RESTORING THE RULE OF LAW, FEDERALISM, & ECONOMIC GROWTH BY REVIEWING THE "WATERS OF THE U.S." RULE

A white paper prepared by the Family Farm Alliance

ABSTRACT

The Environmental Protection Agency and the Army Corps of Engineers have initiated federalism consultations and coordination with stakeholders and the public as the agencies implement a February 28, 2017 Presidential Executive Order. This paper first provides context regarding Clean Water Act implications to Western agricultural water users and then raises considerations specific to the Family Farm Alliance for moving forward with the administrative process.

PREPARED BY THE FAMILY FARM ALLIANCE WOTUS COMMITTEE:

Paul Arrington (Idaho Water Users Association)
Gary Esslinger (Elephant Butte Irrigation District, NM)
Steve Hernandez (Law Office of Steven Hernandez, NM)
Dan Keppen (Family Farm Alliance, OR)
Tom Knutson (Retired irrigation district manager, NE)
Mark Limbaugh (The Ferguson Group, Washington, DC)
Paul Orme (Salmon, Lewis & Weldon PLC, AZ)
Gary Sawyers (Bolen Fransen Sawyers LLP, CA)
Norm Semanko (Parsons Behle & Latimer, ID)

Family Farm ALLIANCE SM

Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule

A White Paper Prepared by the Family Farm Alliance
November 2017

Background on "Waters of the U.S."

On May 27, 2015, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) announced the final rule regarding the "Definition of 'Waters of the United States' (WOTUS) Under the Clean Water Act," in light of two U.S. Supreme Court cases in 2001 and 2006, *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* and *Rapanos v. United States*, respectively. The rule became effective later that year. The final rule sought to clarify which waterways are overseen by the federal government. Because the prior standard has long been a source of confusion and the Supreme Court has had to weigh in twice, the Obama administration set out to clarify the issue in early 2014, releasing a proposed rule that it said would make clear the reach of federal oversight and preserve long held exemptions for agriculture. The final rule included traditional navigable waters, interstate waters, territorial seas, and impoundments of jurisdictional waters in the definition of "waters of the United States." These waters are jurisdictional by rule under the Clean Water Act (CWA).

Soon after Donald Trump was sworn in as President of the United States, he directed new EPA Administrator Scott Pruitt to review this regulation to address the concerns from farmers and local communities that it creates unnecessary burdens and inhibits economic growth. EPA and the Corps ("agencies") are currently initiating federalism consultations and coordination with stakeholders and the public as the agencies implement the February 28, 2017 Presidential Executive Order on "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule."

The Family Farm Alliance's Engagement on the WOTUS rule

The Alliance is a grassroots organization of family farmers, ranchers, irrigation districts, and allied industries in 16 Western states. The Alliance is focused on one mission: To ensure the availability of reliable, affordable irrigation water supplies to Western farmers and ranchers. The Alliance has long worked on finding ways to streamline and improve the federal regulatory processes with past Administrations and Congresses towards that end.

The Alliance dedicated significant time and resources during the Obama Administration towards addressing EPA and the Corps' proposed rule on which "Waters of the U.S." are jurisdictional under the CWA. The Alliance shares many of the views expressed by the states, agricultural organizations and others in the regulated community that, in many ways, the final WOTUS rule expanded federal jurisdiction over most waters under the CWA. Small tributaries, adjacent waters and isolated wetlands and ponds would have automatically become jurisdictional "waters of the U.S." under the Obama final rule and not be subject to any further interpretational "significant nexus" analysis.

Despite these concerns, the Alliance also worked constructively with the Obama EPA and the Corps to ensure that, regardless of what happens with the various court proceedings, assurances will remain that allow for exemption from CWA permitting for the construction and maintenance of irrigation ditches and the maintenance of drainage ditches consistent with Section 404(f) of the CWA. The Alliance had worked closely with these parties in the previous two years, and after reviewing the final rule, it was the organization's belief that the final rule would not likely change how irrigation ditches, canals and drainage ditches in the West would be treated under the pre-rule regulations. The EPA and Corps officials we met with confirmed this interpretation.

Because most of these channels convey "intermittent" flows, they would be considered "non-jurisdictional" under the CWA. For those facilities that flow water year-round (such as in some areas of the Southwest), the existing Regulatory Guidance Letter (RGL) that EPA and the Corps of Engineers issued in July 2007 would apply. As discussed later in this paper, RGL 07-02 provides a national approach for conducting exemption determinations for the construction and maintenance of irrigation ditches and the maintenance of drainage ditches consistent with Section 404(f) of the CWA. Section 404(f) specifically exempts from CWA permitting requirements discharges of dredged or fill material into "waters of the U.S." associated with the construction and maintenance of irrigation ditches and maintenance of drainage ditches. The EPA and the Corps have used this RGL to interpret these CWA exemptions in many cases in the West over the past decade.

The Alliance and others transmitted letters explaining the importance of the RGL to the agencies. High-level Obama Administration officials with the EPA and the Corps responded in writing, saying they would keep the RGL in place and at the time had no plans to retract or replace the RGL under the WOTUS rule. A primary objective of our engagement in WOTUS2 will be to further strengthen the provisions in a new rule that will make the construction and maintenance of irrigation ditches and the maintenance of irrigation drainage ditches exempt from CWA jurisdiction.

Recent Developments

EPA and the Corps have begun to implement President Trump's February 28, 2017 "Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." The purpose of the Executive Order (E.O.) is to review the final Obama Administration's Clean Water Rule (WOTUS rule) and "publish for notice and comment a proposed rule rescinding or revising the rule…." The E.O. further directs that the EPA and the Corps shall consider interpreting the term 'navigable waters' consistent with Justice Antonin Scalia's opinion in *Rapanos* which indicates CWA jurisdiction includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters[1].

[1] In crafting their WOTUS rule, the Obama Administration used the *Rapanos* opinion of Justice Anthony Kennedy which pointed to a "significant nexus" test for wetland connections to navigable waters under the CWA.

The Agencies are Using a TWO-STEP PROCESS:

Step 1 – develop a rule to withdraw and rescind the Obama Administration's WOTUS1 rule and to recodify and re-promulgate the 1986 rule (and 2003 and 2008 guidance) that was replaced by WOTUS1 (which is currently the status quo since WOTUS1 is stayed at the 6th Circuit Court of Appeals);

Step 2 – propose a new definition of "Waters of the United States" (WOTUS2) consistent with the Scalia opinion that would take the place of the recodified 1986 rule and guidance.

Intent of this White Paper

The agencies are interested in state and local government comments on the two-step process as well as the attributes of a potential new definition of WOTUS ("WOTUS2") consistent with Scalia. The important points of Scalia are the definitions of "relatively permanent" waters and wetlands with a "continuous surface connection" to relatively permanent waters. This paper first provides context regarding CWA implications to Western agricultural water users and then raises considerations specific to the Family Farm Alliance for moving forward with the proposed administrative process.

Background: The Status of Clean Water Act Jurisdiction

Without question, interpretation and application of the CWA has engendered much consternation and litigation over the past forty-five years. The reach and scope of CWA jurisdiction, in particular, has kept courtrooms busy as the issue has made its way from the federal district and circuit courts, all the way to and through the United States Supreme Court on several occasions. The regulatory landscape has been, and remains, muddled at best. This is true despite the United States Supreme Court decisions in *SWANCC* and *Rapanos*, despite CWA guidance jointly issued by the EPA and the Corps, and despite the finalization of the Obama Clean Water Rule (WOTUS) in 2015.

Clean Water Act Implementation Challenges to Western Water Managers

Work in Canals, Ditches and Drains - Irrigation districts, canal companies and other water providers do routine maintenance work in their man-made conveyance and drainage facilities every year. In addition, they are required to make more extensive improvements to water delivery infrastructure in the form of rehabilitation, upgrades or replacement of some of the works from time to time. Water conservation activities such as lining or piping canals and drains are also commonplace activities, along with relocating portions of these water conveyance

facilities for improved efficiencies and water conservation. Typically, this work must be done within a very narrow window while the ditches and canals are dewatered during the winter months, making CWA permitting of such activities a significant impediment to complete the work within the allowable timeframes. Without the ability to conduct these necessary activities, agricultural water delivery would come to a screeching halt. Regular maintenance activities to maintain channel capacity are also sometimes necessary to prevent serious flood damage.

The Corps of Engineers has, in certain cases, asserted that these activities are being conducted in "waters of the United States" and therefore require a 404 permit. Fortunately, as noted previously, under the currently active 1986 CWA rule and subsequent guidance, the Corps, EPA and the Bureau of Reclamation in 2007 developed RGL 07-02 to clarify the scope and breadth of the exemptions contained in the CWA as they apply to these activities. Still, there are instances where the Corps continues to try to assert jurisdiction even though the RGL is in place. As a result, some uncertainty continues to exist, and unnecessary time and money are being spent. In addition, the Corps already faces significant challenges with the timely processing of 404 permits.

WORK IN CANALS, DITCHES AND DRAINS

- **Requiring such permits for activities in water conveyance facilities would increase the already significant regulatory workload with little or no improvements in water quality.**

- **In fact, if permits are required for such work, water conservation activities that are designed to improve water quantity and quality could be delayed or stopped, creating worse water quality conditions.**

Section 404. Aquatic Resources of National Importance[2]**.** EPA in recent years has increasingly claimed that waterbodies are "aquatic resources of national importance" (ARNI) when it reviews proposed Army Corps' CWA permits, triggering industry concerns that the threatened designations, which elevate permit reviews to the agencies' headquarters, are slowing permitting decisions and forcing stricter discharge limits. Though EPA has used the designation less than two dozen times since 1992 to elevate a Sec. 404-permitting decision, the agency was threatening to designate more waters as ARNI in comment letters to suggest that proposed permits could be elevated if key changes were not made. This was troubling, given that the designations are exempt from court review.

[2] http://water.epa.gov/lawsregs/guidance/wetlands/dispmoa.cfm or http://www.usace.army.mil/CECW/Documents/cecwo/reg/mou/moa_epa404q.pdf

Threatened ARNI designations elevate permit reviews to the agencies' headquarters, which slow permitting decisions and force stricter discharge limits.

Section 303. Application of Total Maximum Daily Loads (TMDLs) to Artificial Water Conveyance Facilities - Under Section 303 of the CWA, water quality limited segments - those rivers and streams that do not meet established water quality standards - are identified. Thereafter, clean-up plans, or Total Maximum Daily Loads (TMDLs), are established with allocations made to the various users that impact the water quality of the rivers and streams. These TMDLs allow real water quality problems to be addressed in a more focused way with point sources regulated under the CWA. Unfortunately, the federal government has in some instances asserted jurisdiction over canals and drains and treated them as water quality limited segments. By labeling these artificial, manmade water conveyances - many of which are concrete-lined, exhibit no fish habitat characteristics or other stream-like qualities whatsoever, and are completely dry during major portions of the year - as "waters of the United States", the federal agencies have been successful only in diverting limited resources away from improving the quality of our rivers and streams.

APPLICATION OF TMDLs TO ARTIFICIAL WATER CONVEYANCE FACILITIES

Requiring TMDLs for man-made water conveyance channels, rather than focusing on navigable rivers and streams that were intended to be protected under the Clean Water Act, has real-world consequences, not just for water providers, but for the everyday citizens that use the water.

The Importance of WOTUS2 Rule to Western U.S. Agricultural Water Supply Activities

In our view, the final Obama WOTUS rule would have expanded federal jurisdiction over most waters under the CWA. The main thrust of this expansion comes from the new broad definition of a "tributary". While the final rule sorted out erosional features like ephemeral washes, gullies and puddles as not qualifying as jurisdictional waters, the focus remained on riverine systems where small tributaries, adjacent waters and isolated wetlands and ponds would have automatically become jurisdictional "waters of the U.S." under the final rule.

Irrigation ditches in the Western U.S. typically have operational spills and overflows that flow back to a navigable water, interstate water, or territorial sea, either directly or indirectly through another water (such as an irrigation drain) and as such, could be considered "tributaries" and subsequently a "waters of the U.S." under the Obama Clean Water Rule. Thus, without

additional clarification, the Obama WOTUS rule could have extended jurisdiction to virtually all agricultural irrigation facilities.

The Administration's emphasis on the Scalia test provides an opportunity to clearly draw a bright line that limits jurisdiction of the CWA to waters that permanently flow year-round, or most of the year… It further provides an opportunity to clearly articulate existing CWA exemptions for agricultural and roadside ditches, irrigation drains, farming operations, farm runoff.

As noted above, the EPA and the Corps in July 2007 issued RGL 07-02 that provides a national approach for conducting exemption determinations for the construction and maintenance of irrigation ditches and the maintenance of drainage ditches consistent with Section 404(f) of the CWA. Section 404(f) specifically exempts from CWA permitting requirements discharges of dredged or fill material into "waters of the U.S." associated with the construction and maintenance of irrigation ditches and maintenance of drainage ditches.

The EPA and the Corps have used this RGL to interpret these CWA exemptions in many cases in the West; fortunately, the Trump Administration's intent to move forward with a new, revised WOTUS2 rulemaking provides an opportunity to further strengthen the CWA exemptions. The Administration's emphasis on the Scalia test provides an opportunity to clearly draw a bright line that limits jurisdiction of the CWA to waters that permanently flow year-round, or most of the year. It would also limit jurisdiction to those locations where visual surface flow connections can be made between wetlands and navigable waters that flow year-round or most of the year. It further provides an opportunity to clearly articulate existing CWA exemptions for agricultural and roadside ditches, irrigation drains, farming operations, farm runoff.

The New WOTUS2 Rule Must Be Consistent with Congressional Intent

Justification for the Trump Administration's new WOTUS2 rule cannot ignore the touchstone requirement of the term "navigable", which demonstrates what Congress intended when it enacted the CWA. There can be no clearer indication of Congressional intent than that garnered from its express and repeated use of the term "navigable" when drafting and passing the CWA in 1972. Congress did not intend the CWA to touch all waters of the United States. Rather, the stated goal of the CWA is to eliminate the discharge of pollutants into the nation's "navigable waters." Likewise, the permissible discharge of pollutants to "navigable waters" requires a proper permit. Simply put, Congress' repeated use of the term "navigable" throughout the CWA was by design. If the term "navigable" is of no significant or independent import, the term would not have been inserted throughout the CWA.

Congress also confirmed state supremacy in the planning, development, and use of land and water resources. Well-settled legislative and judicial authority has long recognized state and local government control over land and water use and development. The CWA is no different. Section 101(b) of the CWA specifically and expressly recognizes, preserves, and protects the "primary responsibilities and rights of States" to prevent, reduce, and eliminate pollution, as well as to plan and develop the use of land and water resources. As the United States Supreme Court declared in the landmark case of *California v. United States* in 1978, "[t]he history and relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress."

Well-settled legislative and judicial authority has long recognized state and local government control over land and water use and development. The Clean Water Act is no different.

Specific Recommendations for WOTUS2

The West has been forever changed by the construction of the massive system of canals, ditches, and drains, all part of an irrigation system envied by the world. The world-class agricultural production created by irrigation of farmland in the Western U.S. is highly dependent on the

We believe the proposed rule must be crystal clear in using Clean Water Act exemptions and the Scalia opinion to exclude much, if not all, of this important irrigation infrastructure from Clean Water Act jurisdiction.

continued consistent and timely operation and maintenance of this canal and drainage system, a complex, integrated, and interrelated labyrinth of miles and miles of ditches, drains, pipes, culverts, tile drains, and other arteries that carry the precious irrigation water to family farms and ranches, many of which are operated by our membership.

Without explicit protection from the added regulation and permitting requirements that expanded CWA jurisdiction would bring to these features, assertions that those features are subject to CWA jurisdiction are inevitable. At a minimum, that will spawn years of protracted and costly litigation that will create enormous uncertainty that could cripple Western agriculture. This claim is not overblown as we have seen it take as long as a decade to get Section 404 permits because the Corps is already overburdened by the currently defined waters under its jurisdiction.

We have further noted our detailed concerns below along with some suggested improvements to the proposed rule that, if adopted, may help to alleviate some of these concerns.

1. Ditches, Canals and Drains

Section 404(f) specifically exempts from CWA permitting requirements discharges of dredged or fill material into "waters of the U.S." associated with the construction and maintenance of irrigation ditches and maintenance of drainage ditches.

One of the main areas of concern for irrigated agriculture on a WOTUS2 rule is what the rule would mean for ditches that are used to drain agricultural stormwater or runoff from farm fields or to deliver irrigation water to them. Many ditches flow water either directly or through other waters to traditionally navigable waters. These ditches should be categorically exempt under the CWA. These ditches are currently exempted from NPDES permit requirements, some for construction and all for maintenance.

If they are not clearly exempted and are considered "waters of the U.S.," more of these ditches will likely fall under federal jurisdiction and certain maintenance activities may require a CWA Section 404 permit. This permitting process is very expensive and time consuming, creating legal vulnerabilities and economic hardship for small communities and the farms and ranches that are responsible for routinely maintaining these ditches.

There is also some confusion in the West associated with defining terms like "canal" and "lateral". Some of the older Reclamation Projects used the term "canals" to define those ditches connecting directly to a river or stream. Diversions from canals were termed "laterals". WOTUS2 needs to include "canals" and "laterals" in the umbrella definition of "ditches" and must provide a clear articulation of the exemptions that are already included in the CWA.

WOTUS2 Recommendations for Ditches, Canals and Drains:

1. Distinguish the two types of ditches by rule; specifically exclude irrigation ditches from CWA jurisdiction.
2. Maintenance of agricultural drains located in or flowing through the floodplain that essentially drain upland irrigated lands should be excluded from CWA jurisdiction, or at the very least be exempted from CWA permitting requirements provided in the CWA.
3. Certain drains that drain uplands do have perennial flow, mostly due to the timing of agricultural return flows in the form of groundwater, and should be excluded in WOTUS2.
4. WOTUS2 exemptions for construction and maintenance of irrigation ditches and maintenance of irrigation drainage ditches would ensure there is no confusion regarding use of these CWA exemptions for the irrigated agricultural community.

2. Artificially Irrigated Areas

The Obama WOTUS Rule excludes "[a]rtificially irrigated areas that would revert to dry land should application of water to that area cease." In RGL 07-02, the Corps explained that wetlands "established solely due to the *presence of irrigation water, irrigated fields, or irrigation ditches*" are not jurisdictional. An accompanying footnote further clarified that "waters, including wetlands, created as a result of irrigation would not be considered waters of the United States even when augmented on occasion by precipitation."[3]

Irrigation has increased agricultural productivity in the arid American West, but media coverage often focuses only on how it has altered the natural landscape. Most irrigation projects also provide important benefits to wetlands and wildlife habitat. In California's Sacramento Valley, rice production provides vitally important surrogate habitat and food for migratory waterfowl and other species of wildlife. In Northern Colorado, a study[4] by Colorado State University researchers found that 92 percent of wetlands in Colorado were visually connected to the irrigation infrastructure.

The Intermountain West Joint Venture (IWJV) is a public-private partnership with a mission to conserve priority bird habitats through partnership-driven, science-based projects and programs. IWJV has determined that agricultural producers who flood-irrigate working wet meadows in certain landscapes play a key role in sustaining Pacific Flyway waterfowl populations during spring migration. For example, the Southern Oregon and Northeastern California (SONEC) region is one of the most important spring migration stopover areas in North America, supporting more than 4.9 million dabbling ducks at North American Waterfowl Management Plan (NAWMP) goal levels. The IWJV's bioenergetics modeling revealed that 64,700 acres of flood-irrigated wetland habitat must be provided annually on private working wet meadows in SONEC during spring migration to support waterfowl populations at NAWMP goal levels.

These examples demonstrate that current Western agricultural landscapes create beneficial, yet artificial wetlands that rely on irrigation water as their source and underscore the potential importance of the exclusion.

WOTUS2 Recommendation for Artificially Irrigated Areas:

WOTUS2 should state that waters, including wetlands, created as a result of irrigation would not be considered "waters of the United States" even when augmented on occasion by precipitation.

[3] *Id.* at note 1. Under the reasoning in RGL 07-02, it appears that irrigation ditches could be tributaries "solely due to the presence of irrigation water."

[4] Sueltenfuss, Cooper, Knight, and Waskom, "The creation and maintenance of wetland ecosystems from irrigation canal and reservoir seepage in a semi-arid landscape," Colorado State University, 2012.

3. Certain Erosional Features, including Arroyos

Many have expressed concern about the Obama WOTUS Clean Water Rule's potential to increase coverage of very small headwater drainages in the American Southwest. In some parts of the Southwest, water spilled from canal delivery systems ends up in the natural arroyo system, which can link to downstream tributaries of clearly navigable rivers. For example, in Southwest Colorado, water in the Dolores Water Conservancy District can drain back to the natural arroyo system, which physically links to a tributary to the San Juan River (an interstate river which meets the definition of "navigable"). Experience of some District managers is that the Corps would claim regulatory oversight over all dry arroyos, placing additional regulatory requirements on the local municipalities and flood control agencies tasked with keeping residents' safe from flooding. Many of our member organizations who have been managing irrigation for 100 years have essentially converted arroyos that once traditionally only flowed seasonally into perennial flowing streams.

In some areas, interceptor ditches (full of cattails sustained by adjacent farming) are located in existing rights-of-way that sometimes lead to natural arroyos. These interceptor ditches are similar to any roadside ditch, but lie within district rights of way and may be perceived as point sources. Likewise, some canal waste-ways can overflow occasionally (during rain events or from canal operational problems) into the natural drainage system. In other areas, dam structures release water into century-old ditch systems that can very quickly become indistinguishable from natural drainage areas as they flow into larger arroyos.

In other parts of the Southwest, like central Arizona, the nearest truly navigable water body (such as the Colorado River, in this case) might be hundreds of miles away from local farm and ranch lands. In areas of the Central Arizona Project (CAP), a wide network of ephemeral streams runs into other ephemeral natural watercourses, which ultimately drain into the seasonally dry Gila River, which drains into the Colorado River near Yuma, Arizona. Under the Obama WOTUS "connectivity" test, all these mostly dry stream beds would have been jurisdictional because of a theoretical connection to the Colorado River. This determination is impractical, since it does not account for duration of flows and distance to clearly jurisdictional waters. Plus, much of the water in the CAP service area would not be there but for the delivery of Colorado River water provided by the federal irrigation project.

Another problem in some Western states relates to "adjacent" floodplains. Many Southwestern U.S. water purveyors have irrigation facilities that are within floodplains bordering ephemeral streams that only run in major flood events and never make it to a navigable water like the Colorado River. However, those purveyors must operate and maintain facilities within these adjacent floodplains. Additional permitting requirements to do so would be unnecessarily onerous.

WOTUS2 Recommendations for Certain Erosional Features:

1. Provide a blanket exclusion for first-order streams in the arid West; arroyos, dry creeks and washes should all be treated the same, since the flow duration is nowhere near what Justice Scalia envisioned in his *Rapanos* opinion.
2. WOTUS2 should exempt arroyos and seasonal flow paths that might provide coverage for main irrigation canal systems and interceptor ditches (full of cattails sustained by adjacent farming) in existing rights-of-way that sometimes lead to natural arroyos.
3. In no circumstances should extremely common regional features such as ephemeral washes qualify as Aquatic Resources of National Importance in the Section 404 permitting process.

4. Certain Artificial Lakes and Ponds

The Obama WOTUS rule contained an exclusion for "artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds." The WOTUS rule notes that the list is illustrative rather than exhaustive. The exclusion applies to features constructed in dry land that do not connect to jurisdictional waters. The Obama WOTUS rule appears to intend that features that do connect to jurisdictional waters require a CWA Section 402 permit to be excluded. This exclusion can be helpful in the Western U.S., but it needs clarification.

WOTUS2 Recommendation for Certain Artificial Lakes & Ponds:

1. Clarify to exclude similar features, but drop any permitting requirement.

5. Waste Treatment Systems and Other Exclusions

For water recycling and reuse facilities constructed in dry land, detention and retention ponds, groundwater recharge and percolation basins, and recycled water distribution systems, it appears the agencies were responsive to the concerns raised by us and others, and made the necessary changes in the final 2015 rule to accommodate excluding such infrastructure from CWA regulation. These features would revert to dry land if application of water were to cease and, even though they may contain plants and shrubs known to grow in wetlands, they should be included in the list of features identified in the proposed rule as excluded from the definition of "waters of the U.S."

6. Waters in Which Established Normal Farming, Ranching and Silviculture Activities Occur.

Waters in which established normal farming, ranching, and silviculture activities occur are not jurisdictional as "adjacent" under the Obama WOTUS rule. The agencies explained that this exclusion reflects their intent to "minimize potential regulatory burdens on the nation's agriculture community," and recognize "the work of farmers to protect and conserve natural resources and water quality on agricultural lands." The Obama WOTUS rule left open the potential for such waters to be captured under a case-by-case significant nexus evaluation. We recommend that WOTUS2 exclude those waters from CWA jurisdiction.

WOTUS2 Recommendation:

1. Exclude from jurisdiction those waters in which established normal farming, ranching, and silviculture activities occur.

7. Case-specific jurisdictional exclusions, "adjacency" and "other waters"

In designating tributaries and adjacent waters as jurisdictional-by-rule in the Obama WOTUS rule, the agencies made sweeping generalizations about their connectivity to traditional navigable waters, interstate waters, and the territorial seas. These generalizations likely capture at least some waters, such as certain ephemeral drainages in the southwestern United States. The agencies proposed certain excluded waters and exempted activities in determining what is to be considered *per se* "waters of the U.S.", or through case-specific analyses of "other waters", that were ambiguous and could create uncertainty in implementing the CWA. Considering CWA jurisdiction of "other waters" in a watershed on a landscape scale would create burdens on both the regulated community and the regulating agencies without any demonstrated benefit to water quality.

The term "adjacent" should be limited to the definition contained in the *Riverside Bayview* case and only apply to waters directly abutting a traditional navigable water. This would exclude agency discretion over non-abutting waters, and would remove the current subjectivity of assessing shallow groundwater connections between adjacent water bodies. That approach promotes certainty and predictability, two important goals that we believe should be achieved in the proposed rule but which are currently missing.

WOTUS2 Recommendations:

1. Evaluate a case-by-case exclusion that allows an entity to show that a given "jurisdictional-by-rule" water is not jurisdictional because it lacks the required relatively permanent flow through a continuous surface connection to traditional navigable waters, interstate waters, and the territorial seas. If the agencies have drawn reasonable bright lines in the WOTUS2 rule, these instances should be rare. Such a provision would provide appropriate relief in certain circumstances, and help ease concerns of agency overreach.
2. Wetlands should not be considered "tributaries" in WOTUS2, as they should have to meet "relatively permanent" and "continuous surface connection" tests to be considered "waters of the U.S." (see below).
3. The term "adjacent" should be limited to the definition contained in the *Riverside Bayview* case and only apply to waters directly abutting a traditional navigable water.
4. Mere shallow groundwater connectivity should not be used for determining adjacency of riparian areas or floodplains of jurisdictional waters without confined, scientifically-verifiable and substantial, relatively permanent surface water connections.
5. Determining jurisdiction of "Other Waters" should not be considered as an alternative in WOTUS2.

Conclusion

The Family Farm Alliance understands the meaning and purpose of the CWA and the agencies' goal of protecting our nation's water resources while providing clarity and certainty for the regulated community. While we do not believe the proposed Obama WOTUS rule did that, we have provided some insight as to where a proposed new WOTUS2 rule could help address our concerns. Fundamentally, we do not see a clear associated net gain to the environment resulting from the final Obama WOTUS rule. We are clearly not opposed to clean water. We just question the costs versus the benefits and the lack of certainty and clarity of the broadening of CWA regulation against any purported improvement to water quality in the Obama WOTUS rule. Un-certain, case-by-case jurisdictional determinations will have a chilling effect on the economy. WOTUS2 needs to create better certainty with brighter line tests to facilitate business and jobs. We believe any approach to protecting water quality in America must be accomplished through true partnerships at the local, regional and state levels, and that the federal government must provide more clarity and certainty in defining what waters are truly federal "waters of the U.S." We also believe that the CWA provided certain exemptions for irrigated agriculture and farming that must be clarified, well defined, and provided for in a new WOTUS2 rulemaking.

We represent our membership of Western irrigated farmers and ranchers in saying that we stand ready to work with the Trump Administration, the EPA, the Corps, and our local, regional and state governments in protecting water quality on a common sense, practical and collaborative basis for our future and the future of our nation's water resources.

References

(Listed in chronological order)

U.S. Army Corps of Engineers Regulatory Guidance Letter 07-02, "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act", July 4, 2007.

Memo from Robert E. Fabricant, G. Tracy Mehan, Stephen L. Johnson to EPA Regional Administrators: "Interpretive Statement and Regional Guidance on the Clean Water Act's Exemption for Return Flows from Irrigated Agriculture".

Testimony of Norman M. Semanko, Executive Director & General Counsel Idaho Water Users Association, Inc. before the U.S. House of Representatives Committee on Transportation and Infrastructure. Hearing on Status of the Nation's Waters, including Wetlands, Under the Jurisdiction of the Federal Water Pollution Control Act. Submitted on behalf of The National Water Resources Association and The Family Farm Alliance. July 19, 2007

Letter from Family Farm Alliance to Water Docket, EPA. Re: Docket ID No. EPA-HQ-OW-2011-0880: Definition of "Waters of the United States Under the Clean Water Act". November 10, 2014

Letter to Family Farm Alliance Executive Director Dan Keppen from Kenneth J. Kopocis, Deputy Assistant Administrator for Water, U.S. EPA and Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works), U.S. Department of the Army. July 30, 2015.

Memo from The Ferguson Group to Family Farm Alliance re: EPA – Corps of Engineers Final "Waters of the United States" (WOTUS) Rule and Summary of Changes Made Between the Proposed and Final Rule. June 4, 2016.

Memo from Mark Limbaugh, The Ferguson Group LLC, to Family Farm Alliance. Re: EPA Federalism Consultation on WOTUS Rulemaking. April 20, 2017

Secondary Sources

The Family Farm Alliance has been engaged on Clean Water Act implementation issues for much of the past decade, working with other Western agriculture and water organizations and elected officials. The following sources are listed in chronological order.

Letter from Family Farm Alliance Executive Director Dan Keppen to Rep. James Oberstar, Chairman, Committee on Transportation and Infrastructure, U.S. House of Representatives re: "Clean Water Authority Restoration Act of 2007". July 6, 2007

Letter from Agri-Business Council of Arizona to Water Docket, U.S. EPA Re: Docket ID No. EPA-HQ-OW-2010-0257. Support for Family Farm Alliance comments on draft NPDES permit for point source discharges from pesticide applications to waters of the United States. July 19, 2010.

Testimony of Norman M. Semanko (Executive Director & General Counsel, Idaho Water Users Association, Inc. Boise, Idaho) Before the U.S. House of Representatives Committee on Natural Resources Subcommittee on Water and Power. Hearing on "Creating Abundant Water and Power Supplies and Job Growth by Restoring Common Sense to Federal Regulations". April 5, 2011.

Letter from Family Farm Alliance Executive Director Dan Keppen to Donna Downing (EPA Office of Water) and David Olson (Regulatory Community of Practice, U.S. Army Corps of Engineers) Re: Docket ID No. EPA-HQ-OW-2011-0409, EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act. June 23, 2011.

Letter from Northern California Water Association to Donna Downing (Office of Water, EPA) and David Olson (Regulatory Community of Practice, U.S. Army Corps of Engineers) Re: Northern California Water Association's Comments on EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act (76 Fed. Reg. 24479). July 29, 2011.

Testimony of Norman M. Semanko (Executive Director & General Counsel, Idaho Water Users Association, Inc. Boise, Idaho) Before the U.S. House of Representatives Committee on Natural Resources Water and Power Subcommittee. Oversight Hearing on "Water for Our Future and Job Creation: Examining Regulatory and Bureaucratic Barriers to New Storage Projects". February 7, 2012.

Letter from Family Farm Alliance and over 90 organizations to U.S. Representatives Gibbs, Scott, Schrader and McIntyre regarding pesticide applications that are already regulated under the Federal Insecticide Fungicide and Rodenticide Act that are also subject to Clean Water Act National Pollutant Discharge Elimination System permits issued by the EPA or delegated states. March 16, 2013.

Letter from National Federation of Independent Businesses (NFIB) and NFIB Small Business Legal Center to Office of Information and Regulatory Affairs, Office of Management and Budget re: EPA's Definition of "Waters of the United States" Under the Clean Water Act Rule. September 24, 2013.

Letter from Pacific Legal Foundation to EPA Science Advisory Board re: Connectivity of Streams and Wetlands to Downstream Waters. October 11, 2013.

Letter from the Association of California Water Agencies, Family Farm Alliance, Texas Water Conservation Association, and Western Coalition of Arid States to EPA Administrator McCarthy re: Comments on Draft Report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence,* Docket ID No. EPA-HQ-OA-2013-0582. November 6, 2013.

Memorandum of Understanding Among the U.S. Department of Agriculture, the U.S. EPA, and the U.S. Department of the Army Concerning Implementation of the 404(f)(1)(A) Exemption for Certain Agricultural Conservation Practice Standards. March 25, 2014.

U.S. EPA and U.S. Department of the Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(D(1)(A) to Certain Agricultural Conservation Practices. March 25, 2014.

Testimony of Western Governors Association Executive Director James D. Ogsbury before the House Committee on Appropriations' Subcommittee on Interior, Environment and Related Agencies, which expresses concerns that states were insufficiently consulted in the development of the recently released proposed rule on the Clean Water Act from EPA and the Corps. April 10, 2014.

Letter from National Cattlemen's Beef Association and Public Lands Council to Deputy Assistant Administrator Ken Kopocis and Assistant Secretary of the Army Jo Ellen Darcy re: Re: Docket ID No. EPA-HQ-OW-2011-0880; *Definition of "Waters of the United States" Under the Clean Water Act*; 79 Fed. Reg. 22187, April 21, 2014.

Letter from U.S. Senators Jeff Flake and John McCain to EPA Administrator Gina McCarthy, May 6, 2014.

Letter from Waters Advocacy Coalition to Donna Downing (Jurisdiction Team Leader, Wetlands Division, U.S. EPA) and Stacey Jensen (Regulatory Community of Practice, U.S. Army Corps of Engineers) re: Re: Request for Extension of Comment Period on EPA and Corps Proposed Rule Defining Waters of the United States" Under the Clean Water Act, Docket ID No. EPA-HQ-OW-2011-0880. May 13, 2014.

Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States, prepared for The Waters Advocacy Coalition by David Sunding, Ph.D. May 15, 2014.

Letter from Family Farm Alliance Executive Director Dan Keppen to Damaris Christensen (Office of Water, EPA) and Chip Smith (Office of the Deputy Assistant Secretary of the Army) (Policy and Legislation) re: EPA–HQ–OW–2013–0820; 9908–97–OW – "*Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A)" (IR)* and the *"Memorandum of Understanding"* (MOU) among EPA, the Corps and U.S. Department of Agriculture (USDA). June 5, 2014.

Memorandum on Oversight Hearing on "New Federal Schemes to Soak Up Water Authority: Impacts on States, Water Users, Recreation, and Jobs". House of Representatives Committee on Natural Resources - Subcommittee on Water and Power. Prepared by The Ferguson Group. June 6, 2014.

Memorandum on Hearing on "Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule". House of Representatives Transportation Committee - Subcommittee on Water Resources and Environment. Prepared by The Ferguson Group. June 11, 2014.

"EPA and the Army Corps' Proposed Rule to Define "Waters of the United States", Congressional Research Service. Claudia Copeland, Specialist in Resources and Environmental Policy. September 10, 2014.

Letter from Attorney General of Colorado John W. Suthers to EPA re: Proposed Revisions to Definition of Waters of the United States Docket ID No. EPA-HQ-OW-2011-0880. October 21, 2014.

Letter from Western Republican Senators to EPA Administrator Gina McCarthy and Secretary of the Army John M. McHugh re: Docket No. EPA-HQ-OW-2011-0880: Definition of "Waters of the United States under the Clean Water Act". October 23, 2014.

"Trick or Truth? What EPA and the Corps of Engineers Are *Not* Saying About Their "Waters of the U.S." Proposal". American Farm Bureau Federation, October 30, 2014.

Letter from Local Government Advisory Committee to EPA Administrator McCarthy, November 5, 2014.

Letter from Western Growers Association to EPA Administrator McCarthy and Lieutenant General Bostick re: Docket No. EPA-HQ-OW-2011-0880: Definition of "Waters of the United States under the Clean Water Act". November 7, 2014.

Letter from Oregon Water Resources Congress to EPA Administrator McCarthy and Lieutenant General Bostick re: Docket No. EPA-HQ-OW-2011-0880: Definition of "Waters of the United States under the Clean Water Act". November 14, 2014.

Letter from Western Governors Association to EPA Administrator Gina McCarthy and Assistant Secretary of the Army Jo-Ellen Darcy re: Docket No. EPA-HQ-OW-2011-0880: Definition of "Waters of the United States under the Clean Water Act". November 14, 2014.

Presentation to the Council of State Governments West Legislative Council on River Governance, Kalispell, MT. Dan Keppen, Family Farm Alliance. August 25, 2015.

"WOTSUP with WOTUS" panel discussion, Family Farm Alliance annual conference, Las Vegas Nevada. Moderated by Gary Sawyers (Bolen Fransen Sawyers LLP, Fresno, CA), panelists included Melinda Kassen (Interim Director, Center for Water Resources, Theodore Roosevelt Conservation Partnership); Don Parrish (American Farm Bureau Federation, Senior Director, Regulatory Relations); and John Pawlow (House Water Resources and Environment Subcommittee, Professional Staff—via video conference from D.C.) February 23, 2017.