



P.O. Box 216 Klamath Falls, Oregon 97601

*Protecting Water for Western Irrigated Agriculture*

September 25, 2017

Ms. Donna Downing  
Office of Water (4504-T)  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460;

Ms. Stacey Jensen  
Regulatory Community of Practice (CECW-CO-R)  
U.S. Army Corps of Engineers  
441 G Street NW  
Washington, DC 20314

**Attention: Docket ID No. EPA-HQ-OW-2017-0203: Definition of “Waters of the United States” – Recodification of Pre-Existing Rules**

Dear Ms. Downing and Ms. Jensen:

The Family Farm Alliance (Alliance) appreciates the opportunity to submit our comments to the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) on the proposed recodification of pre-existing rules regarding what “waters of the United States” should be considered jurisdictional under the federal Clean Water Act (CWA). We support the proposed action to replace the stayed 2015 definition of “waters of the United States”, and recodify the exact same regulatory text that existed prior to the 2015 rule, which reflects the current legal regime under which the agencies are operating pursuant to the Sixth Circuit’s October 9, 2015 order. 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.

### **Proposed Rule**

On April 21, 2014, EPA and the Corps published, for public comment, a proposed 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. On May 27, 2015, the EPA and the Corps announced the final WOTUS rule<sup>1</sup>, referred to herein as the “2015 Clean Water Rule”, or “2015 rule”. The rule was intended to become effective 60 days after its publication in the Federal Register, but was stayed pursuant to a decision issued by the U.S. Court of Appeals for the Sixth Circuit.

EPA and the Corps (“the agencies”) under President Trump are now publishing a proposed rule to initiate the first step in a comprehensive, two-step process intended to review and revise the definition of “waters of the United States” consistent with the Executive Order signed on February 28, 2017, “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.” This first step proposes to rescind the definition of WOTUS in the Code of Federal Regulations and to re-codify the definition of WOTUS, which currently governs administration of the CWA (pursuant to the aforementioned decision by the U.S. Court of Appeals for the Sixth Circuit).

The agencies would apply the definition of “WOTUS” as it is currently being implemented, which is informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding practice. Proposing to re-codify the regulations that existed before the 2015 Clean Water Rule will provide continuity and certainty for regulated entities, the States, agency staff, and the public. In a second step, the agencies will pursue notice-and-comment rulemaking in which the agencies will conduct a substantive re-evaluation of the definition of WOTUS.

## **Overview of Concerns with the 2015 Clean Water Rule**

Clean water is vital to farmers and ranchers in the Western U.S. and to the well-being of rural communities nationwide. While we understand the importance of clean water to the future of irrigated agriculture, we believe that the final 2015 rule did little to promote the goal of providing clean water and would instead create the potential for an unwarranted expansion of federal jurisdiction over newly defined “tributaries” and associated “other waters” as “waters of the U.S.” Along with the additional bureaucratic red-tape associated with this jurisdictional expansion, the 2015 rule would unnecessarily impede Western farm and ranch families’ ability to manage the delivery and use of irrigation water to grow food and fiber for America and the world.

The 2015 rule, according to the EPA and the Corps, was intended to “clarify” CWA jurisdictional interpretations. Yet the language in the final rule suggests otherwise, creating broader interpretations of what is or should be considered “waters of the U.S.” and creating the uncertainty associated with the agencies performing additional “case-by-case” analyses and specific jurisdictional determinations.

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<sup>1</sup> The text of the final republication draft of the WOTUS rule is *available at* [http://www2.epa.gov/sites/production/files/2015-05/documents/rule\\_preamble\\_web\\_version.pdf](http://www2.epa.gov/sites/production/files/2015-05/documents/rule_preamble_web_version.pdf).

In support of the 2015 rule, EPA and the Corps cited statutory provisions, legislative history, and isolated language from Supreme Court decisions without recognizing the context for the cited material. The 2015 rule and justification thus asserts support based on selected passages in the law but leaves out the limiting requirements. A full statement of the law limits CWA jurisdiction more narrowly than in the 2015 rule. A key omission in the 2015 rule is the touchstone requirement of navigability, which would better demonstrate what Congress intended when it enacted the CWA. Any change to this congressionally-imposed requirement needs to be made by Congress, not a regulatory process. Indeed, the Alliance believes a regulatory expansion of the statutory standard would be illegal and will foster litigation, thus creating the very uncertainty such regulations are supposed to eliminate.

### **Final 2015 WOTUS Rule vs. Pre- Existing Regulations**

Consistent with pre-existing regulations, the final 2015 Clean Water 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 CWA.

In departing from the pre-existing regulations, the final 2015 rule makes all tributaries to a “water of the U.S.” automatically jurisdictional as a “water of the U.S.” under the CWA. The final rule defines a “tributary” as a water feature with a “bed, banks and an ordinary high water mark” that contributes flow either directly or indirectly through another water body (either jurisdictional or non-jurisdictional) to a “water of the U.S.” Tributaries can include perennial, intermittent, and ephemeral (i.e. seasonal rainfall or snowmelt induced) streams. A tributary can be natural, man altered, or man-made waters and includes waters such as rivers, streams, canals, and ditches not specifically excluded under the final rule. Also, under the final rule wetlands and open waters without bed, banks and ordinary high-water marks are not tributaries and will be evaluated for adjacency in determining whether they are a “water of the U.S.” The tributary definition does require that flow in tributaries must be of “sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high-water mark.” If a water lacks sufficient flow to create such characteristics, it will not be considered a “tributary” under the 2015 rule. While the final 2015 Clean Water Rule suggests that a feature that flows very rarely is not a tributary because it would not form the physical indicators required under the definition, this determination would be subjective in nature and could potentially expand jurisdiction to even the smallest of features as technically a “tributary” to a “water of the U.S.”.

Under pre-existing regulations, waters considered “adjacent” to jurisdictional waters -- traditional navigable waters, interstate waters, the territorial seas, impoundments or tributaries, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters -- were considered “waters of the U.S.” However, the 2015 rule changed that to include waters adjacent to jurisdictional waters within a minimum of 100-feet and within the 100-year floodplain, and out to a maximum of 1,500-feet from the ordinary high-water mark (high tide line) of such

jurisdictional waters. These “adjacent” waters are automatically considered “waters of the U.S.” by the 2015 rule.

Pre-existing regulations included isolated or “other” waters as “waters of the U.S.” if the use, degradation or destruction of which could affect interstate or foreign commerce. But the 2015 rule sets forth only two sets of isolated or “other” waters that could trigger a case-specific “significant nexus” analysis under the CWA to determine if they are “waters of the U.S.” subject to federal regulation. The term “significant nexus” is defined in the 2015 rule as “a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a “water of the U.S.””

1. If specific waters are similarly situated as prairie potholes, Carolina & Delmarva bays, podocin’s, western vernal pools in California, and Texas coastal prairie wetlands and are determined to have a significant nexus to “waters of the U.S.” then they, too, are considered jurisdictional.
2. Isolated and “other” waters within the 100-year floodplain of traditionally navigable water, interstate water, or a territorial sea, and all waters within 4,000-feet of any jurisdictional water, and determined through a case-specific analysis to have a significant nexus to such jurisdictional waters, then they, too, will be considered jurisdictional as “waters of the U.S.”

Isolated or “other” waters that do not meet these two tests cannot be considered as “waters of the U.S.” and are excluded from CWA regulation.

Waters that were excluded under pre-existing regulations were limited to prior converted cropland and wastewater treatment facilities. The 2015 rule expands those exclusions to include some ditches; artificially irrigated areas that revert to dry land if irrigation water ceases to be applied; artificial, constructed lakes and ponds created in dry land; artificial reflecting pools or swimming pools created in dry land; small ornamental waters created in dry land; water-filled depressions created in dry land incidental to mining or construction activity; certain erosional features that do not meet the definition of a tributary, non-wetland swales, and lawfully constructed grassed waterways; and puddles.

Therefore, the Alliance supports the proposed rule in its approach to re-codify the pre-existing rules and regulations in place both prior to the 2015 Clean Water Rule and currently due to the stay ordered by the Sixth Circuit.

## Why the 2015 Rule Should be Withdrawn

Even though the agencies are not considering the substantive comments on the scope of a new definition of “waters of the U.S.,” we feel compelled to summarize below our justification for why the 2015 Clean Water Act Rule should be withdrawn.

### **1. The agencies did not provide an adequate or comprehensive economic analysis prior to promulgating the 2015 rule.**

The EPA’s Economic Analysis for the 2015 WOTUS rule failed to provide a reasonable assessment of the proposed rule’s costs and benefits. The Economic Analysis suggested that the proposed rule will increase overall jurisdiction under the CWA by only about three percent. But the EPA arrived at this percentage using a questionable methodology that only accounted for the Section 404 program, relying on figures extrapolated from statistics from FY 2009-2010 (a period of extremely low construction activity during one of our nation’s greatest economic recessions), and failed to account for the universe of waters and features for which landowners have not previously sought CWA permits. Even the agencies noted that “there is uncertainty and limitations associated with the results,” due to data and information gaps, as well as analytic challenges. The analysis did not quantify all possible costs and benefits, and values were meant to be illustrative, not definitive.<sup>2</sup> Relying on this percentage throughout the Economic Analysis, the EPA systematically and hugely underestimated the economic impact of the proposed rule’s new definition of “waters of the U.S.”

The EPA’s calculations of incremental costs and benefits were also deficient. The EPA’s cost analysis was focused on costs associated with the Section 404 program and largely ignored the cost impact of the changes to other CWA regulatory programs due to lack of data. Moreover, the benefit calculation was based on a problematic methodology that relied on studies that were largely irrelevant, did not provide accurate estimates of benefits, and were conducted between 10 and 30 years ago prior to EPA’s economic report.

A rule containing changes in federal policy of this magnitude deserved much more accurate and defensible analyses and accounting of future costs and benefits.

### **2. The agencies did not adequately analyze the 2015 Rule’s implications on the multiple CWA programs it affects.**

The 2015 rule replaced the definition of “navigable waters” and “waters of the U.S.” in the regulations for all CWA programs, including Section 404 discharges of dredge or fill material, the Section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the Section 401 state water quality certification process, and Section 303 water quality standards and total maximum daily load (TMDL) programs. We do not believe the agencies truly considered

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<sup>2</sup> Congressional Research Service (CRS), “EPA and the Army Corps’ Proposed Rule to Define ‘Waters of the United States’”, September 10, 2014 p. 11

the complex implications that the 2015 rule would have for the various CWA programs affected by these changes.

Although the EPA's Economic Analysis purported to analyze the costs of overlaying this new "waters of the U.S." definition onto other CWA programs, the analysis largely focused on the Section 404 program and essentially concluded that there will be no additional costs for other CWA programs. This cursory analysis was wholly inadequate. The agencies did not consider, for example, that many ditches and other water features, including intermittent or ephemeral streams, may now meet the definition of "waters of the U.S.," thereby requiring the water within these irrigation and drainage features to achieve stringent water quality standards throughout their reach. The agencies did not look at how this type of change might create confusion over whether an NPDES permit is required for releasing water into these water features or may place an increased burden on states administering NPDES permitting programs, setting water quality standards, and identifying impaired waters needing TMDLs. The EPA and the Corps did not truly consider how the 2015 rule might affect the states implementing these various CWA programs or the stakeholders regulated by these programs. Nor did the agencies analyze how the proposed definition of "waters of the U.S." would affect their own administration of each of the CWA regulatory programs.

**3. The 2015 rule 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". These are ambiguous and will create uncertainty in implementing the CWA.**

Agriculture

The CWA itself contains broad exemptions from regulation for the agricultural sector in rural America. Farmers and ranchers currently do not need CWA Section 404 dredge and fill permits for normal farming practices like plowing or constructing farm roads. In addition, stormwater runoff and irrigated agricultural return flows from farm fields are not subject to federal pollution permits. The agencies said these exemptions would be carried forward under the 2015 rule and issued (and subsequently withdrew) an "interpretive rule" to explain dredge-and-fill exemptions for normal farming, silviculture, and ranching practices, listing 56 conservation practices approved by the U.S. Department of Agriculture – Natural Resources Conservation Service (USDA-NRCS) that would be exempt from permitting requirements under Section 404 of the CWA.

The Alliance believes that the interpretive rule would not have protected farmers from requirements related to potential pollutant discharges and future permitting requirements under the CWA, and would actually narrow the exemptions for production agriculture under the CWA. The interpretive rule as proposed also placed the USDA-NRCS in a position of policing these practices under the CWA rather than their usual role of partnering with agriculture to ensure the

adoption of best practices important to the balance of productive farms and ranches and clean water.

EPA should collaborate with the agricultural sector to ensure that all normal farming, silviculture, and ranching practices, including USDA-NRCS approved practices continue to be exempt from CWA regulation. Exemption from federal regulation does not imply a complete lack of regulatory oversight. States, such as California, can and are regulating such activities under waivers or waste discharge requirements and, as needed, through stream alteration permits.

### Arroyos

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”). Past 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.

The 2015 rule exempts some seasonal flow paths that might provide coverage for main irrigation canal systems. However, some irrigation districts have interceptor ditches (full of cattails sustained by adjacent farming) 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.

Many of our member organizations who have been managing irrigation for 100 years have effectively made arroyos that once traditionally only flowed seasonally into perennial flowing streams. We are also concerned that many acres of artificially created wetlands that were established after years of irrigation now might be considered “natural” by regulators. Western water managers are fearful of how on-the-ground regulators will apply the 2015 rule to areas like these in the future. Some of our ranchers are especially concerned about the potential for possible requirements for Section 404 permits and the prohibitive cost of acquiring a permit. Many arroyos that run through Western ranches have fences that must be repaired or replaced after every high rainfall event. Others are equally concerned about the probability of a requirement for an EPA-approved grazing plan because of cattle grazing within a drainage area. These are but a few of the very real concerns that have arisen as a result of the lack of clarity and certainty in the 2015 rule.

#### **4. The 2015 Clean Water Rule broadened the regulatory reach of the Clean Water Act beyond what Congress intended.**

In our view, the 2015 rule does expand 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 has sorted out erosional features like ephemeral washes, gullies and puddles as not qualifying as jurisdictional waters, the focus will be on headwaters of riverine systems where small tributaries, adjacent waters and isolated wetlands and ponds will automatically become jurisdictional “waters of the U.S.” under the final rule and not be subject to any interpretational significant nexus analysis. However, many of these waters may, in fact, have an impact on jurisdictional waters and would be determined to be jurisdictional anyway under existing regulations. The larger issue is the 2015 rule’s categorical determination that certain waters are de facto “waters of the U.S.” by rule without further analysis or due process.

##### Irrigation Ditches

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 and as such, most could probably be considered “tributaries” and subsequently a “water of the U.S.” under the 2015 rule. This means the 2015 rule will not change how these ditches, canals and drainage ditches are treated under the current regulations. However, the EPA and the Corps, in July 2007 issued Regulatory Guidance Letter (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.

Since the 2015 final rule itself was not crystal clear in excluding the West’s important irrigation infrastructure from CWA jurisdiction, we believe the entire Western irrigation and drainage system could essentially collapse under the inherent bureaucratic red tape created by being classified as a “water of the U.S.”, potentially following much of Western irrigated agriculture and eliminating the Nation’s and the world’s most reliable and consistent source of food and fiber. 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. Without explicit exemptions for these irrigation features, assertions that those features are subject to CWA jurisdiction are, in our opinion, inevitable. At a minimum, this will spawn years of protracted and costly litigation that will create enormous uncertainty that could cripple Western agriculture.

##### Other Ditches

Certain roadside ditches, swales, and other constructed water features may be excluded from CWA regulation under the 2015 final rule, but not all. The overly broad “tributary” definition continues to be a concern for those ditches that flow directly or indirectly through another water

to a jurisdictional water, and making them a “water of the U.S.” especially if a ditch has perennial flow. The definition of a “tributary” specifically includes “man-altered or man-made” water bodies, including “ditches”. The final 2015 rule failed to clearly articulate exempt ditches and left decisions to exclude some ditches to subjective interpretation.

## **Conclusion**

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 continued consistent 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.

The Alliance agrees with the reasoning in the proposed rule that a stable regulatory foundation for the *status quo* would facilitate the agencies’ considered re-evaluation, as appropriate, of the definition of “waters of the United States” that best effectuates the language, structure, and purposes of the Clean Water Act. We concur that the proposed interim rule would establish a clear regulatory framework that would avoid the inconsistencies, uncertainty and confusion that would result from a Supreme Court ruling affecting the Sixth Circuit’s jurisdiction while the agencies reconsider the 2015 rule. The Alliance agrees that, during this interim period, the scope of CWA jurisdiction should be administered exactly the way it is now and as it was for many years prior to the promulgation of the 2015 final rule.

We believe we represent our membership of Western irrigated farmers and ranchers in saying that we stand ready to work with 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.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Keppen', with a stylized flourish at the end.

Dan Keppen, P.E.  
Executive Director