



Arizona Farm Bureau Federation
325 S. Higley Rd, Suite 210
Gilbert, AZ 85296

April 15, 2019

Submitted via www.regulations.gov

U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OW-2018-0149

Re: Comments on Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4,154 (Feb. 14, 2019)

The Arizona Farm Bureau appreciates this opportunity to offer detailed comments on the United States Environmental Protection Agency’s (“EPA”) and United States Army Corps of Engineers’ (“Corps”) (collectively “the Agencies”) proposed rule revising the definition of “waters of the United States” (“WOTUS”) under the Clean Water Act (“CWA” or “the Act”), 84 Fed. Reg. 4154 (Feb. 14, 2019) (“the Proposed Rule”).

I. Introduction

Arizona Farm Bureau represents more than 2,000 farm and ranch families across the state. As a desert state with a \$23.3 billion agricultural industry, Arizona is uniquely equipped to recognize the need to protect precious water resources. The availability of safe, clean water is of utmost importance to our agricultural producers: without it, we could not raise animals, grow crops, or sustain our vibrant and quickly developing communities. When it comes to Arizona agriculture, water is truly our lifeblood.

We commend the Agencies for proposing a revised definition that goes a long way towards providing clarity and certainty through clear definitions. For too long, the Agencies have through regulations and guidance documents sought to steadily expand the definition of WOTUS beyond what Congress intended, and the Supreme Court has twice had to rein in the Agencies’ power grabs. We believe the Proposed Rule will bring an end to the decades-long regulatory creep by appropriately giving effect to the statutory text and Congress’s intent, while balancing the important goal of environmental protection with Congress’s explicit policy to recognize, preserve, and protect the states’ primary responsibilities over pollution control and over planning

the use of land and water resources. The Proposed Rule does a good job of avoiding the sorts of difficult constitutional questions that prior Agency interpretations raised, and it respects the careful federal-state balance that Congress struck when it enacted the Clean Water Act (“CWA”) in 1972.

In the Proposed Rule, the Agencies have properly recognized that the CWA is not a license for the Agencies to regulate every water body in the United States. Rather, as the Proposed Rule recognizes, Congress has set up a mix of regulatory and non-regulatory approaches for addressing water pollution. Some of those mechanisms rely on localities, some rely on the states, and some rely on federal entities like the Agencies. Each regulatory and non-regulatory mechanism operates within a carefully delineated sphere. “Navigable waters,” for example, are subject to federal regulatory requirements under the CWA, but many other classes of the “Nation’s waters” are not. The Proposed Rule respects the unique roles of federal, state, and local entities in this country’s overall regulatory scheme.

But there are still opportunities for the Agencies to improve the Proposed Rule. For example:

- The Agencies should interpret traditional navigable waters (“TNWs”) in accordance with the traditional two-part test for navigability articulated in *The Daniel Ball* and subsequent cases applying that test. We recommend that the Agencies revise the regulatory text corresponding to this category to cover, in pertinent part, waters used “to transport interstate commerce” and not waters used “in interstate commerce.”
- The Agencies should clarify key terms that are relevant to several of the jurisdictional categories of water, such as “intermittent.” The Agencies define “intermittent” as “surface water flowing continuously during certain times of a typical year.” 84 Fed. Reg. at 4,173. A more precise and therefore clearer definition would replace the phrase “certain times of a typical year” with a minimum duration of continuous surface flow—for example, 90 days.
- The Agencies should eliminate ditches as a standalone category of jurisdictional waters. We agree with the Agencies’ proposal to assert jurisdiction over certain types of ditches, such as those that are man-altered tributaries. But it would be better to do that by clarifying the “tributary” category rather than by establishing a category of jurisdictional ditches, which may create the misimpression that the default status of ditches is that they are jurisdictional.
- The Agencies need not include impoundments as a separate category of jurisdictional waters. The features that the Agencies intend to cover in this category should fall within the new lakes and ponds category. At a minimum, if the Agencies retain impoundments as a separate category, they should clearly define what an impoundment is.

- The definition of “wetlands” could be improved if the Agencies expressly clarify that a wetland must satisfy all three of the delineation criteria set out in the Proposed Rule.

We believe these and other recommendations—detailed in our comments below—will help eliminate potential ambiguities in whatever Final Rule emerges from this rulemaking process. The resulting clarity will benefit the regulated parties, government entities, and courts tasked with following and administering the CWA. It is in that spirit that we offer the following suggestions and observations.

II. General Legal and Policy Considerations

Before commenting on the specific categories of jurisdictional waters, the undersigned organizations first touch upon some important legal and policy considerations, many of which are discussed in detail in the preamble.

A. CWA Background and Relevant Supreme Court Precedent

The CWA’s objective is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” and Congress set forth several national policies and goals to achieve that objective. 33 U.S.C. § 1251. Of critical importance here, Congress intended for the task of controlling water pollution to remain largely a state function. Thus, in section 101(b), Congress announced its “policy to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and “to plan the development and use ... of land and water resources.” *Id.* § 1251(b).

A cornerstone of the CWA is the prohibition on discharges of pollutants to a subcategory of the Nation’s waters known as the “navigable waters.” Specifically, the Act prohibits discharges “to navigable waters from any point source,” except “in compliance with” certain provisions of the Act. *See id.* §§ 1311(a), 1362(12)(A). Congress defined “navigable waters” simply as “the waters of the United States, including the territorial seas.” *Id.* § 1362(7). The precise scope of the terms “navigable waters” and “waters of the United States”—and hence, the jurisdictional reach of the CWA—remains unclear, which explains why those terms have been the subject of considerable litigation dating back to the Act’s inception. The Supreme Court has, on three separate occasions, had to interpret the terms “navigable waters” and “waters of the United States,” though in each case, the issue before the Court was whether the Corps reached *too far* in regulating beyond traditional navigable waters. Therefore, although those cases provide important guideposts concerning the permissible *outer* limits of federal jurisdiction, they offer scant insights concerning what water features Congress *clearly intended* the federal government to regulate under the CWA.

In *United States v. Riverside Bayview Homes*, the issue before the Court was whether the CWA “authorizes the Court to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries.” 474 U.S. 121, 123 (1985). More specifically, the Court addressed whether non-navigable wetlands are “waters of the United States” because they are “adjacent to” and “inseparably bound up with” navigable-in-fact waters. *Id.* at 131–35. The Court upheld the

Corps' assertion of jurisdiction over those wetlands as a "permissible interpretation of the Act" after finding that Congress intended "to regulate at least some waters that would not be deemed 'navigable.'" *Id.* at 133, 135.

In *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs* ("SWANCC"), the Court considered whether the federal government has jurisdiction over "seasonally ponded, abandoned gravel mining depressions" that are not adjacent to open water but "[w]hich are or would be used as habitat" by migratory birds. 531 U.S. 159, 162–64 (2001). The Court "read the statute as written" to not allow the Corps' assertion of jurisdiction over nonnavigable, isolated, intrastate ponds because to do so would read the term "navigable" out of the Act. *See id.* at 171–72. Although the Court acknowledged its previous statement from *Riverside Bayview* that the term 'navigable' was of limited import, it cautioned that "it is one thing to give a word limited effect and quite another to give it no effect whatsoever." *Id.* at 172. The Court explained that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172 (citations omitted). In reaching its holding, the Court emphasized "the text of the statute will not allow" it to hold "that the jurisdiction of the Corps extends to ponds that are not adjacent to open water." *Id.* at 168.

Importantly, SWANCC considered, but rejected, the government's argument "that Congress recognized and accepted a broad definition of 'navigable waters' that includes nonnavigable, isolated, intrastate waters." *Id.* at 169. Accepting the government's position would have required the Court to "assume that 'the use of the word navigable in the statute . . . does not have any independent significance.'" *Id.* at 172. The Court also rejected the government's argument that the Corps' assertion of jurisdiction could be upheld based on "Congress's power to regulate intrastate activities that 'substantially affect' interstate commerce." *Id.* at 173. In so doing, the Court reversed the lower court's holding that the CWA reaches as many waters as the Commerce Clause would allow. *See id.* at 166 (quoting 191 F.3d 845, 850-52 (7th Cir. 1999)). Because the government's expansive view of jurisdiction would "raise significant constitutional questions" by "result[ing] in a significant impingement of the States' traditional and primary power over land and water use," the Court refused to uphold the Corps' assertion of jurisdiction absent a clear statement from Congress. 531 U.S. at 172-74. But "[r]ather than expressing a desire to readjust the federal-state balance in this manner, Congress 'chose to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resource.'" *Id.* at 174 (quoting 33 U.S.C. § 1251(b)).

Most recently, in *Rapanos v. United States*, a majority of the Court rejected the Corps' assertion of jurisdiction over intrastate wetlands located twenty miles from the nearest navigable water. *See* 547 U.S. 715, 720-21 (2006). A four-justice plurality of the Court held that "waters of the United States" encompasses "only relatively permanent, standing or flowing bodies of water" and "wetlands with a continuous surface connection to" those waters. *Id.* at 732, 739, 742. In reaching that holding, the plurality stressed that the regulation of "development and use" of "land and water resources" is a "quintessential state and local power." *Id.* at 737–38.

Justice Kennedy, concurring in the judgment, held that the federal government has jurisdiction over wetlands only if there is a "significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 779. In so holding, Justice Kennedy

disavowed the possibility that “drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it” would meet his “significant nexus” standard. *Id.* at 781, 778. In a separate concurring opinion, Chief Justice Roberts pointedly stated that “[g]iven the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority.” *Id.* at 758.

As noted above, *Rapanos* must be read in its proper context: that case focuses on what *limits* Congress placed on the federal government’s jurisdiction over non-navigable water features. Nonetheless, several courts have held that the “significant nexus” test from Justice Kennedy’s concurring opinion in the *Rapanos* case is the controlling test for what is or is not WOTUS. *E.g.*, *United States v. Robison*, 505 F.3d 1208, 1221–22 (11th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724–25 (7th Cir. 2006). It is important to bear in mind that Justice Kennedy’s concurring opinion does *not* stand for the proposition that any water feature with a “significant nexus” to traditional navigable waters is *per se* jurisdictional. What Justice Kennedy’s opinion instead makes clear is that *if* the Agencies want to assert jurisdiction over non-navigable features and adjacent wetlands, there must, at a minimum, be a “significant nexus.” *See Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring). In his words, “[a]bsent a significant nexus, jurisdiction under the Act is lacking.” *Id.* at 767. But that is different from saying that the Agencies must apply a “significant nexus” test, let alone that they must assert jurisdiction over any water feature that meets such a test. Like the Supreme Court’s other pronouncements on the meaning of WOTUS, Justice Kennedy’s *Rapanos* concurrence (and the plurality for that matter) provides little instruction on the water bodies and features over which the Agencies’ *must* assert jurisdiction.

B. The Agencies’ Proposal Rests on a Sound Reading of the Statute and is Consistent with Supreme Court Precedent.

The Agencies’ essential task is to give meaning to key elements of the statutory text and structure of the Clean Water Act. The Proposed Rule correctly identifies the statute and the term “navigable” as the starting points for that endeavor. Beginning with the term “navigable,” the Agencies correctly note that Congress intended to assert authority over more than simply waters that are traditionally understood to be navigable. Nonetheless, as the Agencies recognize, *SWANCC* reinforced that the term “navigable” still retains independent significance: it shows that, in promulgating the CWA, Congress had in mind “its traditional jurisdiction over waters that are or were navigable in fact or that could reasonably be so made.” 531 U.S. at 167.

Staying with the text, the law strongly suggests that the term “waters” should not be interpreted to include normally dry channels or features that are better characterized as “point sources.” *See Rapanos*, 547 U.S. at 733–36 (plurality opinion). The Proposed Rule is therefore correct to read the statute in a way that, by and large, does not create overlap between the terms “navigable waters” and “point sources.” *See* 33 U.S.C. § 1362(12); *see also Rapanos*, 547 U.S. at 735 (“[T]he CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from ‘navigable waters,’ by including them in the definition of ‘point source.’”). Finally, the phrase “of the United States” reflects that “navigable waters” are distinct from “waters of the states.” Thus, the preamble to the Proposed Rule correctly explains that

waters of the States are part of the “Nation’s waters,” but not all of the “Nation’s waters” are “navigable waters.” *See* 84 Fed. Reg. at 4,169.

Turning to the structure and purpose of the Act, the Proposed Rule correctly recognizes that CWA section 101(b) is a fundamental guidepost in any rulemaking defining WOTUS. The Proposed Rule respects Congress’s intent “that States should maintain responsibility over land and water resources.” 84 Fed. Reg. at 4,196. That intent is most clearly articulated in CWA Section 101(b). Unlike the 2015 Rule, the Proposed Rule carefully adheres to this express policy, while trying to accomplish the objective and goals of the Act. Consistent with the clear 101(b) policy, the Proposed Rule avoids interpreting “waters of the United States” in a way that pushes the limits of Congress’s commerce power. As the Supreme Court clarified in *SWANCC*, the closer the Agencies get to those limits, the more likely they will “significant[ly] impinge[] [upon] the States’ traditional and primary power over land and water use.” *SWANCC*, 531 U.S. at 174. In this regard, the *SWANCC* decision is not as narrow as merely rejecting the assertion of jurisdiction over isolated waters based on use as habitat by migratory birds. The majority opinion in *SWANCC* announces a broader principle: that *any* assertion of jurisdiction over such waters (and comparable features) would read “navigable” out of the Act in ways that would impermissibly adjust the federal-state balance. *Id.* at 172, 174. The Proposed Rule comports with that principle.

Implicit in the CWA Section 101(b) policy is the recognition that States are effective guardians of their own water resources. As the Proposed Rule explains, the CWA takes on the broader problem of pollution of the “Nation’s waters” through various regulatory and non-regulatory approaches. Among those approaches are the CWA Section 402 and 404 permit programs, which are led by EPA and the Corps, respectively. Many other sections of the CWA protect both navigable waters and the rest of the Nation’s waters through cooperation between the federal government and state governments. Congress provided EPA and the Corps with several tools to indirectly persuade state authorities to protect water quality, such as the award of grant money and other incentives. *E.g.*, 33 U.S.C. §§ 1255(b) (providing for grants to states to research treatment and pollution control from point and nonpoint sources in river basins), 1255(c) (authorizing grants for research and demonstration projects “for prevention of pollution of any waters by industry”), 1314(f) (directing EPA to issue guidelines and other information regarding pollution from, among other things, “changes in the movement, flow, or circulation of any navigable waters or ground waters”).

Congress also gave EPA ultimate approval authority over various state management plans, water quality standards, and total maximum daily loads. CWA sections 208 and 303(e), in particular, require states to develop comprehensive Water Quality Management Plans including best management practices that can control significant nonpoint sources of pollution. *See* 33 U.S.C. §§ 1288, 1313(e). And in 1987, Congress added CWA Section 319 to provide additional incentives in the form of grant funding for states to address nonpoint sources, while also requiring more detailed nonpoint source management programs. *See id.* § 1329. Fundamentally, however, the regulation of state land and water resources resides with state regulatory authorities, *not* with the federal government. Congress deliberately gave States the lead role—not a subservient one—in protecting upstream non-navigable waters and regulating land use. This is why the CWA limits federal regulatory programs to addressing point source discharges of

pollutants to “navigable waters,” *id.* §§ 1311, 1362(12), while leaving state-led programs free to address many other forms of point and nonpoint pollution.

State and local officials have a long history of working with landowners to improve water quality. Working under the CWA’s cooperative federalism structure, state programs have been, and can continue to be, very effective in protecting water resources. *See, e.g.*, US EPA, “Nonpoint Source Success Stories,” available at <https://www.epa.gov/nps/nonpoint-source-success-stories> (detailing how restoration efforts have led to documented water quality improvements in hundreds of primarily nonpoint source-impaired waterbodies nationwide). And EPA has not held back in using its bundle of sticks and carrots to persuade state authorities to follow EPA’s lead.

Water is a precious commodity in the desert and Arizona agencies responsible for its management and use work to insure state and federal obligations under the CWA are realized. Furthermore, there are a number of examples in the state where waters identified as impaired have been improved significantly through efforts conducted by private and public partnerships.

All of this is to say that the protection of “navigable waters” does not require federal control over every feature that can conceivably be characterized as “water.” Not only is stretching the definition of “waters of the United States” unnecessary to achieve the CWA’s goal of protecting water quality, it would directly contradict the clear congressional policy announced in CWA section 101(b). *See SWANCC*, 531 U.S. at 173 (quoting 33 U.S.C. § 1251(b) to conclude that “[r]ather than expressing a desire to readjust the federal-state balance ... Congress chose to ‘recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the development and use ... of land and water resources’”). To the extent section 101(a) of the CWA embraces a goal of eliminating discharges into the Nation’s waters, the Proposed Rule properly recognizes that Section 101(a) is purely aspirational, and is therefore distinct from the fixed policy statement set out in Section 101(b). *See* 84 Fed. Reg. at 4,169 & 4,163 n.18.

C. The Revised Definition of “Waters of the United States” Should Include Clear Terms that are Easy to Apply in the Field.

Farmers and ranchers cannot overstate the importance of a rule that draws clear lines of jurisdiction that can be understood without the need to hire an army of consultants and lawyers. The CWA is a strict liability statute that carries huge civil fines and criminal penalties for persons who violate the Act’s prohibitions.

Prior regulatory interpretations of “waters of the United States” were needlessly complex, unclear, and confusing on their face, which allowed the Agencies continually to broaden their interpretation of the scope of the CWA. And although the Supreme Court has twice rejected overly broad assertions of federal jurisdiction, the scope of CWA jurisdiction remains far from clear, so “[l]ower courts and regulated entities [have had] to feel their way on a case-by-case basis.” *Rapanos*, 547 U.S. at 757-58 (Roberts, J., concurring).

A growing number of Supreme Court justices have become more vocal in expressing their concerns about the CWA’s reach in the past few years. Seven years ago, in *Sackett v. EPA*, Justice Alito lamented how “the combination of the uncertain reach of the Clean Water Act and

the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA's tune." 566 U.S. 120, 132 (2012) (Alito, J., concurring) ("In a nation that values due process, not to mention private property, such treatment is unthinkable."). And nearly three years ago, in *U.S. Army Corps of Engineers v. Hawkes Co.*, Justices Thomas and Alito joined Justice Kennedy's concurring opinion, which warned that the CWA "continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation." 136 S. Ct. 1807, 1817 (2016) (Kennedy, J., concurring).

American farmers and ranchers want to comply with the CWA and take seriously their obligations under the law. But to do so, they must know—before engaging in agricultural activities—which features on their farms are jurisdictional and which are not. Thus, to ensure that law abiding farmers and other landowners can understand and comply with the CWA, the Final Rule's definition of WOTUS must provide clarity and certainty. Indeed, the need to clearly define and precisely limit the reach of the federal government under the CWA is something the Agencies should cite to support the Proposed Rule's more limited view of federal jurisdiction.

The same basic concerns provide a reason why the Agencies should avoid including vague terminology that landowners and regulators will be unable to apply without having to undertake burdensome scientific determinations. While the Proposed Rule provides more clarity than prior definitions of WOTUS, there are still some terms and concepts that cause concern which we discuss later in these comments, along with suggestions for providing additional clarity.

D. The Proposed Rule Rightly Accounts for, but Is Not Dictated by, the Science.

Science alone does not dictate how the Agencies are to draw the boundaries of CWA jurisdiction. The prior administration recognized as much. *See* Clean Water Rule, 80 Fed. Reg. 37054, 37,060 (June 29, 2015) ("the 2015 Rule") (proclaiming that the "science does not provide bright line boundaries with respect to where 'water ends' for purposes of the CWA"); *see also* Definition of "Waters of the United States" — Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899, 34902 (July 27, 2017) (quoting 2015 Rule).

While the rulemaking record that was established for the 2015 Rule "demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters," it was and is ultimately the Agencies' "[interpretive] task to determine where along that gradient to draw lines of jurisdiction under the CWA." 80 Fed. Reg. at 37,057. This will involve "policy judgment" and "legal interpretation" on the Agencies' part. *Id.*; *see also id.* at 37,060 ("[T]he agencies' interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but not dictated by them."). Again, the Agencies have "plenty of room to operate" when interpreting the statutory text and exercising their policy-making authority. *See Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring); *see also San Francisco Baykeeper v. Cargill Salt Division*, 481 F.3d 700, 704 (9th Cir. 2007) ("By not defining further the meaning of 'waters of the United States,' Congress implicitly delegated policy-making authority to the EPA and the Corps, the agencies charged with the CWA's administration.").

The Proposed Rule accounts for the common-sense gradient concept, that some waters (*e.g.*, perennial and intermittent streams) have a stronger influence on downstream waters than others (*e.g.*, isolated wetlands and ephemeral streams). *E.g.*, 84 Fed. Reg. at 4,175-76. The science does not and cannot tell us that the mere fact that a water might have *some* influence on downstream waters is a sufficient basis to deem it a WOTUS and assert federal jurisdiction. That is a legal and policy question to be determined “within the overall framework and construct” of the Act. *Id.* at 4176. The Agencies have appropriately construed the Act to avoid raising significant constitutional questions by defining WOTUS in a way that leaves ephemeral and isolated features as part of the Nation’s waters that remain under state control. And this finds support in the science. *E.g.*, 84 Fed. Reg. at 4,175-76 (discussing gradient concept and explaining the decreased probability that ephemeral streams will impact downstream waters compared to perennial and intermittent streams); *id.* at 4,177 (explaining how connections become less obvious as the distance between wetlands and flowing waters increases).

III. Recommendations on Proposed WOTUS Categories

In general, we support the revised definition of WOTUS, and believe it is protective of water resources, while respecting the careful federal-state balance that Congress struck when it enacted the CWA. We do however have the following recommendations for providing additional clarity.

A. Traditional Navigable Waters

At the heart of the Proposed Rule’s definition of WOTUS is what the Agencies call the traditional navigable waters (“TNWs”) or the “(a)(1) waters.” The scope of this category is of critical importance because all other categories of WOTUS tie back to it. Unfortunately, the Agencies carry forward prior, overly broad interpretations of TNW. In the Agencies’ view, this category encompasses all waters subject to Rivers and Harbors Act jurisdiction, *plus* waters that court decisions would define to be TNWs, *plus* any other waters that are navigable-in-fact. *See* 84 Fed. Reg. at 4,170.

We strongly urge that the Agencies correct this overreaching interpretation and limit the TNW category to just waters subject to Rivers and Harbors Act jurisdiction. Thus, TNWs should be defined as “waters which are currently used, or which were used in the past, or may be susceptible *to transport* interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide.” We also urge the Agencies to rescind Appendix D to the *Rapanos* Guidance.

B. Interstate Waters

We support the Agencies’ proposal to eliminate “interstate waters” as a standalone category of jurisdictional waters. *See* 84 Fed. Reg. at 4,171. The CWA provides for federal jurisdiction over “navigable” waters, not “interstate” ones and thus, elimination of this category is consistent with the statutory text. In fact, as the Proposed Rule explains, Congress deliberately removed the term “interstate” from the CWA when it overhauled the Federal Water Pollution Control Act in 1972. *See id.* (tracing the history that led to the replacement of “interstate waters” with “navigable waters”).

There is simply no statutory or constitutional basis for regulating waters merely because they happen cross state lines, regardless of whether the waters are TNWs or connected to TNWs. Regulating waters solely on that basis goes far beyond what Congress had in mind in enacting the CWA: “its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.” *SWANCC*, 531 U.S. at 172 (citing *Appalachian Elec. Power Co.*, 311 U.S. at 407-08). To do so would allow federal assertions of jurisdiction over isolated ponds or primarily dry channels even though such features are not navigable, cannot be made navigable, have no connection or influence to a navigable water, are not adjacent to a navigable water, and contribute no flow to a navigable water. Such an assertion of jurisdiction reads the term “navigable” out of the statute. The Agencies have appropriately proposed to remove this category.

C. Tributaries

Under the Proposed Rule, tributaries of TNWs are jurisdictional. The Proposed Rule defines “tributary” as “a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a [TNW] or territorial sea in a typical year either directly or indirectly through other jurisdictional waters . . .” *Id.* at 4,173. The Proposed Rule further provides that (i) tributaries do not lose their jurisdictional status if they flow through a natural or artificial break, so long as the break conveys perennial or intermittent flow to a jurisdictional water at the downstream end of the break; and (ii) alteration or modification of a tributary does not affect its jurisdictional status so long as the other elements of the Proposed Rule’s definition are satisfied. *See id.*

We support the Agencies’ proposal to define tributary as a stream, river, or “similar naturally occurring surface water channel” contributing more than just ephemeral flow to a downstream (a)(1) water. We also support defining “tributary” in a way that avoids the need for case-specific determinations of a “significant nexus.” And we support omitting from the definition the concepts of “ordinary high water mark” and “bed and banks.” Indeed, we strongly urge the Agencies *not* to add these terms to the definition of “tributary.” Because occasional storm events are enough to establish a bed, banks, and ordinary high water mark, countless features on otherwise dry land without any significant nexus to a TNW would become jurisdictional. For too long, regulators have overreached when applying the ordinary high water mark concept and consequently, reliance on its use has proven to be disastrous for landowners. It is easy to see why both the plurality and Justice Kennedy criticized the Agencies’ heavy reliance on the ordinary high water mark concept in *Rapanos*. *See, e.g.*, 547 U.S. at 725 (plurality) (describing how the Corps has used this concept to extend jurisdiction “to virtually any land features over which rainwater or drainage passes and leaves a visible mark—even if only the presence of litter and debris”); *id.* at 780-81 (Kennedy, J., concurring) (noting that the ordinary high water mark provides “no such assurance” of a reliable standard for determining significant nexus). Put simply, “ordinary high water mark” is not a reliable means of distinguishing jurisdictional streams from non-jurisdictional erosion features, and reincorporating it into the Final Rule would only exacerbate the vagueness and uncertainty the Agencies seek to eliminate.

Furthermore, the Agencies’ discussion of the Connectivity Report appropriately recognizes that the line-drawing that the Agencies must engage in with respect to tributaries is a legal and policy choice, not one “dictated by, science.” *Id.* at 4187. The Connectivity Report

suggests that all waters are connected, but that report at least acknowledged that those connections occur along a gradient. Where to draw the line along degrees of connectivity between federal and state waters is not a matter of the extent of the ecological impacts to downstream waters, because the CWA nowhere embodies that concept. Rather, legal and policy considerations, such as the established meaning of “navigable waters,” Commerce Clause limits on federal authority, the states’ traditional authority over land and water resources, and the need for a clear rule that provides Due Process and fair notice to landowners concerning whether their conduct is legal, should be used to draw the line between waters of the United States and those that fall within State jurisdiction. Importantly, this legal and policy decision must respect the will and intent of Congress. In this respect, as we note earlier, the statute is clear: Congress has reserved to the states the “primary responsibilities and rights” to “prevent, reduce and eliminate pollution.” Thus, neither Congress nor the Supreme Court has vested the agency with the authority to make a legal or policy choice in conflict with the statute. The Agencies have rightly drawn the line in the Proposed Rule in a way that should avoid raising difficult constitutional questions. “Science,” the Agencies properly state, “cannot be used to draw the line between Federal and State waters, as those are legal distinctions that have been established within the overall framework and construct of the CWA.” 84 Fed. Reg. at 4176.

While we generally support the Proposed Rule’s approach to tributaries, we are concerned that the definition of “tributary” leaves some important terms undefined. For instance, the Proposed Rule does not say how often a tributary must flow to meet the “certain times of a typical year” threshold. “Certain times of a typical year” is a phrase that, according to the Agencies, is “intended to include extended periods of predictable, continuous seasonal surface flow occurring in the same geographic feature year after year.” *Id.* The Agencies should provide further clarification about how those terms will be applied. To achieve the clarity that the Agencies acknowledge is an important goal of the rule, the Agencies should further define how those terms will be applied. We recommend including some sort of quantitative measure of what qualifies as intermittent for an extended period—*e.g.*, at least 90 days of continuous surface flow in a typical year.

We further recommend that the Agencies provide a more definite means of identifying what constitutes a “typical year.” For instance, the Agencies could specify particular sources of data and methodologies for determining what a “typical year” is.

Finally, in defining what qualifies as a tributary, the Proposed Rule refers to a litany of different tools that regulators might use, ranging from visual observations, to trapezoidal flumes and pressure transducers. *See id.* at 4176–77. We remain concerned about the Agencies’ ability to make crucial jurisdictional determinations based on an array of desktop analyses not readily available to farmers and ranchers or other members of the regulated public. Vesting the Agencies with that authority invites more uncertainty and confusion in a process that carries life-changing consequences for regulated parties.

D. Ditches

The Proposed Rule adds a new category of jurisdictional ditches. *Id.* at 4,179. The rule defines ditch as “an artificial channel used to convey water,” but the Proposed Rule only asserts jurisdiction over three classes of ditches: (1) those that would also fall within the category of

TNWs; (2) those that are constructed in or that relocate or alter a tributary; and (3) those that are constructed in an adjacent wetland, so long as they also satisfy the definition of tributary. *Id.* The preamble to the Proposed Rule clarifies that a ditch is constructed in a tributary “when at least a portion of the tributary’s original channel has been physically moved.” *Id.* at 4,193.

We agree with the Agencies’ goal to exclude most ditches and artificial channels from federal jurisdiction, such as the various types of ditches that are commonplace on agricultural lands. But we recommend that the Agencies accomplish this goal through different regulatory text. Rather than define WOTUS in a way that includes a separate category of jurisdictional ditches – which risks creating the wrong impression that the default status of ditches is that they are jurisdictional – the Agencies should remove the standalone ditches category and instead address the question of which ditches are jurisdictional through language in the tributary definition and in the ditches exclusion.

- To the extent the Agencies intend to assert jurisdiction over ditches that are constructed in tributaries, they should revise the “tributary” definition to clarify that the definition encompasses man-altered tributaries.
- For ditches that are constructed in jurisdictional adjacent wetlands, the ditch exclusion can indicate that such ditches would not be excluded.
- Finally, there is no need for a standalone ditch category to clarify that features like the Erie Canal are jurisdictional. To the extent a man-made or man-altered channel such as the Erie Canal is a TNW, the (a)(1) category already covers such channels, and it would be redundant to specify, in a standalone ditch category, that ditches that satisfy the (a)(1) requirements would be jurisdictional.

Farmers and ranchers have a significant interest in ensuring that this rule provides as much clarity as possible over the regulatory status of ditches. As background, farmers rely on ditches for a broad variety of purposes, which is why they are found everywhere on farmlands. To assert jurisdiction over most agricultural ditches would be a significant departure from longstanding practice and would seriously alter the federal-state balance that Congress struck in the CWA. We appreciate the Agencies’ recognition in the preamble that, since the 1970s, the Agencies have generally excluded non-tidal ditches from CWA jurisdiction.

E. Lakes and Ponds

We believe the Proposed Rule provides a reasonable definition of the new category of jurisdictional lakes and ponds, particularly to the extent it focuses on a lake’s or pond’s contribution of flow to and connection with TNWs. We especially support the Agencies’ elimination of case-specific “significant nexus” determinations as the basis for asserting jurisdiction over lakes and ponds. As already noted, nothing in the CWA compels, or even supports, the use of that test, nor is it required under relevant Supreme Court precedent.

We also appreciate that the preamble to the Proposed Rule appropriately ties the lakes and ponds category back to the CWA’s text and Congress’s intent, particularly to terms like “navigable” and Congress’s commerce power over navigation. *See, e.g., id.* at 4,183. Thus, the

Agencies correctly point out that isolated, intrastate lakes and ponds cannot be deemed jurisdictional based on ecological connections for the reasons discussed in *SWANCC*. *Id.* An alternative interpretation would effectively read the term “navigable” out of the statute and would raise serious constitutional issues. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (cautioning against statutory constructions that render any part of the statutory language “inoperative, superfluous, void or insignificant”).

F. Impoundments

We recommend that the Agencies eliminate impoundments as a standalone category of WOTUS. If the Agencies remove this category, there should not be a gap in jurisdiction because impoundments should still be covered under one of the other categories of WOTUS.

If the Agencies insist on retaining the impoundment category, we recommend that the Agencies provide some clarifications in the final rule. For instance, the Agencies should clearly define what constitutes an impoundment, *e.g.*, that it is a standing body of water created by blocking or restricting the flow of a WOTUS. Similarly, the Agencies should clarify that they would be asserting jurisdiction over the water feature that results from impounding a WOTUS, as opposed to the actual impoundment, whether it is a dam or some other structure.

G. Adjacent Wetlands

We support the Agencies’ approach to adjacent wetlands. We agree with the Agencies that the proposed definition of “adjacent wetlands” is superior to the current definition (“bordering, contiguous, or neighboring”), which the Agencies note has led to considerable confusion in the field. *See* 84 Fed. Reg. at 4,187. Apart from causing confusion, the current definition of “adjacent” has allowed regulators to assert jurisdiction over isolated wet patches of land. *See Rapanos*, 547 U.S. at 728 (detailing how both the Corps and lower courts have determined that wetlands were “adjacent” based on hydrological connections “through directional sheet flow during storm events” or on location within the 100-year floodplain or within 200 feet of a tributary). Such an expansive view of adjacency improperly goes far beyond the “point at which water ends and land begins,” *see Riverside Bayview*, 474 U.S. at 132, and raises the very statutory and constitutional concerns discussed in *SWANCC*. *See* 541 U.S. at 172–74. It also improperly reads the term “navigable” out of the statute and alters the federal-state balance that Congress struck in the CWA. *Id.* By contrast, we believe the Proposed Rule is consistent with the statutory text, Congress’s intent, and applicable Supreme Court precedent.

We also support the Agencies’ attempts to clarify that wetlands must satisfy all three wetland delineation criteria under normal circumstances, but we urge the Agencies to go further. To complement the new definition of “upland,” the definition of “wetland” should be revised to clearly state that an area that does not satisfy all three wetland delineation criteria under normal circumstances is not a jurisdictional wetland. *See* 84 Fed. Reg. at 4,184. This clarification is necessary to ensure consistent implementation across Corps districts and EPA regions. We also recommend that the Agencies provide additional clarity regarding the terms “intermittent” and “typical year,” as discussed in our comments to the tributary category above.

IV. Comments and Recommendations on Proposed Exclusions

The Proposed Rule also identifies certain features that are expressly excluded from the definition of WOTUS. As farmers and ranchers, we support the proposal to exclude features from jurisdiction even if the excluded features develop wetland characteristics within the confines of the features. *See* 84 Fed. Reg. at 4,192. More specifically, we offer the following comments on some of the exclusions of particular interest to farmers and ranchers to help the Agencies clarify and improve them where appropriate.

A. Prior Converted Cropland

We support the Agencies proposed clarifying text on the agencies' longstanding exclusion for prior converted cropland ("PCC"). This clarification continues to exclude PCC from CWA jurisdiction but would ensure that the exclusion applies as the Agencies envisioned when they originally codified its existing longstanding practice in 1993. *See* 58 Fed. Reg. 45,008 (Aug. 25, 1993). The Agencies clarified at the time that "[a]n area remains prior converted cropland even if it is no longer used in agricultural production or is put to a non-agricultural use." The lack of a clear definition of PCC in the regulatory text, however, has given rise to some problems in the past, and we appreciate the Agencies' efforts to clarify their intent in the Proposed Rule.

We support the proposed regulatory text and the preamble text clarifying how the Agencies interpret the PCC exclusion. However, the Agencies should clarify—either in the text or the preamble—that there is a broad array of uses of PCC "in support of" agricultural purposes, such as idling land for conservation purposes; idling land to protect wildlife; irrigation tailwater storage and recovery; crawfish farming and allowing land to lie fallow following natural disasters such as hurricanes (for example, to offset saltwater intrusion). While these uses may look like the land has been abandoned, they are "in support of" agricultural purposes and should be expressly recognized as such. We also urge the Agencies to clarify in the final rule that PCC includes ditches, canals, and other features within PCC.

In connection with this rulemaking, the Agencies should also formally rescind the 2009 Issue Paper from the Corps' Jacksonville Field Office that was set aside by the court in the *New Hope Power* case. Corps districts should not be implementing this guidance, or any other guidance that purports to incorporate change-in-use principles, and trying to recapture lands based on broad interpretations of abandonment. As the Agencies originally explained in 1993, PCC are abandoned (and thus, the exclusion no longer applies) only if land is abandoned *and* the area has reverted to wetland.

B. Groundwater

The Proposed Rule excludes groundwater, "including groundwater drained through subsurface drainage mechanisms." *Id.* at 4,190. We support that exclusion. The text, structure, and history of the CWA make it clear that Congress did not intend for groundwater to be WOTUS. There are numerous instances in the text where Congress plainly distinguished between "ground waters" and "navigable waters" and those distinctions must be given effect. *E.g.*, 33 U.S.C. § 1252(a) (referring to "pollution of the navigable waters and ground waters");

id. § 1256(e)(1) (referencing “the quality of navigable waters and to the extent practicable, ground waters”); *id.* § 1314(a)(2) (“all navigable waters, ground waters, waters of the contiguous zone, and the oceans”).

C. Ephemeral Features and Diffuse Runoff

The Agencies propose to exclude “ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland.” 84 Fed. Reg. at 4,190. “Ephemeral” is defined to mean “surface water flowing or pooling only in direct response to precipitation (*e.g.*, rain or snow fall).” *Id.* at 4,204 (proposed 33 C.F.R. § 328.3(c)(3)).

We support this exclusion. Interpreting the CWA to exclude ephemeral features is in line with the CWA’s text. Navigable waters must be “waters,” and it is reasonable to interpret that term to mean rivers, streams, oceans, and other hydrographic features more conventionally identifiable as “waters.” *See Riverside Bayview*, 474 U.S. at 131. Dry desert washes in Arizona that might run twice a year (in a good year) for only a couple of hours, are in no way navigable waters.

The ephemeral exclusion is of particular importance in our state where ephemeral features are commonplace after rain events. Under the 2015 Rule the definition of tributary gives the EPA and the Corps jurisdiction over nearly every dry desert wash, river bed, or man-made canal which might have geographical connectivity, but very little flow connectivity to navigable waterways. Much is at risk for farmers and ranchers given the breadth of ephemeral features across the Arizona landscape and the fact that with the 2015 Rule they bear the burden to prove there is no hydrological connection if these features lie within their farm or ranch.

We recommend that the Agencies include regulatory text that makes it clear that if a feature falls within the ephemeral exclusion, it is *per se* excluded and cannot be deemed jurisdictional under any of the six categories of jurisdictional waters.

D. Ditches

The Agencies propose to exclude all ditches that are not identified as jurisdictional in paragraph (a)(3) of the definition. *See id.* at 4,190; *see also* Part III.D *supra*. The Agencies state that this exclusion should address the majority of irrigation and drainage ditches, including most agricultural ditches, but they clarify that the exclusion does not affect the possible status of a ditch as a point source. *See id.* at 4,193.

We support the Agencies’ general approach to ditches, but as discussed above, we believe the Agencies should eliminate the standalone category of jurisdictional ditches and make revisions to the “tributary” definition and the proposed ditches exclusion to accomplish their intent to assert jurisdiction over only ditches that are constructed in jurisdictional tributaries or adjacent wetlands or that alter or relocate a jurisdictional tributary.

Moreover, it is important that, in the Final Rule, the Agencies acknowledge that many ditches on agricultural lands are often constructed in low areas that have wetland characteristics or are ephemeral drainages (and hence, are not dry land). The Proposed Rule seems to reflect that understanding by not requiring that ditches be constructed on dry land. We also agree that

irrigation ditches would and should remain excluded even if they draw water from a jurisdictional tributary and move that water to another jurisdictional tributary. *See* 84 Fed. Reg. at 4,195.

E. Artificially Irrigated Areas

The Agencies propose to exclude “artificially irrigated areas,” “including fields flooded for rice, or cranberry growing, that would revert to upland should application of irrigation water to that area cease.” *See id.* at 4,191. The Agencies have historically considered these areas to be non-jurisdictional, although they have previously considered them under the exclusion for artificial lakes and ponds. *See id.* at 4,194.

The Agencies invite comment on whether this exclusion should be “expanded” to cover areas flooded to support aquaculture or fields flooded to support the production of wetland crop species in addition to rice and cranberries. *Id.* at 4,195. We find this request for comment puzzling because nothing in the proposed regulatory text suggests that the exclusion is limited to fields flooded for rice or cranberry growing. Under the plain terms of the regulatory text—which we support—*any* artificially irrigated areas, not just those fields flooded for rice or cranberry growing, should be excluded. *See id.* at 4,204 (proposed 33 C.F.R. § 328.3(a)(6) (defining “Artificially irrigated areas” to *include*—but not be limited to—“fields flooded for rice or cranberry growing ...”). The Agencies might wish to consider clarifying this point in the Final Rule, to eliminate any confusion caused by the request for comment on the subject.

F. Artificial Lakes and Ponds

We generally support the artificial lakes and ponds exclusion, but recommend that the Agencies codify the preamble clarifications in the text of the Final Rule. In particular, the Final Rule should explicitly exclude lakes and ponds “constructed in upland, *constructed by impounding non-jurisdictional waters or features, or were constructed in jurisdictional waters prior to the enactment of the Federal Water Pollution Control Act of 1972.*”

For this exclusion to be meaningful to farmers and ranchers, it is important that it not be limited to features constructed on dry land. The very purpose of ponds is to carry or store water, which means that they are not typically constructed along the tops of ridges. Often, the only rational place to construct a 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, pond construction may be infeasible without impounding or some excavation in a natural ephemeral drainage or a low area with wetland characteristics.

G. Stormwater Control Features

The Agencies also propose to exclude features that are “excavated or constructed in upland to convey, treat, infiltrate, or store stormwater runoff.” The preamble states that this exclusion does not cover ditches, which the Proposed Rule addresses in a separate exclusion.

In discussing this exclusion, the preamble focuses on urban and suburban settings such as curbs, gutters, sewers, retention and detention ponds, and urban green infrastructure. The Agencies should either clarify that this exclusion encompasses conservation infrastructure found

on agricultural lands—such as grassed waterways, restored wetlands, conservation ponds and sediment basins—or that such infrastructure falls under another exclusion. Farmers rely on a variety of conservation infrastructure to support their operations, including grassed waterways, terraces, sediment basins, conservation farm ponds, biofilters, and restored 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. To avoid creating disincentives to water quality conservation practices and infrastructure, the Agencies should make it clear that these conservation features are *not* jurisdictional.

H. Waste Treatment Systems

We support the continued exclusion of waste treatment systems, which has been part of the regulatory text for decades. The Agencies propose to define more clearly what constitutes a “waste treatment system” in the regulatory text: “all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey, retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).” 84 Fed. Reg. at 4,205. This regulatory text is consistent with longstanding agency practice. We support the Agencies’ proposed definition of waste treatment system, particularly the clarifications that such systems need not perform active treatment and that the system includes not just ponds and lagoons, but also conveyances to and from those ponds and lagoons.

V. Implementation and Burden of Proof

In implementing any final definition of WOTUS, we believe that field evaluations should be the presumptive approach. We see no reason to limit such evaluations to certain circumstances. Use of desktop tools, by contrast, should be carefully avoided because they threaten to complicate and obscure the operation of any Final Rule the Agencies issue in ways that will impose potentially significant burdens on our members.

We agree with the Agencies that, when it comes to implementing any Final Rule, the landowner should have the benefit of the doubt with respect to determining jurisdiction. In other words, waters should not be WOTUS unless the agency can point to evidence solidly backing that designation. Keeping the burden of proof on the agency is especially important when it comes to making determinations about things like whether a ditch was, at some point in the distant past, constructed in a jurisdictional tributary or wetland. Many farmers and ranchers simply lack the means or opportunity to conclusively establish the answer. Similarly, farmers should not have to prove that farm and stock watering ponds were constructed in upland, as opposed to a jurisdictional wetland. Burdens like those properly fall on the agency because, as between the agency and the regulated party, the agency is in a much better position to make a conclusive showing.

VI. Conclusion

We appreciate the opportunity to provide these comments to the Agencies. Overall, we are very supportive of the Proposed Rule, and we believe the proposed definitions will go a long

way to providing much needed clarity and certainty for farmers and ranchers. Furthermore, we applaud the Agencies for conducting an inclusive and transparent rulemaking process, and we look forward to the culmination of the Agencies' attempts to revise the definition of "waters of the United States."

Thank you for your time and consideration.

Sincerely,

A handwritten signature in cursive script that reads "Stefanie A. Smallhouse". The signature is written in black ink and is positioned above the typed name and title.

Stefanie Smallhouse, President
Arizona Farm Bureau Federation