



February 7, 2022

The Honorable Radhika Fox
Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

The Honorable Michael L. Connor
Assistant Secretary of the Army for Civil
Works
Department of the Army
108 Army Pentagon
Washington, DC 20310-0104

Re: Docket ID No. EPA-HQ-OW-2021-0602; “Revised Definition of ‘Waters of the United States’”

On behalf of the more than 200,000 family farmers and ranchers of National Farmers Union (NFU), thank you for the opportunity to comment on the proposed rule defining “waters of the United States” (WOTUS) under the Clean Water Act (CWA). NFU is a grassroots general farm organization representing family farm, ranch, and rural members nationwide. Since 1902, NFU has worked to ensure that farm families and their communities are respected, valued, and enjoy economic prosperity and social justice.

I. Introduction

Clean, safe water is an essential resource that family farmers, ranchers, and their communities depend on. Farmers and ranchers strive to be good stewards of our nation’s natural resources, including by protecting water quality through sound land management practices. Ambiguous or confusing regulations regarding the definition of WOTUS under the CWA make compliance difficult and unduly burdensome. NFU appreciates the Environmental Protection Agency (EPA) and the Department of the Army’s (“the agencies”) stated efforts to establish durable rules that define the scope of waters protected under the CWA. Yet, ongoing litigation over the Navigable Waters Protection Rule (NWPR) and a recent announcement by the Supreme Court that it is reviewing the “significant nexus” issue adds to uncertainty around the WOTUS statutory and regulatory regime.

As the agencies attempt to craft rules that define the scope of WOTUS under the CWA, NFU asks the agencies to ensure it balances the important goal of protecting water quality with rules that are clear, simple, and not unduly burdensome for farmers and ranchers. Additionally, we urge the agencies to ensure they are conducting extensive outreach and consulting a diverse array of farmers and ranchers regarding the challenges and conditions they face on their land. NFU is concerned that ongoing litigation may create additional confusion among the regulated community as the agencies work to develop and implement this and future rules. We urge the agencies to mitigate that confusion to the maximum extent possible.

II. NFU Policy with respect to the definition of WOTUS under the Clean Water Act (CWA)

Environmentally-sound production of food, feed, fiber, and fuel is very important to Farmers Union members. NFU's grassroots, member-driven policy expresses strong support for the protection of water quality. Farmers and ranchers understand the importance of clean water on their own farms and ranches and as a shared resource. They know that protecting water quality is a key component of achieving sustainable agricultural production.

NFU policy also “encourages a well-balanced, sensible environmental policy that protects the public and the environment without unduly burdening family farmers through excessive regulation or economic hardship.”¹ Ambiguous regulations regarding the definition of WOTUS present ongoing challenges for farmers and ranchers. We urge the agencies to develop rules that lead to greater regulatory certainty and clarity for farmers as soon as possible.

Additionally, NFU policy expresses support for “exemptions for normal agricultural activities being reaffirmed”² under any interpretation of WOTUS under the CWA. NFU expects that the current and future rules will reaffirm these longstanding exemptions and exclusions for common agricultural activities.

III. The importance of consulting family farmers and ranchers in the development of durable WOTUS rules

Clean water is essential. But protecting our nation's water resources is a complex task that requires sincere, careful, and painstaking engagement and dialogue with stakeholders. Full consideration must be given to the legitimate concerns of the people who will be regulated under updated and new CWA rules, including family farmers and ranchers. Farmers are involved in production across a

¹ National Farmers Union, *Policy of the National Farmers Union*, (March 2020).

² Ibid.

wide variety of landscapes, and they manage many different types of water resources. The nature of water resources and approaches to water management will differ across geographies.

NFU policy states that agricultural producers “from all agricultural areas of the U.S. [be] included in discussions to address the issues concerning the proposed changes to jurisdiction of the CWA.”³ The conditions facing farmers in the humid east are quite different from the arid west. Certain regions, like the Prairie Pothole region, present unique hydrologic conditions. NFU supports the agencies in their plan to host roundtables across diverse geographies, but we believe the agencies must do more to ensure everyone who would like to be heard can have a voice in the development of these regulations. As the agencies pursue rulemakings to define the scope of waters protected under the CWA, we encourage the agencies to consult farmers and ranchers regularly, extensively, and equitably.

IV. Ongoing litigation and future rulemakings

There are several factors that bear on the current proposed rule and possible future regulatory action regarding the definition of WOTUS under the CWA. The proposed rule is being promulgated after a federal district court decision vacated the Navigable Waters Protection Rule (NWPR), and the agencies make clear in the current proposed rule that further developments in litigation over the NWPR are possible. Furthermore, the Supreme Court recently agreed to review the Sackett case, which could have an impact on the test used to determine wetlands jurisdiction under the CWA.

Given the agencies’ efforts to craft rules while relevant litigation is ongoing, NFU understands that the proposed rule and future rules may need to evolve as the law evolves. We encourage the agencies to be mindful that these circumstances may lead to greater confusion among the regulated community. It will be important for the agencies to work closely with the regulated community to help them understand the rule and the evolving legal landscape.

NFU also understands that the current proposed rule is not intended to be the conclusion of the rulemaking process. As the agencies note, they “will also consider changes through a second rulemaking that they anticipate proposing in the future, which would build upon the foundation of this proposed rule.”⁴ In the further rules promulgated by the agencies, it will be essential that the agencies find the right balance between providing certainty for farmers and ranchers, while ensuring the protection of water resources. Moreover, as with this rulemaking, the agencies must

³ Ibid.

⁴ <https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0001>

extensively engage family farmers and ranchers to ensure the regulations are clear and not overly burdensome.

V. Conclusion

Thank you again for the opportunity to submit comments. We look forward to continuing to work with the agencies to ensure they implement rules that protect our water resources, while being clear, simple, and not unduly burdensome for farmers and ranchers. NFU plans to closely monitor implementation of this final rule for its impacts on family farmers, ranchers, and rural communities.

If you have any questions or would like to further discuss NFU's comments, please contact Aaron Shier, NFU Senior Government Relations Representative, via e-mail at ashier@nfudc.org or by phone at 202-554-1600. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Rob Larew". The signature is fluid and cursive, with the first name "Rob" and last name "Larew" clearly distinguishable.

Rob Larew
President