



February 7, 2022

Submitted via www.regulations.gov

Docket ID No. EPA-HQ-OW-2021-0602

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

We thank the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers (Agencies) for the opportunity to offer comments on the Agencies proposed revised definition of “waters of the United States” (“WOTUS”) under the Clean Water Act (CWA), 86 Fed. Reg. 69,372 (Dec. 7, 2021). The definition of WOTUS is extremely important to corn farmers which is why NCGA has participated in rulemakings, legislative proceedings and litigation related to this issue for decades.

Founded in 1957, NCGA represents nearly 40,000 dues-paying corn farmers nationwide and the interests of more than 300,000 growers who contribute through corn checkoff programs in their states. NCGA and its affiliated state organizations work together to create and increase opportunities for corn growers. U.S. corn farmers are committed to continuous improvement in the production of corn, a versatile crop providing abundant high-quality food, feed, renewable energy, biobased products, and ecosystem services. As stewards of the land, we understand the responsibility we have for creating a more environmentally and economically sustainable world for future generations with transparency and through continued advances and efficiencies in land, water, and energy use.

NCGA and its farmer members are committed to the objectives of the CWA and the protection of water quality around our agricultural operations and downstream. We firmly believe that achieving these objectives do not require drainage and water features that are distant from relatively permanent flowing tributaries be made subject to the mandatory controls of the CWA’s regulatory measures. We also firmly believe that as a matter of law, the CWA does not claim federal jurisdiction over these features distant from relatively permanent flowing tributaries. The CWA, along with other federal and state law, amply provides for the programming and support of our work with the federal and state agencies and other stakeholders to protect water quality involving these remote water features.

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We strongly urge you not to finalize this rule given its expansive and unlawful claims of potential jurisdiction over all ephemeral tributaries, man-made ditches, remote waters and wetlands, and even prior converted cropland (PCC). Such expansive jurisdictional claims can be made in the field by Agency personnel for highly vague and subjective reasons. This will *again* create enormous and pervasive uncertainty and confusion in the agricultural community as to how they manage land they own or operate. At best, this rule will lead to costly, bureaucratic interactions with federal regulators, or at worst civil or criminal penalties. We note that the Navigable Waters Protection Rule (NWPR), which this proposed rule unfortunately rescinds, did in our view strike the correct legal and policy balance in these matters, and provided the appropriate degree of certainty and transparency needed by our members.

Our request not to finalize this rule in its current form is further supported by the Supreme Court's recent decision to hear the *Sackett v. EPA* case. This case involves a direct challenge to the central instrument for the proposed rule's claim of jurisdiction over remote features, the so-called "significant nexus" test. Should the Agencies persist in rescinding the NWPR, we believe it wise that the Agencies simply rely on the actual pre-2015 guidance and rules, as they were applied and used pre-2015. Once the Supreme Court issues its decision, the Agencies should then move to a rulemaking to achieve the Agencies stated goal in crafting a rule that includes the lawful, best, and most workable elements of the NWPR and the Obama Administration's 2015 rule. While the pre-2015 rules and guidance resulted in great uncertainty for the agricultural community, use of them as an interim measure would result in less uncertainty and confusion than the finalization of the current proposed rule in its current form.

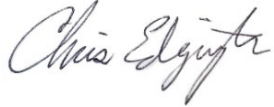
With respect to treatment of PCC from a CWA jurisdictional perspective, we urge the Agencies to return to the policy articulated in the Agencies' 1993 rulemaking. Under that policy, PCC should not be considered a WOTUS as long as it does not meet the three-part wetland test (wetland hydrology, hydric soils, hydric vegetation), even if the PCC is used for non-agricultural use. Such a policy provides the greatest clarity and certainty for farmers and minimizes confusion.

The proposed rule forces the CWA treatment of PCC back into non-sensical conformance with how PCC is addressed under an entirely different statute (the 1985 Food Security Act) for entirely different purposes (to determine eligibility for federal farm program payments as administered by the U.S. Department of Agriculture; the so-called "Swampbuster" provisions). Forcing this conformance does **not** reduce confusion for farmers and it creates even greater uncertainty for them.

NCGA is a member of the Waters Advocacy Coalition (WAC). We fully endorse the extensive and detailed comments that the WAC has submitted on the proposed rule. We have also joined a coalition of agricultural organizations in endorsing the American Farm Bureau Federation comments that provide particular emphasis on aspects of the proposed rule that most directly affect farmers and ranchers. Both sets of comments offer extensive technical and legal review and commentary on the ways that the proposed rule goes well beyond the pre-2015 rules and guidance. We urge the Agencies to rely on those comments to determine how to properly understand and use the pre-2015 rules and guidance as it was being applied pre-2015.

Thank you for the opportunity to provide these comments. Moving forward, we hope the Agencies include stakeholders in a more robust and meaningful engagement.

Sincerely,

A handwritten signature in cursive script that reads "Chris Edgington". The signature is written in black ink and is positioned above the printed name and title.

Chris Edgington, President
National Corn Growers Association