposal most directly applicable—and concerning—to the Agricultural Groups and their members. Moreover, given the Supreme Court's recent decision to revisit the Agencies proper scope of jurisdiction under the CWA, the Agencies should pause this rulemaking until after the Court rules in *Sackett v. Environmental Protection Agency*, No. 21-454 (cert granted Jan. 24, 2022).

I. The Proposed Rule Will Profoundly Affect Everyday Farming and Ranching Activities.

A. Given the Abundance of Water Features on Farm and Ranch Lands, an Expansive Definition of "Waters of the United States" Could Lead to Substantially Increased Permitting Requirements.

Farming and ranching are necessarily water-dependent enterprises. Fields on farms and ranches often have low spots that tend to be wet year-round or at least contain water seasonally. Some of these areas are ponds used for purposes such as stock watering, providing

"waters of the United States," we urge that they retain various aspects of the NWPR discussed in these comments for the reasons provided below.

irrigation water, or settling and filtering farm runoff. Irrigation ditches also carry flowing water to fields throughout the growing season as farmers and ranchers open and close irrigation gates to allow water to reach particular fields. These irrigation ditches are typically close to larger sources of water, irrigation canals, or actual navigable waters that are the source of irrigation water—and they channel return flows back to these source waters. In short, America's farm and ranch lands are an intricate maze of ditches, ponds, wetlands, "ephemeral" drainages, and other water features, such as those found in the following photos:

Considering drains, ditches, stock ponds, and other low spots on farmlands and pastures as jurisdictional "waters" opens up the potential for regulation of activities on those lands that move dirt or apply products to the land. Everyday activities such as plowing, planting, or fence building in or near ephemeral drainages, ditches, or low spots could trigger the Clean Water Act's ("CWA") harsh civil or even criminal penalties unless a permit is obtained. Further, farmers need to apply weed, insect, and disease control products to protect their crops. Fertilizer application is another necessary and beneficial aspect of many farming operations that is nonetheless swept into the CWA's broad scope (even organic fertilizer, *i.e.*, manure). 40 C.F.R. § 122.2 (defining "pollutant"). On much of our most productive farmlands (*i.e.*, areas with plenty of rain), it would be extremely difficult to avoid entirely the small wetlands, ephemeral drainages, and ditches in and around farm fields when applying crop protection products and fertilizer. And yet, permits could also be required for those activities, and even accidental deposition would be unlawful, *even when those features are completely dry* and even harder to differentiate from the rest of the fields.

These concerns are amplified by the Supreme Court's recent holding, in *County of Maui v. Hawaii Wildlife Fund*, that the CWA's permitting requirements apply to discharges of pollutants from point sources "that reach navigable waters after traveling through groundwater if that discharge is the functional equivalent of a direct discharge from the point source into navigable waters." 140 S. Ct. 1462, 1477 (2020). Most agricultural activities take place on or in soil and thus, everyday activities can result in the movement of nutrients or other materials from point sources, through the soil into groundwater, and ultimately to surface waters. The combined effect of an expanded definition of "waters of the United States" and the application of the "functional equivalent" test under *Maui*—whether by permitting authorities or by governmental or citizen suit enforcement actions—could wreak havoc on farmers and ranchers.

Many family and small business farm and ranch owners can ill afford the tens of thousands of dollars in additional costs for federal permitting of ordinary farming activities. Even those who can afford the permitting should not have 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. Yet this is exactly what could occur should the Agencies finalize their Proposal. The Agencies will make it their business to determine whether, and when, a field may be fertilized. Worse still, environmental activists could sue owners of cows, arguing that cows are "discharging" manure into these "waters" without a permit; or sue a farmer for simply plowing, planting, or building a fence across small jurisdictional wetlands or ephemeral drains.[2] Given the "very low" "threshold" the Agencies apply before "truly *de minimis* activities" turn into "adverse effects on any aquatic function," farmers and ranchers would even have to think about whether "walking, bicycling, or driving a vehicle through" a jurisdictional feature is prohibited. 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993). Federal permits would be required (subject to the

[2] *E.g., Borden Ranch P'Ship v. U.S. Army Corps of Engr's*, 261 F.3d 810 (9th Cir. 2001) (finding a plow to be a point source).

exemption of certain activities, discussed below in Part III) if such activities cause fertilizer, dirt, or other pollutants to fall into low spots on the field, even if they are dry at that time.

B. The Proposed Rule Thrusts Farmers and Ranchers Back Into a World of Uncertainty and Inconsistency.

The 2015 Rule—where it took effect—dramatically expanded the scope of CWA jurisdiction over land used for normal farming and ranching activities. Far from providing regulatory clarity and consistency, it continued to prove very difficult for individual farmers and ranchers to determine whether any wet feature on their property, whether a natural puddle or man-made stock watering pond, would be considered a WOTUS. While the 2015 Rule purported to exclude puddles, rills, swales, and some ditches, those exclusions were effectively meaningless because the broader definitions of included features such as tributaries and adjacent "waters" swallowed the exclusions. *See* Ex. 1 (Declaration of Don Parrish in Support of the Agencies' Motion for Voluntary Remand, *S.C. Coastal Conservation League v. Regan*, No. 20-cv-1687, at ¶ 30 (D.S.C. filed June 28, 2021)).[3]

As explained more fully throughout these comments, the Agencies' proposal this time around is, if anything, different only in degree and timing, not kind. The Agencies' aggregation policy potentially allows the Agencies to assert jurisdiction over any sometimes-wet feature which, taken together with other sometimes-wet features in the region (broadly defined), have what the Agencies consider to be a "significant nexus" on a "foundational water." But the term "significant nexus" generated significant confusion and inconsistent results under the pre-2015 regime, and the Proposed Rule is likely to only make things worse. Furthermore, the process to arrive at a jurisdictional determination is tortuous and costly. A jurisdictional determination could take between six months and a year to receive, and in the meantime a farmer or rancher is stuck in limbo. The harm from delay is only compounded once an affirmative jurisdictional determination occurs, with the cost of consultants, engineers, permit applications, and mitigation and compliance costs that make the process simply untenable for many. Indeed, it can amount to a $500/acre or greater *decrease* in value of the land. *See id.* (Parrish Decl. ¶¶ 43-45). Mitigation costs to proceed with development could be into the thousands of dollars *per linear foot*. *See id.* Adding insult to injury, the Agencies' proposed approach of case-by-case analysis threatens to create a seriously unequal playing field, where identical features may be viewed as jurisdictional or not depending upon where the property is located. A dependable, clear rule, this is not. Rather, the Agencies are setting up a system where arbitrary decision-making will be a feature, not a bug.

The chilling effect on productive activity is also notable. Farmers have had to avoid plowing certain parts of fields or take certain areas out of production entirely for fear that they may accidentally disturb a feature that the Agencies would consider a WOTUS. One farmer

[3] The full title of this document is "Declaration of Don Parrish in Support of the Agencies' Motion for Voluntary Remand, in Opposition to Plaintiffs' Motion for Summary Judgment, and in Support of Intervenor-Defendants' Cross-Motion for Summary Judgment."

reported that, under the 2015 Rule, he would have had to create a fifteen-foot buffer around drainage ditches to avoid the risk of fertilizers or pesticides accidentally reaching those ditches. *See* Ex. 2 (Declaration of Robert E. Reed, *Georgia v. Wheeler*, No. 15-cv-79, at ¶ 14 (S.D. Ga. filed Sept. 26, 2018)). In total, that would have required taking about five percent of that farmer's field out of production, resulting in a loss of revenue of approximately $1,400 per acre. *See id.*

These issues are particularly apparent in the Southwest, where assertion of jurisdiction over ephemeral waters—what most farmers and ranchers would consider to be dry land—is difficult for individual landowners to understand. But the price of any mistake is steep, as the CWA exposes farmers and ranchers to potentially millions of dollars in civil penalties, not to mention the risk of criminal liability. *See infra* Part II.A.

Perversely, the Agencies' broad assertion of jurisdiction can make it *more* difficult for farmers and ranchers to engage in soil conservation activities. Farmers and ranchers have more incentive than most to try to preserve topsoil on their land; as such, where land is at risk of erosion they may want to engage in mitigation activities. But if a farmer could not do this without applying for a federal permit, it may be cost-prohibitive, resulting in environmental *degradation*, not protection. The same is true for minor agricultural infrastructure maintenance and repairs—while this activity may make a farm operation more efficient from a water or energy perspective, or have other environmental benefits, requiring a permit would undercut the farmers' ability to make productive use of their land.

That the Agencies are overweening in their jurisdictional reach is even more evident when considering activities that had been permitted under local processes, but then vetoed by federal regulators under the pre-2015 regulatory regime. In one instance, a farmer who consulted both local and tribal authorities learned that federal officials expressed concern over historical and tribal protections that the *tribal authority* did not raise. *See* Ex. 1 (Parrish Decl. at ¶ 52) ("Although the farmer explained that the tribal archaeologist during the local permitting process had noted no concerns, the federal reviewer refused to consider the local process and insisted that the background work be redone. This consisted of an archaeological assessment that would have cost $42,000.").

In sum, the Proposed Rule threatens to impede farmers' and ranchers' ability to provide safe, affordable, and abundant food, fuel, and fiber to the citizens of this nation and the world. The concerns that our members have are not hyperbole nor are they isolated occurrences. They are lived experiences illustrating the pitfalls of returning to an overly expansive definition of "waters of the United States" and, specifically, an outsized view of what it means for a water to have a "significant nexus."

C. Mechanisms Already Available to the Agencies to Protect Water Quality

Instead of drastically expanding the federal permitting regime, the Agencies should make use of already existing state and federal programs to enhance water quality. The CWA provides a robust suite of non-regulatory programs to provide technical and financial assistance to the States, municipal groups, and cooperation with other federal agencies to improve the quality of

the nation's waters. These programs are not limited to protection of waters that qualify as "waters of the United States." Rather, they also include, but are not limited to: grants to research improved methods of pollution control and/or sewer stormwater discharge prevention (§ 1255(a)(1)); grants to research treatment and pollution control from point and nonpoint sources in river basins (§ 1255(b)); waste-management, waste-treatment, and pollutant-effects research and development (§ 1255(d)); grants for research in preventing and reducing agricultural and sewage pollution in rural areas, in consultation with the Secretary of Agriculture (§ 1255(e)); and programs for management of the Great Lakes (§ 1268), Chesapeake Bay (§ 1267), Long Island Sound (§ 1269), and Lake Champlain (§ 1270).

Instead of the Agencies' top-down, command-and-control approach, Congress intended that States and the Agencies work *cooperatively* to manage the nation's water resources under the framework established by the CWA, and not at cross-purposes due to incessant jurisdictional tug-of-war. *See infra* Part IV.B (discussing federalism concerns).

II. Rather than Providing Clarity and Certainty for Farmers and Ranchers, the Proposed Rule Makes Opaque Pronouncements Leading to Potentially Unlimited Jurisdiction.

The Agencies' Proposed Rule professes constraint, disguising its campaign of jurisdictional Manifest Destiny as "limiting jurisdiction only to those waters that significantly affect the integrity of waters where the federal interest is indisputable." 86 Fed. Reg. at 69,402. But those words cannot conceal the true breadth of the proposal. While the Agencies have resisted the urge to again categorically regulate all tributaries and all adjacent waters like they did in the 2015 Rule, the case-by-case approach in the Proposed Rule is no less of an overreach given that the underlying theory of "significant nexus" is one and the same as the 2015 Rule. It is clear the Agencies will just expand their jurisdiction one watershed at a time, instead of by general fiat—but it is only a matter of time until the Agencies will find a significant nexus.

A. The Proposed Rule's Case-by-Case, "Significant Nexus" Approach Is Unconstitutionally Vague, Leaving Farmers and Ranchers without Any Clarity of What the Status of Their Land May Be.

The critical importance of protecting citizens against vague civil laws, in addition to vague criminal laws, has become more pressing. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (Gorsuch, J., concurring in part and concurring in the judgment) (noting that "today's civil laws regularly impose penalties far more severe than those found in many criminal statutes"). "[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). The first is to ensure fair notice, so that regulated individuals and entities "know what is required of them so they may act accordingly." *Id.* The second is to provide precise standards and guidance for enforcement "so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.*

Importantly, since the infamous decision in *Rapanos v. United States*, 547 U.S. 715 (2006), a growing number of justices have expressed concerns about the "reach and systemic consequences" of the CWA. Justice Kennedy, joined by Justices Thomas and Alito, protested that

"the Act's reach is 'notoriously unclear' and the consequences to landowners even for inadvertent violations can be crushing." *U.S. Army Corps of Eng'rs v. Hawkes, Co.*, 136 S. Ct. 1807, 1816 (2016) (quoting *Sackett v. EPA*. 566 U.S. 120, 132 (2012)) (Kennedy, J., concurring). He further warned that this lack of clarity "raise[s] troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation." *Id.* at 1817.

Despite these important concerns, the Proposed Rule does not even acknowledge, much less address them. Instead, the Agencies once again propose to resurrect the same broad and confusing significant nexus standard that was the foundation for the 2015 Rule. That standard can be used to assert jurisdiction over tributaries, adjacent wetlands, and basically any "other water" because the Proposed Rule uses undefined, amorphous terms like "similarly situated" and "more than speculative or insubstantial" that will leave farmers and ranchers guessing about whether waters on their lands are WOTUS. *See* 86 Fed. Reg. at 69,449-50. To make things worse, the Agencies throw out a bunch of alternatives for implementing some of these terms. *See id*. at 69,439-40. This suggests that regulators can manipulate the standard to reach whatever outcomes they please and that farmers and ranchers may not know the outcomes until they are already exposed to civil and criminal liability, including devastating penalties.

To use an example, imagine a farmer is trying to figure out whether a federal permit is needed to make a wet patch of land more usable to a farmer by constructing a stock watering pond. This requires her to try to determine whether the wet spot, "either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity" of any traditional navigable water, interstate water, or territorial sea. *See* 86 Fed. Reg. at 69449-50 (proposed 33 C.F.R. § 328.3(a)(3)(ii) & 40 C.F.R. § 120.2(a)(3)(ii)). This is easier said than done, as she must try to understand how regulators will apply each of the following concepts:

In the region: The farmer must first sort out what regulators will consider to be the relevant "region." Because the "other waters" category was not addressed in the 2008 *Rapanos* Guidance and because the pond in question is not a tributary, the 2008 *Rapanos* Guidance's approach to "in the region" (*i.e.*, an approach focused on the relevant tributary "reach") is a poor fit. *See* 86 Fed. Reg. at 49,439. Consequently, the landowner must guess whether regulators will look to a subwatershed, watershed, ecoregion, hydrologic landscape region, or some other comparably broad "region" across which to apply the significant nexus standard. *Id.* The Agencies' Proposal creates more questions than it answers with regard to how to determine what waters may be in the region.

Similarly situated: Even if the farmer is told what the Agencies think is the relevant "region," she still has to try to figure out which "other waters" will be evaluated along with her pond. The Agencies suggest they can look at any "waters that are providing common, or similar, functions for downstream waters such that it is reasonable to consider their effect together." 86 Fed. Reg. at 69,439. But how does the farmer know whether her wet patch provides "common, or similar, functions" compared to other waters relative to some downstream navigable water?

And how is she possibly expected to identify every "similarly situated" water within whatever area the regulators determine to be the "region"?

Significantly affect: The next thing the farmer must try to figure out is whether the Agencies will determine that her pond, in combination with those similarly situated waters, has "more than speculative or insubstantial effects on the chemical, physical, or biological integrity" or a traditional navigable water, interstate water, or territorial sea. The Proposed Rule lists a slew of "factors" (such as shallow subsurface connections or the *lack* of hydrologic connections) and "functions" (such as nutrient recycling, provision and export of food resources for aquatic species located in foundational waters). *See* 86 Fed. Reg. at 69,430-31. The Agencies claim the factors enumerated in the regulatory text are "readily understood criteria" and that the functions referenced in the preamble "can include [but do not necessarily include] measurable indicators." *Id.* at 69,430. In reality, the average farmer or rancher will not "readily" understand where to even start with these factors and functions.

Because of how the Proposed Rule is written, it all but guarantees that the Agencies can reach whatever outcome they wish and that regulators' assessments are bound to vary from field-office to field-office and case to case. This approach does not give ordinary farmers and ranchers fair notice of when the CWA actually applies to their lands or conduct, nor does it provide any assurance against arbitrary or discriminatory enforcement. For these reasons, the Proposed Rule is unconstitutionally vague.

B. The Agencies' Approach to Specific Categories of Waters Are as Flawed as the Agencies' General Approach.

The Agricultural Groups fully adopt and incorporate WAC's comments with regard to the Agencies' erroneous approach to WOTUS, and below focuses on the particular issues of profound concern to the nation's farmers and ranchers.

1. "Tributaries" Cannot Include Ephemeral Drainages.

The American Heritage Dictionary (1982) defines "tributary" as "a stream or river flowing into a larger stream or river." This common understanding of "tributary" simply does not include "ephemeral" drainages that only channel stormwater after heavy rains. Most of the time, ephemeral drainages are dry land—they are not flowing rivers or streams. It is simply shocking to farmers and ranchers that the Agencies could interpret a "tributary" as reaching ephemerals and thereby sweeping in many features that look just like land. The NWPR provided important clarification regarding the status of ephemeral streams that flowed only in response to precipitation by correctly concluding that they were *not* WOTUS.[4] The Agencies' rapid about-face in this proposal is disappointing, to say the least.

[4] As noted in the WAC comments, commenters take issue with other aspects of the NWPR's tributary definition, but here AFBF limits its comments to the rule's appropriate exclusion of ephemeral features.

The Agencies set off on the wrong foot by failing to define tributary in the first place. The lack of a definition of tributary with measurable criteria results in significant vagueness and fairness concerns, especially where the application of "tributary" could substantially expand or limit the scope of jurisdiction under the CWA.[5] *See supra* Part I. The Agencies justify this gap by saying they have "decades of experience implementing the 1986 regulations." 86 Fed. Reg. at 69,422. But that is hardly reassuring. Although the Agencies do not define "tributary" in the regulatory text, they say that tributaries include natural, man-altered, or man-made water bodies that flow directly *or indirectly* into a TNW, interstate water, or the territorial seas. *Id.* This broad approach provides the Agencies with significant discretion to exercise jurisdiction, which results in uncertainty and confusion for regulated entities. The Agencies' approach is particularly concerning to farmers and ranchers who regularly have water flowing on their properties in response to precipitation, and therefore could be considered "ephemeral" tributaries by the Agencies.

By failing to provide clarity, the Agencies are forcing farmers to either: (1) presume that an ephemeral drainage that carries water only when it rains will be deemed a jurisdictional tributary, or (2) seek a jurisdictional determination from the Corps, or (3) take a chance that their activities near or in such features may result in unlawful discharges carrying civil penalties of nearly $60,000 a day. *See* 87 Fed. Reg. 1,676, 1,678 (Jan. 12, 2022). Even worse, a farmer could face criminal liability with jail time and up to $100,000 a day in fines. With such stiff statutory penalties at stake—including the loss of one's own personal liberty—farmers and ranchers deserve more clarity.

The Agencies assert that certain ephemeral waters in the arid West may be jurisdictional under the significant nexus standard where they have a significant effect on the physical, chemical, and biological integrity of downstream TNWs. *See* 86 Fed. Reg. at 69,437. The Agencies attempt to distinguish such ephemeral waters from geographic features such as non-jurisdictional swales and erosional features by noting that these ephemeral tributaries may serve as a transitional area between the upland environment and TNWs, provide habitats for wildlife, and assist in physical processes such as nutrient cycling, sediment retention, and pollutant trapping, which may in turn affect the integrity of downstream TNWs. *See id*. This paragraph made little sense when the Agencies originally included it in the *Rapanos* Guidance, and it still makes no sense.

This approach to ephemeral waters in the arid West ignores the importance of volume, duration, and frequency of flow, which both the plurality and Justice Kennedy's opinions in *Rapanos* found to be vitally important. In so doing, the Agencies allow for the same sorts of unlawful assertions of jurisdiction over ephemeral drainages that they attempted to get away

[5] The way in which "tributary" is defined impacts the scope of jurisdiction because the Proposal defines "waters of the United States" to include tributaries of TNWs, interstate waters, impoundments, or the territorial seas if the tributary satisfies either the relatively permanent or significant nexus standard.

with under the former "any hydrologic connection" theory, which was resoundingly rejected in the *Rapanos* decision. *See Rapanos*, 547 U.S. at 784 ("Absent some measure of the significance of the connection for downstream water quality, this standard was too uncertain . . . mere hydrologic connection should not suffice . . .") (Kennedy J., concurring); *see also id.* at 732 n. 5 (plurality) ("Common sense and common usage distinguish between a wash and seasonal river."). The opinions forming the majority in *Rapanos* thus tell us that all streams, whether ephemeral or otherwise, must have more than insubstantial flows.

Moreover, the Agencies' discussion of how ephemeral tributaries serve as transitional areas and provide certain ecological functions stands on weak ground. Putting aside whether that discussion has record support, such attributes are not unique to ephemeral streams and is thus not a defining feature of a WOTUS. To the contrary, any channel or upland riparian area may serve as a "transitional area" or provide ecological functions that could affect the integrity of downstream waters. For example, non-jurisdictional upland vegetated areas bordering waters often provide the same ecological and water quality functions as jurisdictional wetlands. Therefore, there is no rational basis to extend jurisdiction over ephemeral streams simply because they serve as transitional areas or provide ecological and/or water quality benefits.

The Agencies' approach to seasonal flow under the relatively permanent standard could also unlawfully sweep in some ephemeral water features (and too many intermittent features for that matter). The Agencies' propose to employ a vague "flow at least seasonally" approach, where by "seasonally" they mean generally three months, or possibly even less time depending on what part of the country the water feature is located in. *E.g.*, 86 Fed. Reg. at 69,434; *see also id.* at 69,441. The Agencies do not articulate any scientific or legal basis for interpreting seasonal flow to mean three months. Instead, the Agencies purport to rely on a footnote in *Rapanos* to support this conclusion, but at most, that footnote—which actually discussed a stream flowing for *290 days* (closer to 10 months)—can be read to acknowledge the *possibility* that jurisdiction can be exercised over rivers, streams, and tributaries that flow for 290 days on a case-by-case basis. *See Rapanos*, 547 U.S. at 732 n.5. It does *not* support the Agencies' view that a feature that flows for three months (or even two months, for example in Oregon) *automatically* meets the relatively permanent standard and is thus jurisdictional. This interpretation of "relatively permanent" finds no support in the plurality's opinion in *Rapanos*.

Ultimately, the question is *not* whether tributaries or ephemeral streams are "important" or may as a scientific matter have some connection with downstream navigable waters, *see, e.g.*, 86 Fed. Reg. at 69,390; rather, the question is whether they should be considered as falling within the bounds of federal jurisdiction. As with so many other categories in the Proposed Rule, the agencies collapse that distinction. The NWPR was correct to exclude ephemeral streams categorically, and the Agencies are wrong to dismiss that approach.

2. <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 abut[ted] on a navigable waterway" in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985). The Agricultural Groups recommend that the Agencies assert jurisdiction over only wetlands, and only those wetlands that are *directly abutting* other "waters of the United States."

The Proposed Rule instead grasps at the constitutional limits of the Agencies' jurisdiction. As with several of the other categories of waters, the Agencies propose to assert jurisdiction under either the relatively permanent or significant nexus standards. *See* 86 Fed. Reg. at 69,435-38. This is a mistake. *First*, the Proposed Rule's approach to "relatively permanent" is not consistent with the plurality's opinion in *Rapanos*, because the Agencies deprive the Court's requirement for a "continuous" connection of all meaning by turning it into a mere "physical connection" test that apparently can be satisfied by features such as ditches or pipes that may flow only on occasion. *Id.* at 69,435-36. Such connections stray too far from the plurality's test and are not the sort of "continuous surface connection[s]" that "mak[e] it difficult to determine where the 'water' ends and the 'wetland' begins." 547 U.S. at 742 (plurality).

Second, the Agricultural Groups also oppose the significant nexus approach to adjacent wetlands in the Proposed Rule. The Agencies' approach of aggregating wetlands is flatly contrary to Justice Kennedy's requirement that each wetland be judged in its own right to determine whether it (and it alone) bears a significant nexus to traditional navigable waters. *Rapanos*, 547 U.S. at 782 (explaining that "the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries" and that "this showing is necessary to avoid unreasonable application of the statute" given the potential overbreadth of the Corps' regulations).

Finally, the Agencies' proposal to aggregate the functions performed by all of the wetlands in an entire watershed (or similarly broad region) to evaluate whether a significant nexus is present expands the reach of the significant nexus test even farther, and is even less clearly implementable.

Rather than finalize the Proposed Rule, the Agencies should assert jurisdiction over only those wetlands that are directly abutting "waters of the United States;" in so doing, 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.

This definition 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. Any definition of "waters of the United States" should also 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 have not always consistently implemented that definition. Specifically, some have not required 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.

3. The Broad Sweep of the Agencies' Proposal for "Other Waters" Is Likewise Unlawful.

The Agencies' overconfidence reaches new heights with regard to its proposal to include any "other waters" that meet either the relatively permanent or significant nexus standards. *See* 86 Fed. Reg. at 69,418. This new category would reach many intrastate, non-navigable water features that would be considered "isolated" under *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"). Under the Proposed Rule's application of the relatively permanent standard to this new category, any relatively permanent (defined too broadly), standing or continuously flowing "other water" can be deemed jurisdictional merely because it has a continuous surface connection to a *non-navigable* interstate water or wetland. *See* 86 Fed. Reg. at 69,449-50 (proposed 33 C.F.R. § 328.3(a)(3)(i) & 40 C.F.R. § 120.2(a)(3)(i)). A reasonable reader would be hard-pressed to find an endorsement of this approach in the plurality's requirement that "a relatively permanent body of water [be] connected to traditional interstate navigable waters." *Rapanos*, 547 U.S. at 742 (plurality).

Worse still is the Proposed Rule's application of the significant nexus standard to "other waters," not least because, if that standard is ever to be applied, it should be to wetlands, and wetlands *only*. Applying the significant nexus standard elsewhere allows the Agencies to aggregate all similarly situated "other waters" (*e.g.*, prairie potholes or ponds that are not part of a tributary system) across an entire watershed and claim jurisdiction over *all* such features based on a finding that they collectively perform a single important function for a downstream "foundational" water. This is plainly not what Congress could have intended, and not what the Supreme Court would allow.

Moreover, the Proposed Rule lacks sufficient guidance as to how the Agencies plan to apply the significant nexus standard to the "other waters" category. The likely result will be mass confusion on the part of farmers and ranchers and inconsistent decision-making by regulators. As a procedural matter, the Proposed Rule does not provide enough information on or scientific support for the various "alternatives" for implementing the significant nexus standard with

respect to the "other waters" category. As such, the public does not have a meaningful ability to evaluate and comment on the various alternative approaches.

It appears, though, that under this Proposal, countless small wetlands or other small waters that are far removed from traditional navigable waters (including ephemeral tributaries and ditches) or coast nevertheless will be potentially within the scope of federal jurisdiction. Long linear features, such as ditches, will have floodplain and riparian areas around them—and will often have "hydrologic connections" to nearby wetlands or ponds. Farm ponds, for example, will have overflow outlets designed to allow overflow during heavy rains, so as to protect the integrity of the pond. Presumably, the Agencies would see this as a "confined surface hydrologic connection." The inclusion of small, isolated wetlands, ponds and similar features that are "adjacent" to ditches or ephemeral drainages would sweep into federal jurisdiction countless small and otherwise remote wetlands and ponds that dot the nation's farmlands.

In short, the "other waters" category is beyond the pale.

4. <u>The Agencies Should Clearly Exclude Farm Ditches and Artificial Farm Ponds.</u>

Ditches and similar 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."[6] Without adequate drainage, farmlands could remain saturated after rain events and unable to provide adequate aeration for crop root development. Drainage ditches and other water management structures can help increase crop yields and ensure better field conditions for timely planting and harvesting. In areas without sufficient rainfall, irrigation ditches and canals are needed to connect fields to water supplies and to collect and convey water that leaves fields after irrigation. Put simply, ditches are vitally important to support American agriculture and ultimately to feed the growing population.

Therefore, the Agricultural Groups strongly recommend that the definition of WOTUS should retain standalone exclusions for ditches (including, but not limited to drainage ditches and irrigation ditches), and artificial ponds (including, but not limited to, stock watering ponds, irrigation ponds, and sediment basins).[7] But if these exclusions are to be meaningful, they must not be limited to features constructed on dry land or upland. Because these features are constructed to store water, it would not typically be useful for them to be constructed along the

[6] The Agricultural Groups acknowledge that construction of such features *in* a WOTUS should not eliminate CWA jurisdiction.

[7] Farmers also rely on 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. The Agencies should also clarify that such features are excluded *unless* they were constructed in a WOTUS.

tops of ridges, for example. Rather, 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 Agencies should retain the approach to ditches and artificial ponds from the NWPR, which is protective of downstream navigable waters and avoids impinging upon state and local governments' traditional authority. Otherwise, the Agencies should find some way to make it clear that such features are excluded as they historically were from the definition of "waters of the United States." There is no need (or lawful basis) to include these features within the definition of "waters of the United States" to try to protect either the features themselves or connected waters against the discharge of pollutants. Indeed, there is an extensive framework of stormwater regulation that ensures that water from such conveyances do not impact downstream "waters of the United States." *E.g.*, 40 C.F.R. §§ 122.26, 122.34.

The NWPR appropriately recognized the practical realities surrounding ditches on farm and ranch lands 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. The Agricultural Groups strongly support both of 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 placed the burden of proof on the government to prove its jurisdictional status. This clarification provided much needed certainty to farmers and ranchers as to how the Agencies would 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.

The Proposed Rule, however, nullifies these helpful exclusions. Not only does it leave a gap in the regulatory text by failing to expressly exclude ditches or artificial ponds, the discussions in the preamble regarding the Agencies' past practice leave much to be desired. The following paragraphs detail our concerns with the Agencies' approach to ditches and artificial ponds.

Ditches: Unfortunately, the Proposed Rule's approach to ditches is, like so much else in this Proposed Rule, overbroad and impermissibly vague. The Agencies propose to continue implementing the approach to ditches set forth in the 2008 *Rapanos* Guidance: "ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States." 86 Fed. Reg. at 69,433. This is flawed for several reasons.

First, as with tributaries, an interpretation of "relatively permanent" that encompasses all upland ditches that flow for three months (or perhaps for even shorter amounts of time depending on what Corps districts consider to be seasonal flow) is inconsistent with the *Rapanos* plurality opinion and the plain text of the CWA. Further, the Agencies indicate they might interpret the term to encompass features that "may flow for shorter periods of time" such as "two months" in certain parts of the country. *See* 86 Fed. Reg. at 69,436 & 69,441. Moreover, a ditch carrying relatively permanent flow, however minor, that is far removed from a traditional navigable water does not meet Justice Kennedy's significant nexus standard either. *Rapanos*, 547 U.S. at 780-82 (Kennedy, J., concurring) ("Yet the breadth of [the Corps standard [defining "tributaries"]—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system.").

Second, the Proposed Rule also uses ambiguous and vague terms that leaves too much room for inconsistent and arbitrary implementation. To illustrate, the phrase "excavated wholly in and draining only uplands" does not make it clear what exactly the Agencies consider "uplands" to be, particularly since the Agencies have proposed to remove the NWPR's definition of "uplands" from the regulations. Is any feature that does not meet all three wetland factors count as "uplands"? If a ditch crosses a wetland, is it possible for the portion that is excavated in uplands to be excluded even if the portion downstream of the wetland crossing is jurisdictional, or is the entire ditch jurisdictional? What if a ditch was constructed in a wetland long before the CWA's enactment? It may be the case that such a ditch now drains only uplands because it long ago drained the wetland; would the Agencies still consider that ditch to meet the "draining only uplands" requirement?

Moreover, the Proposed Rule seems to assume that all ditches carry "flow." But sometimes, water is simply present. In flat areas, for example, drainage may be poor, resulting in the presence of water in low-lying portions of many ditches. Would the Proposed Rule disqualify such ditches from the exclusion if there is standing water for more than two or three months at a time? If so, then a significant number of ditches in rural settings could be deemed jurisdictional.

Third, unlike the NWPR, the Proposed Rule would shift the burden of proof back to landowners to demonstrate that ditches on their lands were excavated wholly in and drain only uplands. But what exactly must a landowner show with respect to a ditch that was constructed several decades ago? Must the landowner demonstrate that conditions at the time do not satisfy the Agencies' *current* wetland delineation standards or is the area to be judged based on scientific understanding at the time? Once again, the Agencies' proposal inevitably means more regulatory burdens and delays for simple projects such as constructing or maintaining ditches and of course more litigation.

Artificial Lakes and Ponds: The preamble to the Proposed Rule mentions that such features are excluded if they are created by excavating and/or diking dry land *and* if they are

"used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing." 86 Fed. Reg. at 69,434. First, the requirement to excavate or dike dry land is too restrictive because it puts the burden on landowners to try to prove historic conditions, rather than focusing on current conditions. It will be difficult, if not impossible, for landowners to demonstrate what conditions were like on the ground at the time a feature was created.

Relatedly, as the agencies have recognized in the past, areas that perhaps used to be WOTUS, but have been lawfully converted to dry land (whether because it was authorized by a permit or because it occurred before there was a permit requirement) should not be subject to regulation as WOTUS. For example, EPA has recognized that CWA Section 404 does not regulate existing "waters" and thus "[w]hen a portion of the [w]aters of the United States has been legally converted to fast land . . . it does not remain waters of the United States." 45 Fed. Reg. 85,336, 85,340 (Dec. 24, 1980). Likewise, the Corps has stated that "Section 404 . . . regulate[s] discharges of dredged or fill material into the aquatic system as it exists, and not as it may have existed over a period of time" and thus, the agency does not "assert jurisdiction over those areas that once were wetlands and part of an aquatic system, but which in the past, have been transformed into dry land for various purposes." 42 Fed. Reg. 37,122, 37,128 (July 19, 1977); *see also* Corps RGL 86-9, at ¶ 3 (Aug. 27, 1986) ("[I]f a former wetland has been converted to another use (other than by recent un-permitted action not subject to 404(f) or 404(r) exemptions) and that use alters its wetland characteristics to such an extent that it is no longer a "water of the United States", that area will no longer come under the Corps regulatory jurisdiction for purposes of Section 404.").

Finally, the requirement that artificial ponds be used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing is confusing and potentially too limiting. As written, the preamble creates the impression that a pond would *not* be excluded if it is used for more than one purpose or if it is used for a purpose other than the four listed uses. The Agricultural Groups question whether that is truly the Agencies' intention. In the 2015 Rule, for example, the Agencies specifically removed the "used exclusively" language between the proposed and final rules and clarified that they "recognize that artificial lakes and ponds are often used for more than one purpose and can have other beneficial purposes[.]" 80 Fed. Reg. at 37,099. The Agencies further clarified that the "list of ponds has always been illustrative rather than exhaustive" and thus, the final 2015 Rule added references to "farm ponds" among other types of ponds. *See id.*

C. The Agencies Must Give Full Effect to the Prior Converted Cropland Exclusion.

The Agricultural Groups support the Agencies' proposal to maintain the decades-old exclusion for prior converted croplands ("PCC"), of which there are approximately 53 million acres in the United States.[8] Farmers and ranchers across the country rely on this critical

[8] *See* U.S. Dep't of Agriculture, Natural Resources Conservation Service, RCA Issue Brief #8, "Wetlands Programs and Partnerships," (Jan. 1996), *available at* https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/technical/nra/rca/?cid=nrcs143_014

exclusion which establishes that PCC may be used for any purposes so long as wetland conditions have not returned. In practice, however, numerous issues have arisen regarding the interpretation and application of the PCC exclusion. For this reason, AFBF has long advocated for a clear, commonsense definition and clarification of PCC in the Agencies' regulations. AFBF thus welcomed the NWPR's approach to PCC, which was designed to improve clarity and consistency regarding the implementation of the exclusion, and is disappointed to see that the Agencies are not proposing to carry it forward. The lack of a clear definition of PCC has presented problems in the past regarding when, for example, PCC can be "recaptured" and treated as jurisdictional.

1. PCC Background

Congress passed the Food Security Act in 1985 in part to encourage farmers to protect wetlands on their agricultural property. Pub. L. No. 99-189, 99 Stat. 1354, 1504 (1985). The Food Security Act established the "Swampbuster" program to provide incentives to achieve this purpose. *See* 16 U.S.C. §§ 3821-24 (2000). The Agencies adopted a rule in 1993 to codify how the exclusion would work for their purposes, as opposed to USDA's, and the original rationale 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 PCC exclusion reflects the fact that PCC generally has been subject to such extensive modification and degradation as a result of human activity that the resulting "cropped conditions" constitute the normal circumstances for such lands. *See id.* The 1993 Rule specifically clarified that PCC does not lose its status merely because the owner changes use. *See id.* at 45,033-34. Thus, even if the PCC is used for a non-agricultural use, it remains excluded from the definition of "waters of the United States." That interpretation was upheld in *United States v. Hallmark Constr. Co.*, 30 F. Supp. 2d 1033, 1035, 1040 (N.D. Ill. 1998). Relatedly, another important clarification in the 1993 rule is that even if PCC is "abandoned," meaning it is not used for agricultural production at least once in five years, it does not automatically become subject to CWA regulation. Rather, it merely becomes eligible for CWA regulation. The critical inquiry is whether wetland conditions (as determined using the Corps' 1987 Wetlands Delineation Manual) have returned to the area. If not, the land remains PCC and excluded from the definition of "waters of the United States."

In the 1996 Farm Bill, Congress changed how *USDA* makes eligibility determinations for purposes of the conservation compliance programs it administers, but that bill did not affect how *EPA and the Corps* make PCC determinations for CWA purposes. *See* H.R. Conf. Rep. No. 104-494, at 380 (1996), *reprinted in* 1996 U.S.C.C.A.N. 683, 745 (clarifying "the amendments to

214 ("The Corps and EPA agreed to final regulations ensuring that approximately 53 million acres of prior-converted cropland will not be subject to wetland regulation.").

the abandonment provisions under Swampbuster should not supersede the wetland protection authorities and responsibilities" of the Agencies under the CWA).[9] Further, the 1996 Farm Bill established a process to delineate and certify *wetlands* on farm property for purposes of Swampbuster. *See* Pub. L. No. 104-127, Sec. 322(a), 110 Stat. 888, 988-989 (1996) (codified at 16 U.S.C. § 3822(a)(1)). The Farm Bill adopted a "change in use" concept, whereby USDA's *wetlands* certification would remain "valid and in effect as long as the area is devoted to an agricultural use …." *Id.* § 322(a) (codified at 16 U.S.C. § 3822(a)(4)). Importantly, this provision relates to a *wetlands* certification, not a PCC certification, and specifically does not change how the Corps treats these areas for purposes of the CWA. *See* 61 Fed. Reg. 47,091, 47,023 (Sept. 6, 1996). Neither did the 1996 Farm Bill overrule the Agencies' regulation that "[n]otwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for purposes of the Clean Water Act, the final authority regarding the Clean Water Act jurisdiction remains with EPA." *See* 33 C.F.R. § 328.3(b)(2) (2014). Therefore, the Agencies retain authority over how to apply the PCC exclusion when identifying WOTUS.

2. The Agencies' Shifting Approach to PCC

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. The court also reaffirmed that the only way PCC can return to being jurisdictional for purposes of the CWA is if it is abandoned such that no crops are grown *and* it reverts to a wetland state. *Id.* at 1276 & 1282. Again, this means that a change from agricultural use to non-agricultural use cannot, in itself, cause PCC status to end. Moreover, in any evaluation of whether PCC status was lost, the Corps must look to present conditions and not *hypothetical* future conditions. *Id.* at 1283. 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.

3. The Importance of PCC to Farmers and Ranchers

Appropriate recognition of the PCC exclusion is critical for the Agricultural Groups' members. Land with a PCC designation is significantly more valuable than that same parcel

[9] Likewise, when USDA amended its regulations following the 1996 Farm Bill, it specified that they "do[] not affect the obligations of any person under other Federal statutes, or the legal authorities of any other Federal agency including, for example, EPA's authority to determine the geographic scope of Clean Water Act jurisdiction." *See* 61 Fed. Reg. 47,019 (Sept. 6, 1996).

would be if subject to CWA jurisdiction due to the presence of a WOTUS on the land. Significantly, this land is often used as collateral for farm loans. Moreover, to farmers and ranchers, the ability to use their property as they so choose has intrinsic value. The knowledge that PCC could be put to non-agricultural uses also has value. USDA's Economic Research Service found that the potential for putting converted wetlands to non-agricultural use had an average opportunity cost of $2,200 per acre—in 2001. LeRoy Hansen, Agricultural Resources and Environmental Indicators, *Wetlands: Status and Trends* (July 2006), http://www.ers.usda.gov/publications/arei/eib16/Chapter2/2.3/. Adjusted for inflation, the average opportunity cost would now be over $3,500 per acre. Multiply that by the 53 million acres of PCC nationwide, and that is over $150 *billion* in value hanging in the balance if the PCC exclusion is diminished. Simply put, restrictions on the PCC exclusion decrease the value of PCC, threatening the prosperity of farmers and ranchers nationwide.

4. The Agencies Should Return to the PCC Approach Adopted in the NWPR.

The Agricultural Groups recommend that the Agencies retain the following clarifications from the NWPR, which will help reduce confusion over how the PCC exclusion is implemented: (i) formal withdrawal of the 2005 Joint Guidance and any other guidance that is inconsistent with the 1993 regulations; (ii) a site can be PCC regardless of whether there is a PCC determination from either USDA or the Corps, as there is no specific requirement for issuance of a formal PCC determination, and USDA does not provide determinations unless a farmer is seeking benefits under the conservation compliance programs; and (iii) PCC designations are retained so long as land has been used for a broad range of agricultural purposes at least once in the preceding five years.

The PCC definition in the NWPR brought an end to 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 was 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 NWPR reinforced how the PCC exclusion is to be applied and put an end to any improper attempts to narrow the PCC exclusion through the "change in use" policy that the *New Hope* court rejected.[10]

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;

[10] 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.

haying; idling land for conservation purposes. *See* 85 Fed. Reg. at 22,320-21 & 22,326. These clarifications were appropriate, easy to understand, and implementable, and helped to 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 were 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.").

The NWPR's recognition that abandonment does not automatically equate to recapture was also significant. *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.

Finally, the NWPR's preamble provided 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.

Even if the Agencies decide not to take up these recommendations to retain key provisions of the NWPR, under no circumstance should the Agencies return to implementing the PCC exclusion in a manner consistent with the USDA's "change in use" principle, which would upend nearly 30 years of largely consistent implementation in accordance with the 1993 Rule. In sum, the PCC exclusion is essential to the functioning of many farms and ranches as evidenced by the sheer number of acres it encompasses; restriction would have serious negative consequences for AFBF's members.

III. The Agencies' Expanded Assertion of Federal Jurisdiction Threatens to Shrink the Scope of Congress's Exclusions to the Point of Uselessness.

Congress plainly expected that most activities on farmlands and pastures would be covered by state programs aimed at controlling nonpoint source pollution and would not be subject to federal permit requirements. Congress specifically included in the CWA several critical statutory exemptions for agriculture, each of which would be unlawfully undermined by the Proposed Rule:

- Section 404 exemption for "normal" farming and ranching activities
- Section 404 exemption for construction of farm or stock ponds
- Exclusions of agricultural stormwater discharges and return flows from irrigated agriculture from the definition of "point source" and hence, from Section 402 permitting

When Congress enacted these exemptions, it used language that assumed that farming and ranching activities generally occur on land, not in "waters of the United States." An expansive interpretation of the phrase "waters of the United States"—one that effectively defines land to be water—would nullify Congress' specific choice to avoid federal permitting requirements for fanning and ranching.

As explained in more detail below, the statutory exemptions for agriculture demonstrate a clear and consistent determination by Congress not to impose CWA permit requirements on ordinary farming and ranching activities, which are weather-dependent and time-sensitive activities necessary for the production of our nation's food, fiber and fuel. The Proposed Rule's broad assertion of jurisdiction over ditches, dry ephemeral drainages, and isolated water features on farm fields would render those exemptions virtually meaningless. Although non-governmental organizations (and even the Agencies from time to time) insist that farmers and ranchers have no reason to complain about an expansive definition of "waters of the United States" because they are protected by these exemptions, those arguments mischaracterize the scope of the exemptions and conveniently ignore both citizen suit and governmental efforts to construe the exemptions as narrowly as possible.

A. Expansive WOTUS Definitions Undermine the Section 404(f) Exemption for "Normal" Farming and Ranching Activities.

Congress amended the Clean Water Act for the express purpose of exempting "normal" farming, ranching, and forestry activities from the Section 404 "dredge and fill" permit requirements. 33 U.S.C. § 1344(f). This amendment came as a response to the Corps' expansion of the definition of "navigable waters" as including certain wetlands. Under this exemption, "normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices" are generally exempt from Section 404 permitting requirements. 33 U.S.C. § 1344(f)(1)(A). In addition, by statute, the exemption is inapplicable to any activity "having as its purpose bringing an area of navigable water into a use to which it was not previously subject, where the reach of navigable waters may be impaired or the reach of such waters be reduced" (*i.e.*, converting wetland to non-wetland so as to make it amendable to a new use). 33 U.S.C. § 1344(f)(2). This limitation is often referred to as the "recapture" provision.

The text of 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 themselves jurisdictional, it is important to remember that discharges to those features may still be exempt from permit requirements, *e.g.*, under Section 404(f).

Unfortunately, the Agencies have interpreted this statutory exemption very narrowly to apply only where farming has been ongoing at the same location since 1977 (the year that the exemption and its implementing rules were adopted). *See, e.g., United States v. Cumberland Farms of Conn., Inc.,* 647 F. Supp. 1166 (D. Mass. 1986), *aff'd*, 826 F.2d 1151 (1st Cir. 1987).[11] Over the years, whenever the Agencies have sought to expand the definition of "waters of the United States," they have overstated the protection afforded by the normal farming and ranching exemption by refusing to publicly acknowledge their interpretation of an "established" operation.

The Agencies claim that "the scope of 'waters of the United States' does not affect these statutory exemptions." 86 Fed. Reg. at 69,377. Not so. Because the Agencies interpret the "recapture" provision as applying to all navigable waters, any increase in scope of WOTUS increases the scope of the recapture provision, thus limiting the 404(f) exemption.

B. Expansive WOTUS Definitions Undermine the Section 404(f) Exemption for Construction or Maintenance of Farm Ponds.

Section 404(f) also exempts from its permitting requirement any discharge of dredged or fill material into WOTUS for "construction or maintenance of farm or stock ponds or irrigation ditches." 33 U.S.C. § 1344(f)(1)(C). This provision exempts from section 404 permit requirements any discharge of dredged or fill material into waters of the U.S. for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches. This exemption, however, like the "normal" farming and ranching exemption, is subject to the "recapture" provision. *Id.* § 1344(f)(2); *see also* 33 C.F.R. § 324.3(c). Thus again, the scope of WOTUS matters. The Corps has interpreted the farm pond exemption narrowly and applied the so-called "recapture" provision broadly. In the experience of many farmers, where wetlands or ephemeral "tributaries" are involved in farm or stock pond construction, the recapture provision essentially swallows the

[11] On March 25, 2014, the Agencies issued an immediately effective "interpretive rule" concerning the application of "normal" farming exemptions to 56 listed conservation practices. 79 Fed. Reg. 22,276 (Apr. 21, 2014). The interpretive rule provided no meaningful protection from the harmful implications of the expansion of "navigable waters" and, in fact, further narrowed the already limited "normal" farming exemption. Congress directed the Agencies to withdraw it. 80 Fed. Reg. 6,705 (Feb. 6, 2015). If nothing else, that should caution the Agencies against going too far again.

exemption. Farmers have been ensnarled in litigation and enforcement due to the creation of ponds by impounding small ephemeral drainages.

By expanding the scope of the Agencies' jurisdiction as described above, the Proposed Rule will further limit farmers' and ranchers' ability to build and maintain farm ponds. This aspect of the rule will affect countless (maybe most) farm and stock ponds (of which there are millions). By expanding jurisdiction to include common ephemeral drainages, isolated wetlands, and isolated "other waters" (even if only on a case-by-case basis), the rule could prohibit the impoundment of these natural drainage or depressional areas—which is often the *only* rational way to construct a farm or stock pond. Farm or stock ponds are typically constructed at natural low spots to capture stormwater that enters the pond through sheet flow and ephemeral drainages. Depending on the topography, pond construction may be infeasible without diking a natural drainage path on a hillside. For that reason, the Proposal's recognition of the exclusion for "artificial lakes or ponds created by excavating and/or diking *dry land* and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing," 86 Fed. Reg. at 69,433, is almost meaningless. "Dry land" would exclude anything that qualifies as a wetland or any ephemeral feature where stormwater naturally channels—presumably even non-jurisdictional wetlands or ephemeral features. This leaves little "dry land" available for any rational construction of a farm pond. Farm and stock ponds are not excavated on hill tops and ridges. They are excavated at low spots where water naturally flows and collects. Thus, the proposed expansion of jurisdiction would render the farm pond exclusion meaningless, and the Section 404(f) exclusion for certain farm or stock ponds would provide no relief for most farmers and ranchers.

C. Expansive WOTUS Definitions Undermine the Statutory Exclusions for Agricultural Stormwater and Return Flows from Irrigated Agriculture.

In addition to the Section 404(f) exemptions, "agricultural stormwater discharges" and "return flows from irrigated agriculture" are excluded from the definition of "point source" and thus, are not subject to NPDES permitting. *See* 33 U.S.C. §§ 1362(14), 1342(*l*)(1). Precipitation runoff and irrigation water from farms and ranches is excluded from NPDES permitting requirements even if the stormwater or irrigation water contains "pollutants" and is channeled through a ditch or other conveyance that might otherwise qualify as a "point source" subject to NPDES permit requirements. The exemption shows Congress's clear intent to exclude farmers and ranchers from CWA liability and permitting for activities on farm and ranch land that may result in "pollutants" being carried by precipitation or irrigation flows into navigable waters.

Because the Proposed Rule's articulation of excluded ditches is so narrow, however, it would severely undermine this exemption by potentially treating as WOTUS the very ditches and drains that carry stormwater and irrigation water from farms. Similarly, the Proposed Rule is likely to lead to more assertions of jurisdiction over ephemeral features and isolated ponds due to the Agencies' broad interpretations of both the relatively permanent and significant nexus standards, combined with their view that the science essentially shows that all ephemeral tributaries and broad variety of other water features exert a strong influence on downstream

navigable waters. This expansion is problematic because the statutory exclusions arguably would not cover the direct addition of pollutants into such ditches and drains, such as materials that fall into or are sprayed into those features on dry weather days.

Because ditches and ephemeral drainages are ubiquitous on farm and ranch lands—running alongside and even within farm fields and pastures—the Proposed Rule will make it impossible for many farmers to apply fertilizer or crop protection products to those fields without triggering potential CWA liability and permit requirements.[12] A CWA pollutant discharge to navigable waters arguably will be deemed to occur each time even a *molecule* of fertilizer or pesticide falls into a jurisdictional ditch, ephemeral drainage or low spot—even if the feature is dry at the time of the purported "discharge." Courts (and EPA) have long held that there is no *de minimis* defense to CWA discharge liability. Thus, farmers will have no choice but to "farm around" these features—allowing wide buffers to avoid activities that might result in a discharge—or else obtain an NPDES permit for farming. Such requirements are contrary to congressional intent and would present substantial additional hurdles for farmers who wish to conduct practices essential to growing and protecting their crops.

IV. Beyond Vagueness, the Proposal Raises Other Constitutional and Statutory Concerns.

A. The Proposed Rule Exceeds the Scope of the Federal Government's Authority Under the Commerce Clause.

Congress has not clearly delegated to the Agencies the authority to exert regulatory jurisdiction over every wet spot in the United States. *See Touby v. United States*, 500 U.S. 160, 165 (1991); *Mistretta v. United States*, 488 U.S. 361, 372 (1989); *Atl. City Elec. Co.* v. *FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) ("Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony."). While the Commerce Clause authorizes Congress to regulate interstate and foreign commerce, that has historically been employed to protect the country's waterways with navigability as the touchstone for the exercise of federal regulatory power. *See* Rivers and Harbors Act of 1899, § 13, 33 U.S.C. § 407 (prohibiting the unpermitted discharge of "refuse matter" "into any navigable water of the United States" or any tributary thereof). The CWA cannot be read to expand the scope of Congress's constitutional limitations. While the Supreme Court has interpreted the CWA to extend federal regulatory authority to more than just those waters that are navigable in the traditional sense, *Rapanos v. United States*, 547 U.S. 715, 767 (2006) (Kennedy, J., concurring in the judgment), it has also said the Agencies may not read "navigable" out of the statute.

[12] Our concerns regarding these exclusions are heightened by the fact that farm ditches and conveyances are popular targets for citizen suits filed by non-governmental organizations seeking to narrow both exclusions. *E.g.*, *Board of Water Works Trustees of the City of Des Moines v. Sac County Board of Supervisors*, No. 15-cv-4020, 2017 WL 1042072 (N.D. Iowa Mar. 17, 2017) (agricultural stormwater exclusion); *Pacific Coast Fed'n of Fishermen's Ass'ns v. Glaser*, No. CIV S-11-2980-KJM-CKD, 2013 WL 5230266, (E.D. Cal. Aug. 31, 2012) (return flows from irrigated agriculture).

SWANCC, 531 U.S. at 159 (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377407-408 (1940)).

The Supreme Court has had to step in several times and remind the Agencies of their constitutional limits. For example, the Court characterized the Corps' assertion of jurisdiction over sand and gravel pits based on their use by migratory birds as "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *SWANCC*, 531 U.S. at 174. The Court further emphasized that Congress only intended to exercise its traditional "commerce power over navigation" in enacting the CWA and not to extend federal regulatory authority to the maximum extent allowable under the Commerce Clause. *See id.* at 168 n.13. Likewise, in *Rapanos*, the Court found that the Agencies' assertion of jurisdiction under an "any connection" theory over wetlands that were *not* adjacent to traditional navigable waters "stretch[ed] the outer limits of Congress's commerce power." 547 U.S. at 738 (plurality). But instead of reading *Rapanos* as the Court intended, *i.e.*, as directing the Agencies to show *restraint* in exerting jurisdiction, they have taken it as an invitation to see just how far they can "stretch" their jurisdictional bounds before once again being restrained by the Court.

The Proposed Rule extends the scope of federal regulatory authority far beyond the commerce power over navigation that Congress had in mind. The Agencies claim authority to regulate countless non-navigable waters on the landscape, from ephemeral drainages to isolated wetlands to prairie potholes, which are far removed from navigable waters. And based on our review of the Technical Support Document, one would be hard pressed to identify any water feature that *lacks* a strong enough physical, chemical, *or* biological connection to some downstream navigable water within the context of a regulator's evaluation of the cumulative effect of a bunch of water features within a large "region." Because the Proposed Rule allows for the assertion of jurisdiction under what amounts to an "any ecological interconnection" or "migratory pollutant" theory, the Agencies have again read the term "navigable" out of the statute and exceeded their authority under the Commerce Clause.

B. The Proposed Rule Raises All of the Significant Federalism Concerns that Underpinned the Supreme Court's Rejection of Broad Federal Regulatory Authority in *SWANCC*.

The Agencies continue to give States short shrift in the Proposal, leaving to the States only very few water features the Agencies do not deem fit to regulate themselves. But the Agencies do so at their peril, for it simply is not the case that Congress intended to diminish States' role in water quality protection so completely. Rather, in the CWA Congress sought to preserve and protect States' primary responsibilities and rights to *plan the development and use of land and water resources*, which the Supreme Court has recognized.

The Agencies prefer to interpret only Section 101(a) as effectively dictating the scope of their authority, but they cannot ignore 101(b), and in fact must read the two provisions together. *See United States v. Mills*, 850 F.3d 693, 698 (4th Cir. 2017) ("adjacent statutory subsections that refer to the same subject should be read harmoniously"). In Section 101(a), Congress expressed the CWA's "objective" as "to restore and maintain the chemical, physical and biological integrity

of the Nation's waters," and enumerated seven national goals or policies to achieve that objective. 33 U.S.C. § 1251(a). Congress did not specify how to realize those goals or policies in that provision. But Congress did articulate in the very next section its policy "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 [of EPA] in the exercise of his authority under this chapter." *Id*. § 1251(b).

Read together, Section 101(b)'s policy of preserving and protecting states' rights and responsibilities must inform Section 101(a)'s objective of maintaining the integrity of waters. This conclusion is evident when examining the distinction between an "objective" and a "policy." An "objective" is a "goal," something to be aspired to. *See* 84 Fed. Reg. at 56,634/1 & n.20; 85 Fed. Reg. at 22,269. A *policy*, by contrast, is a means to achieve the goal; a "'plan or course of action'." 84 Fed. Reg. at 56,634/1 (quoting *Webster's II, New Riverside Dictionary*); 85 Fed. Reg. at 22,252 (explaining that Congress also established several key policies that direct the work of the agencies to effectuate th[e] goals"). Courts presume that Congress chooses language purposefully. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006). Here, particularly given that Congress chose to set forth an "objective" and a "policy" in sequential subsections, this distinction must be given effect. But the Agencies give short shrift to the role of Congress's policy in Section 101(b) in achieving the objectives set forth in Section 101(a).

Instead, the Agencies read Section 101(b) as doing little more than designating States as mere enforcers of federal policy. *See, e.g.*, 86 Fed. Reg. at 69,400-01. The language the Agencies use is slightly less harsh—reading Section 101(b) "as a recognition of states' authority to '*prevent, reduce, and eliminate* pollution' and provide support for the Administrator's exercise of his authority to advance the objective of the Act." *Id.* at 69,400. The Agencies claim to have "considered" the provision in Section 101(b) that commands respect for States' rights "to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." *Id.* at 69,401. But the upshot of this "consideration" is to discard its significance altogether, as though it has no bearing on the permissible level of federal encroachment on traditional state powers. That is baseless.

The Agencies claim that their interpretation of Section 101(b) is consistent with Supreme Court precedent. 86 Fed. Reg. at 69,401. In making this assertion, the Agencies all but ignore that *SWANCC* clearly recognized the constitutional concerns implicated "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power" *and emphasized the language in 101(b) that the Agencies downplay*. *SWANCC*, 531 U.S. at 173-74. The regulation of land and water use within a State's borders is just such a "quintessential" State and local function. *Rapanos*, 547 U.S. at 738. The CWA contains no clear statement that Congress intended to alter that scheme. Rather, the CWA preserves a significant and primary role for the States in not just implementing the Act's various regulatory and non-regulatory programs, but also in planning the use and development of land and water resources.

C. The Agencies Have Failed to Provide a Meaningful Opportunity for Notice & Comment

The Agencies' meager 60-day public comment period for this proposal does not provide an appropriate opportunity for interested stakeholders to review all of the supporting documents in the docket—not all of which were even available when the comment period was opened—and comment on the proposed rule. Moreover, the Agencies' "regional roundtables" are focusing not on this Proposal, but rather on identifying regional similarities and differences that should be considered as part of a *separate* rulemaking. Even the Obama Administration provided more time—207 days, in all—to comment on the proposal.

Perhaps the Agencies did not believe that a lengthy comment period would be necessary, since they describe the Proposed Rule as a mere codification of prior practice. *E.g.*, 86 Fed. Reg. at 69,406. That description provides little comfort about this proposal, given the Agencies' past exceedances of their authority under the Constitution and the Act. Moreover, that description is inaccurate. The Proposed Rule is not as limited in scope as the Agencies suggest; to the contrary, the preamble details how the Agencies intend to expand how they are currently implementing the relatively permanent and significant nexus standards by, among other things, appealing to purported deference to the Agencies' evolving ecological judgment. In essence, the Agencies are attempting to convert a test that Justice Kennedy intended to be a check on "unreasonable applications of the statute," *Rapanos*, 547 U.S. at 782 (Kennedy, J., concurring) into a justification for reaching as far as, or arguably further than, the Agencies did under the Migratory Bird Rule or the "any hydrological connection" theories. The Agencies cannot pretend that the Proposed Rule—which required dozens of pages of the Federal Register and even more in supporting documents—requires so little time to review and comment on.

Given the importance of this issue and the inadequately short comment period, the Agencies should respect the calls for more time.

V. The Agencies Do Not Need to Define Water Features as "Waters of the United States" to Ensure Their Protection.

The Proposed Rule, as well as the Agencies' rationale for revising the NWPR (dating back to June 2021), reflect the Agencies' apparent view that the protection of water resources depends on defining "waters of the United States" as broadly as possible. But the exercise of federal regulatory authority under the CWA—which is limited to "navigable waters"—is only one aspect of the CWA's comprehensive framework for the protection of *all* of the Nation's waters. That framework includes both regulatory and non-regulatory programs and envisions action at all levels of government. Many CWA programs, for instance, involve the provision of federal grants and technical assistance to states to ensure protection of *any* waters, not just the "waters of the United States." *See, e.g.*, 33 U.S.C. §§ 1255, 1314.

In announcing their intent to reconsider and revise the NWPR in June 2021, the Agencies painted a frightening picture in their press statements and litigation filings. They pointed to an EPA declaration that described how "a broad array of stakeholders—including states, Tribes,

local governments, scientists, and non-governmental organizations—*are seeing destructive impacts to critical water bodies* under the 2020 rule." "EPA, Army Announce Intent to Revise Definition of WOTUS" (June 9, 2021) (emphasis added).[13] The Agencies further told the public they "have determined that the rule is significantly reducing clean water protections" and "is leading to significant environmental degradation." *Id.*

The Agencies' concerns about water quality degradation under the NWPR were overblown. For example, as the Arizona Department of Environmental Quality (ADEQ) explained, "the only evidence provided [by the Agencies] was the number of waters that were no longer regulated." *See* Ex. 3 (Letter from Director Misael Cabrera, AZ Dep't of Envtl. Qual., to Administrator Michael Regan, U.S. EPA, Re: State of Arizona Input on Proposed Revision to the Definition of "Waters of the United States," Doc. No. EPA-HQ-OW-2021-0328-2503, at 1 (Oct. 1, 2021). But "[e]quating lack of regulation to environmental degradation is not completely accurate." *Id.* ADEQ further highlighted that, after the NWPR's promulgation, it developed its own surface water protection program to ensure the protection of important waters no longer considered WOTUS. *See id.* at 1-2. ADEQ estimates that it spent more than $2 million in the year following the NWPR's promulgation to implement the rule, including sampling and pollutant monitoring, pollution impact reduction, and permitting/compliance. *Id.* at 2. The whiplash-inducing reversal by the Agencies results in significant uncertainty for state and local regulatory entities such as ADEQ—not to mention a waste of scarce resources.

Another illustration of how the Agencies' claims of environmental degradation resulting from the NWPR were speculative and misleading involves the construction of a farm pond in Illinois. The supporting documentation that accompanied the Agencies' June 2021 announcement contains a spreadsheet of 333 "Actions Associated with an Approved Jurisdictional Determination in ORM2 (June 22, 2020-April 15, 2021) with the No Permit Required Closure Method of 'Activity occurs in waters that are NO longer WOTUS under the NWPR." *See* Attachment A to Memorandum for the Record, "Review of U.S. Army Corps of Engineers ORM2 Permit and Jurisdictional Determination Data to Assess Effects of the Navigable Waters Protection Rule" (June 8, 2021).[14] Among the actions listed in that spreadsheet is the construction of a farm pond at Kelsey Farms in Putnam County, Illinois. *See id.* at 18. The Agencies' reliance on this pond as part of their justification to avoid significant environmental degradation by revising the NWPR is mystifying for several reasons:

- The Agencies do not explain why they believe construction of this pond would have required a permit before the NWPR, but no longer did under the NWPR. The current owner of the land did not obtain a jurisdictional determination (JD) under a pre=NWPR definition of "waters of the United States," and he is not aware of any prior JD associated with his land.

[13] *See* https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus.

[14] *Available at* https://www.epa.gov/sites/default/files/2021-06/documents/combined_4_thru_12_508.pdf.

- The farmer coordinated with USDA and Corps staff over an extended period of time and eventually rescoped his proposed project to avoid impeding water resources. This was no easy task. The farmer was not able to being construction of the pond until a full three years after purchasing the property. Ultimately, he spent $55,000 to construct the pond, including considerable sums on pine trees, grassweed, and fish to stock the pond. The end result is a highly engineered pond that is attractive to wildlife and waterfowl. *See* Ex. 4 (constructed pond photos).

- This farmer's story is not one of seizing the opportunity to significantly degrade or harm the environment under a narrower definition of "waters of the United States."[15] It is one of a private landowner and farmer who sought to: realize the full use and enjoyment of his property; carefully plan and execute the project, and communicate with regulators throughout the planning process to ensure full compliance.

In short, it is wrong to assume that a narrower definition of "waters of the United States" necessarily will lead to environmental degradation, much less significant degradation.

VI. Conclusion

For all the above reasons and those set forth in WAC's comments, AFBF and the undersigned organizations recommend that the Agencies withdraw the Proposed Rule. Retaining the NWPR is a far preferable alternative, given the certainty and predictability it provided. Even were the Agencies to seek to amend it, the NWPR is a more appropriate foundation for a durable and defensible rule than a return to the flawed pre-2015 framework. Regardless of the course the Agencies choose, they must include all stakeholders in a more robust and meaningful dialogue to arrive at a rule that respects congressional intent and the limits the Supreme Court has recognized. We thank the Agencies for the opportunity to provide these comments.

Sincerely,

American Farm Bureau Federation
Agricultural Retailers Association
Minnesota Agricultural Water Resources Council
National Council of Farmer Cooperatives
The Fertilizer Institute
National Corn Growers Association
National Pork Producers Council
Illinois Corn Growers Association
Illinois Farm Bureau

[15] Notably, several environmentally beneficial conservation projects appear on the Agencies' list of actions affecting waters that were purportedly no longer WOTUS under the NWPR, such as the construction of grassed waterways according to NRCS standards. *See id.*

U.S. Poultry & Egg Association
United Egg Producers
Indiana Pork Producers Association
National Milk Producers Federation
Idaho Dairymen's Association
South East Dairy Farmers Association
Iowa Farm Bureau Federation
Milk Producers Council
Washington State Dairy Federation
Oregon Dairy Farmers Association
Texas Association of Dairymen
Dairy Producers of Utah
Dairy Producers of New Mexico