AMERICAN FARM BUREAU FEDERATION®

Testimony of Ms. Katherine English

on behalf of The American Farm Bureau Federation

Before the House Small Business Committee

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Chairman Williams and Ranking Member Velázquez, thank you for the opportunity to testify today. My name is Katherine English and I am a farmer, rancher, small business owner and an environmental lawyer from Fort Myers, Florida. My family farms and ranches property on the banks of the Caloosahatchee River in Alva, Florida, that my great-great grandmother homesteaded in 1870. Agriculture runs deep in our extended family and presently includes a cow/calf operation and citrus production. It is an honor to be here representing the thousands of hard-working farm and ranch families who produce the abundant food, fiber, and renewable fuel that our nation and the world depend on.

The American Farm Bureau Federation (AFBF) is the Voice of Agriculture® and our members—millions of farm and ranch families from across the country--care deeply about the health of our environment. The success of our lives and businesses depends on healthy soils and clean water, as most farmers live on the land we farm and ranch. We support the objectives of federal environmental statutes such as the Clean Water Act (CWA). What we cannot support is the continuing ambiguity of the location of the line between federal and state jurisdiction that has created confusion for landowners for decades. We have lived in a world of regulatory uncertainty for decades due to near constant rulemakings that bounce back and forth, redefining the scope of the CWA. We have seen WOTUS definitions change with each new Administration, guidance documents offered and then rescinded, and confusing court orders that generate more questions than answers. Landowners, small businesses, and American families are the ones who suffer the most.

Once again, the Environmental Protection Agency and the U.S. Army Corps of Engineers (the Agencies) have finalized a new regulatory definition of "waters of the United States" (WOTUS) that greatly expands the federal government's role in regulating land use. I am pleased to share my perspective as a farmer on this rule and its potential impact on agricultural producers across the nation.

The new WOTUS Rule Will Profoundly Affect Everyday Farming and Ranching Activities.

The definition of WOTUS is critically important to farmers and ranchers across the country, which is why AFBF and state Farm Bureaus have participated in numerous rulemakings, legislative proceedings and litigation on this issue for decades. Farming and ranching are water-dependent enterprises. Whether we are growing plants or raising animals, farmers and ranchers need clean water. For this reason, so many of us grow our crops and raise our animals on lands where there is either plentiful rainfall or adequate water available for irrigation. There are many features on those lands, however, that may only be wet when it rains and that may be miles from the nearest "navigable" water. Farmers and ranchers managing their lands need clarity about whether these features constitute a regulated water body. We cannot afford a mistake or

misunderstanding. The consequences can be financially devastating if a violation is determined to exist.

Additionally, many farms and ranches rely on ponds used for purposes such as livestock watering, providing or recycling irrigation water, and settling and filtering farm runoff prior to discharge. Irrigation ditches also carry flowing water to fields throughout the growing season as farmers and ranchers open and close irrigation gates to allow water to reach particular fields. These irrigation ditches are typically close to larger sources of water, irrigation canals, or actual navigable waters that are the source of irrigation water—and they channel return flows back to these source waters. In short, America's farm and ranch lands are an intricate maze of ditches, ponds, wetlands, and so-called "ephemeral" drainages.

Considering these water management features, whether used for irrigation, drainage, or water quality improvement, as jurisdictional "waters" opens up the potential for regulating any activity on those lands that moves dirt or applies fertilizer or pesticides to treat crops. Everyday activities such as tillage, planting, or fence building in or near ephemeral drainages, ditches, or low spots could trigger the CWA's harsh civil or even criminal penalties unless a permit is obtained. Farmers need to apply weed, insect, and disease control products to protect their crops. They do so carefully and following the strict guidelines already in place to ensure safe use. Fertilizer application is another necessary and beneficial aspect of many farming operations that is nonetheless swept into the CWA's broad scope (even organic fertilizer or manures) of "pollutants" (40 C.F.R. § 122.2, defining "pollutant"). On most of our productive farmlands (i.e., areas with plenty of rain), using the new definition of WOTUS would make it almost impossible to understand what portions of the property, that have historically been farmable, are now subject to regulation as WOTUS. This could affect planting, land management, or using crop protection products and fertilizer. Those features would now require federal oversight, either through a wetlands jurisdictional determination or a permit, for farmers and ranchers to avoid liability for violations of the CWA, as it would be impossible for a farmer or rancher or even their consultants to objectively determine what portions of their farms or ranches are subject to jurisdiction, regardless of their distance from any navigable water body.

The costs associated with a jurisdictional determination or a federal permit range from the tens of thousands to hundreds of thousands dollars to authorize ordinary farming and ranching activities are beyond the means of many small business farmers and ranchers. And even those farmers and ranchers who may be able to afford the costs of permitting cannot afford the cost of lost opportunities and delays caused by the months, or even years, waiting for a federal permit to till, plant, fertilize, or carry out any of the other ordinary farming and ranching activities. For all these reasons, farmers and ranchers have a keen interest in how WOTUS is defined.

Despite our efforts to inform the Agencies about these concerns, our members are disappointed by the Agencies' final rule. We feel strongly that the Navigable Waters Protection Rule (NWPR) was a clear, defensible rule that appropriately balanced the objective, goals, and policies of the CWA for farms and ranches. The Agencies should have kept the NWPR in place, rather than revert to definitions of WOTUS that test the limits of federal authority under the Commerce

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Clause and are not necessary to protect the nation's water. The Agencies can ensure clean water for all Americans through a blend of the CWA's regulatory and non-regulatory approaches, and state and federal action just as Congress intended. It is unnecessary (and unlawful) to define non-navigable, intrastate, mostly dry features that are far removed from navigable waters as "waters of the United States."

The Rule Thrusts Farmers and Ranchers Back Into a World of Costly Uncertainty and Inconsistency.

The 2015 WOTUS Rule dramatically expanded the scope of CWA jurisdiction over land used for normal farming and ranching activities. The 2022 Rule is different only in degree and timing, not kind. The Agencies' aggregation policy potentially allows them to assert jurisdiction over any sometimes-wet feature which, taken together with other sometimes-wet features in the region (broadly defined), have what the Agencies consider to be a "significant nexus" on a "foundational water." But the term "significant nexus" generated significant confusion and inconsistent results under the pre-2015 regime, and this rule makes things worse. Furthermore, the process to arrive at a jurisdictional determination is tortuous and costly. A jurisdictional determination could take between six months and a year to receive, at best, and in the meantime a farmer or rancher cannot proceed with any activity or risk being found to have violated the CWA. Adding insult to injury, the use of case-by-case determinations using highly subjective criteria, threatens to create a seriously unequal playing field, where identical features may be viewed as jurisdictional or not depending upon where the property is located, the season in which it is inspected, and the staff person to which the request is assigned. These are not hallmarks of a dependable, durable, or clear rule. Rather, the Agencies have crafted a rule that that generates arbitrary decision-making as a matter of course due to its lack of clarity.

Furthermore, field experiences suggest that the Agencies are not equipped and staffed to respond to these determinations in a timely manner, increasing the potential for long wait times as farmers and ranchers are forced to seek federal clearance or permits for their ordinary farming activities. Prior to the implementation of the NWPR, a farmer in Florida sought authorization to insert blocks, totaling less than an ½ acre of fill, into existing upland cut ditches on a farm that had been operated for decades. The ditch blocks were needed to improve hydration to a wetland mitigation area. The farmer waited more than a year for a Nationwide Permit before being informed that an archeological study of the farm would be required to comply with federal historical preservation requirements. An archeological study had already been performed and accepted by the state's historical preservation agency, but that study was not acceptable, and a new study would require tens of thousands of dollars and more delays. Shortly thereafter, the NWPR went into effect and staff determined that a permit was no longer required since the project was in upland cut ditches and upstream of the outfall structure for the entire project.

As described above, the Agencies' broad assertion of jurisdiction will make it more difficult for farmers and ranchers to engage in soil conservation and water quality protection activities.

Farmers and ranchers have more incentive than most to preserve topsoil on their land; as such, where land is at risk of erosion, they may want to engage in mitigation activities. Farmers and ranchers also take on projects that provide irrigation support, stormwater management, wildlife habitat, flood control, and nutrient processing that improve overall water quality. But, if they cannot do this without applying for a federal permit, it becomes time- and cost-prohibitive, resulting in environmental degradation, not protection.

This rule threatens to impede farmers' and ranchers' ability to provide safe, affordable, and abundant food, renewable fuel, and fiber to our nation and the world. Their concerns are not hyperbolic, nor are they isolated occurrences. They are lived experiences illustrating the pitfalls of returning to an overly expansive definition of "waters of the United States" and, specifically, an outsized view of what it means for a water to have a "significant nexus."

The Significant Nexus Standard May Lead To Potentially Unlimited Jurisdiction.

While the Agencies have resisted the urge to categorically regulate all tributaries and adjacent waters like they did in the 2015 Rule, the case-by-case approach that they use in this WOTUS rule is no less of an overreach. The Agencies once again resurrect the same broad and confusing significant nexus standard that was the foundation for the 2015 Rule. It is clear the Agencies will just expand their jurisdiction one watershed at a time, instead of by general fiat—but it is only a matter of time until the Agencies will find a significant nexus. This domino effect illustrates the almost limitless jurisdiction that the Agencies will have over private property.

The significant nexus test can be used to assert jurisdiction over tributaries, adjacent wetlands, and basically any "other water" because the rule uses undefined, amorphous terms like "similarly situated," "in the region" and "material influence" that will leave farmers and ranchers guessing about whether there are "waters" on their lands and whether those "waters" are WOTUS. This ambiguity suggests that regulators can exercise subjective judgement in their use of the standard to reach whatever outcomes they believe best serves the public purpose and that farmers and ranchers may not know the outcomes until they are already exposed to civil and criminal liability, including devastating penalties.

Because of the subjective nature of the significant nexus test, regulators' assessments are bound to vary from field office to field office and from case to case. This approach does not give farmers and ranchers fair notice of when the CWA actually applies to their lands or conduct, nor does it provide any assurance against arbitrary or discriminatory enforcement. For these reasons, this rulemaking is unconstitutionally vague.

The Case-By-Case Regulation of Ephemeral Drainages Is Unnecessary.

Much of where we disagree comes down to one classification of "waters": ephemeral drainage features. As previously mentioned, ephemeral drainages are dry land—they are not flowing

rivers or streams. It is simply shocking to property owners to hear that a "tributary" can be interpreted to reach ephemerals and sweep in many features that are part of the area's natural topography. The NWPR provided important clarification regarding the status of ephemeral streams that flowed only in response to precipitation by correctly concluding that they were not WOTUS. The Agencies' rapid about-face in this rulemaking is disappointing, to say the least.

The Agencies failed to define tributary in the first place. The lack of a definition of tributary with measurable, objective criteria sanctions subjective, inconsistent decision-making where lands with similar features and uses will be subject to very different regulatory burdens. This failure means that a determination that a particular feature is a "tributary" could substantially expand or limit the scope of jurisdiction under the CWA over lands, without objective justification for the decision, the very essence of an arbitrary and capricious decision that takes a landowner's property rights without compensation or a proper public purpose.

By failing to provide clarity, the Agencies are forcing farmers to guess which features on their land might be jurisdictional and each potential guess carries substantial risk. Farmers and ranchers may: (1) presume that some portion of their property that carries water only when it rains is a jurisdictional tributary, regardless of its history of use; (2) seek a formal jurisdictional determination from the Corps which will require the assistance of consultants to submit the application for a determination and which may result in an agency decision that requires obtaining a nationwide or an individual permit depending on the agency decision; or (3) take a chance that their normal activities near or in such features may result in unlawful discharges to a WOTUS resulting in civil penalties of nearly $60,000 a day.[1] Even worse, a farmer could face criminal liability with jail time and up to $100,000 a day in fines. With such stiff statutory penalties at stake—including the loss of one's own personal liberty—farmers and ranchers deserve more clarity.

Ultimately, the question is not whether tributaries or ephemeral streams are "important" or may as a scientific matter have some connection with downstream navigable waters; rather, the question is whether they should be considered as waters so integrally important and connected to navigable waters that they should fall within the bounds of federal jurisdiction. As with so many other categories in the rulemaking, the Agencies collapse that distinction. The NWPR was correct to exclude ephemeral streams categorically, and the Agencies are wrong to dismiss that approach.

The Adjacency Category Should Be Limited to Wetlands that Directly Abut Other WOTUS.

The adjacency category is also rife with confusion. First, the rule's approach to "relatively permanent" is not consistent with the plurality's opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), because the Agencies deprive the Court's requirement for a "continuous" connection

[1] See 87 Fed. Reg. 1,676, 1,678 (Jan. 12, 2022).

of all meaning by turning it into a mere "physical connection or ecological connection" test. Further, the criteria for establishing whether a wetland is "adjacent"—such as whether a "shallow" subsurface connection exists or whether wetlands are in reasonably close proximity to a jurisdictional water—stray too far from the plurality's test in *Rapanos* and raise vagueness and fair notice concerns.

We also oppose the significant nexus approach to adjacent wetlands used in this rule. The Agencies' approach of all wetlands as subject to federal regulation = is flatly contrary to Justice Kennedy's requirement that each wetland be judged in its own right to determine whether it (and it alone) bears a significant nexus to traditional navigable waters. This approach expands the reach of the significant nexus test even farther and is even less clearly implementable.

We believe that the Agencies should assert jurisdiction over only those wetlands that are directly abutting and continuous to "waters of the United States," which would provide much needed clarity and be easily interpreted in the field. Only those wetlands that directly touch "waters of the United States" should be considered "adjacent."

The Broad Sweep of the "Other Waters" Category is Problematic

The most obvious example of the rule's expansion of regulatory reach lies in the "other waters" category. This new category would reach many intrastate, non-navigable water features that would previously have been considered "isolated" and not subject to federal jurisdiction.

The rule's application of the significant nexus standard to "other waters," is highly problematic because, if that standard is ever to be applied, it should be to wetlands, and wetlands only. Applying the significant nexus standard elsewhere allows the Agencies to aggregate all similarly situated "other waters" (e.g., prairie potholes or ponds that are not part of a tributary system) across an entire watershed and claim jurisdiction over all such features based on a finding that they collectively perform a single important function for a downstream "foundational" water. This plainly is not what Congress intended in the CWA and seems to be outside what the Supreme Court would allow. Through this rule, countless small wetlands or other small waters that are far removed from traditional navigable waters (including ephemeral tributaries and ditches) or coasts, nevertheless, will be potentially within the scope of federal jurisdiction. These are the features that were previously considered to be subject to individual states' regulations and requirements. This language usurps state authority to areas that are not within federal jurisdiction. This flies in the face of the CWA's legislatively designed concept of cooperative federalism that allows space for both the concerns of the federal government and that of state governments within the same regulatory space.

The Agencies should have withdrawn the "other waters" category. Their ability to aggregate waters together expands the federal reach to every water feature within the United States regardless of the quality of its connection to navigable waters and adjacent wetlands that are clearly within the CWA's jurisdiction. It is absolutely impossible for any farmer or rancher to

know if a jurisdictional "other water" is located on their property even with the assistance of consultants and even with a jurisdictional determination. Jurisdictional determinations are time limited and not perpetual so a farm or ranch that was previously outside federal jurisdiction may be determined to be subject to federal jurisdiction at a later date.

The Biden Administration's Rule is Broader than the 2008 Guidance

The Agencies insist that this rulemaking is not an expansion of federal authority and is no broader than the 2008 Bush Guidance that was released after the Supreme Court decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* and *Rapanos*. Here are a few examples from the preamble that indicate that this is an expansion in scope.

Interpretation of the Relatively Permanent Test: The final rule makes the relatively permanent standard more expansive compared to the post *Rapanos* Guidance, which used the concept of continuous flow for at least one season (typically three months) as a benchmark. The final rule abandons the seasonal concept and does not use any bright line tests (days, weeks, or months). Relatively permanent tributaries have flowing or standing water year-round or continuously during certain times of the year. Relatively permanent waters should not include tributaries with flowing or standing water of short durations in direct response to precipitation. This subtle change to the relatively permanent test greatly expands the areas subject to federal jurisdiction, within every category.

Conversely, because the relatively permanent standard is broader than the approach described in the 2008 guidance some of the exemptions will become narrower. For example, the ditch exclusion appears identical to the exclusion in the 2008 guidance however, as it is applied under this new interpretation of the relatively permanent test—the exclusion becomes far harder to apply and in areas with little to no topographical change, a guarantee that those properties with such ditches will now be subject to federal jurisdiction even if those ditches were originally constructed through uplands.

Adjacent Wetlands Category: The Agencies interpret continuous surface connection to mean a physical connection that does not need to be a continuous hydrologic connection.

Under the relatively permanent standard for adjacent wetlands, wetlands meet the continuous surface connection requirement if they are separated from a relatively permanent impoundment or tributary by a natural berm, bank, dune, or similar natural landform so long as that break does not sever a continuous surface connection and provides evidence of a continuous surface connection. This is broader than the 2008 guidance, which used to equate continuous surface connection with directly abutting and not separated by a berm, dike, or similar feature.

Scope of significant nexus test: Under the 2008 guidance, the Agencies applied the test to a specific reach of a tributary plus wetlands adjacent to that reach. The new rule applies a broader catchment approach. The Agencies will start by identifying where a specific reach flows into a

higher order stream. But rather than looking just at that reach and its adjacent wetlands, the Agencies will look at the combined effect of all lower order tributaries upstream of that point plus all wetlands adjacent to those lower order tributaries.

(A)(5) Category: This category was not even mentioned in the 2008 guidance. The 2008 guidance focuses only on applying the significant nexus test to a specific tributary reach plus its adjacent wetlands, and it says nothing about how to apply the test to waters outside of the tributary system. The new rule applies the significant nexus test to this category, and even though the Agencies say they will "generally" evaluate whether such waters meet the test on an individual basis, the rule on its face allows the Agencies to consider whether waters "alone or in combination with similarly situated [(a)(5)] waters in the region" meet the significant nexus test.

The Exemptions Are Challenging to Use

Ditch Exclusion:

Ditches and similar water features commonly found on farms that are used to collect, convey, or retain water should be excluded from the definition of "waters of the United States." Without adequate drainage, farmlands remain saturated after rain events damaging crops by limiting adequate aeration for crop root development. Drainage ditches and other water management structures can help increase crop yields and ensure better field conditions for timely planting and harvesting. Even in areas without sufficient rainfall, irrigation ditches and canals are needed to connect fields to water supplies and to collect and convey water that leaves fields after irrigation. Put simply, ditches are essential infrastructure for both the irrigation and drainage needed to support American agriculture and ultimately, to feed the United States and the world.

While this rule does provide a ditch exclusion, it is not particularly meaningful or useful because it is limited to features constructed on dry land or upland. Because these features are constructed to convey and sometimes store water, it is typically useful for them to be constructed on naturally higher areas of a property. Historically, ditches and ponds were constructed in the places where water naturally flowed. Most drainage and irrigation systems rely on some passive water movement, powered by gravity, that allows waters to flow from higher to lower ground, whether that is a ditch, farm pond, stock pond, or a tailwater pond. Stormwater moves into these kinds of infrastructure through sheet flow and ephemeral drainages. Depending on the topography of a property, ditch or pond construction sometimes requires excavation to be effective. Such normal farming and ranching activities should not require a federal permit to manage stormwater and irrigation.

***Prior Converted Cropland Exclusion*:**

America's farmers and ranchers strongly support the 2023 Rule's maintaining of the decades-old exclusion for prior converted croplands (PCC), of which there are approximately 53 million

acres in the United States. Farmers and ranchers across the country rely on this critical exclusion which establishes that PCC may be used for any purposes, so long as wetland conditions have not returned. In practice, however, numerous issues have arisen regarding the interpretation and application of the PCC exclusion. For this reason, we have long advocated for a clear, commonsense definition and clarification of PCC in the Agencies' regulations. We welcomed the NWPR's approach to PCC and are disappointed to see that this rule fails to carry forward the NWPR's definition of PCC, which was designed to improve clarity and consistency. For example, the lack of a clear definition of PCC has presented problems in the past regarding when PCC can be "recaptured" and treated as jurisdictional.

The Agencies failed to acknowledge our strong opposition to the application of USDA's "change in use" principle. Additionally, they have failed to clearly convey if PCC that is shifted to non-agricultural use becomes subject to CWA jurisdiction. We have presented these questions to both EPA and Corps officials and have received completely different answers. Incorporating a "change in use" policy into the PCC exclusion would upend nearly 30 years of largely consistent implementation in accordance with the 1993 Rule. While we acknowledge that the Agencies have attempted to make constructive changes, the result fell well short of that goal.

Real World Impacts of an Expansive WOTUS Rule

The Agencies claim that the costs associated with this rule are de minimis. This conclusion can only be reached by failing to consider the entire gamut of costs that landowners will incur. One must consider not only the cost of the permit, but also the expenses for experts needed to navigate the permitting process—such as environmental consultants, attorneys, and engineers. You must also consider the cost of mitigation, which can be exorbitant, and project delays of months and, more likely, years, which makes the process simply untenable for all but the largest and most well-funded of businesses. These costs can amount to a $500/acre or greater decrease in value of the land. Mitigation costs to proceed with development could reach thousands of dollars per linear foot. Additionally, permitting under the CWA triggers review under other federal environmental statutes, such as the Endangered Species Act and the National Historic Preservation Act. Many small businesses are unable to take on these additional costs and farmers and ranchers cannot pass these costs on to their customers as agricultural commodities compete in global markets. Expansive regulatory actions like this new WOTUS definition will exacerbate the affordability challenges that plague many American farm and ranch families. This rule puts us further away from the goal of providing affordable and accessible food and energy. The financial and logistical challenges of compliance with WOTUS adds to the burden of multi-generational farm and ranch families who seek to continue their stewardship of family lands. Many families, faced with the costs of succession and seemingly insurmountable regulatory challenges, make the decision to sell the property, sometimes into public lands programs, but more frequently to real estate investors, both here and abroad, whose long term plans do not include farming and ranching. Rural lands within an hour drive of developing urban and suburban areas are particularly at risk.

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Agencies Improperly Certified the WOTUS Rule

In 1996, Congress amended the Regulatory Flexibility Act to include the Small Business Regulatory Enforcement Fairness Act (SBREFA). This action was in direct response to concerns expressed by the small business community that federal regulations were too numerous, too complex, and too expensive to implement. SBREFA was designed to give small businesses assistance in understanding and complying with regulations and more of a voice in the development of new regulations. The law sets up the infrastructure to require specific engagement with small businesses to discuss the impacts major regulations will have on them. When crafting the WOTUS rule, the Agencies must either certify that the rule "will not, if promulgated, have a significant economic impact on a substantial number of small entities" or prepare a Regulatory Flexibility analysis that would include SBREFA requirements.

Since the impact of this rule will be felt by industry sectors that represent large segments of our national economy, we expected the Agencies to comply with the law and hold formal review panels. Unfortunately, the Agencies failed to do that and improperly certified that the rule would have "de minimis" impacts on any business, let alone small businesses, while vastly expanding the number of businesses that must incur costs of determining whether their activities are subject to regulation through jurisdictional determinations and obtaining permits.

The Small Business Administration's (SBA) Office of Advocacy recognized that the Agencies were going to bypass this important engagement requirement and stepped in to hold meetings for small businesses members. There were several farmers and ranchers, as well as representatives from many other industry sectors, who participated in these meetings. Unfortunately, this was the only opportunity devoted to small businesses and the information collected during these discussions was not included in the regulatory docket—since these were not formal SBREFA panels. The Agencies are required to consider only the information that has been entered into the docket when crafting their rulemaking, so these meetings did nothing to inform the rule.

It is important to note that in the weeks after the SBA hosted these meetings, they sent a letter to the Agencies expressing their disagreement with the certification of the rule. The SBA letter states that they "believe that the Agencies have failed to state a factual basis for its certification that the rule will not have a significant economic impact on a substantial number of small entities. The proposed rule imposes costs directly on small entities, and those costs will be significant for a substantial number of them." The letter is very critical of the Agencies' economic analysis, highlighting their failure to use an appropriate baseline and to quantify the full direct costs to small entities. The letter concluded that the proposed WOTUS rule will have a direct and potentially costly impact on small entities and advised the Agencies to hold the proposed rule in abeyance until they hold a small business review panel. The regulated community was pleased that the SBA, a department within the Biden Administration, came forward to defend small business owners, but it was disheartening to see this effort ignored.

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The Rule Fails to Respect the States' Role in Protecting Waters

Additionally, the rule completely usurps the states' role in protecting our nation's waters. While many aspects of the CWA are unclear, one area of certainty is that Congress intended for the states to play an important role in regulating lands and waters within their borders. The objective of the CWA detailed in section 101B explains that environmental protections are a shared responsibility between the federal government and state governments. This language only solidifies the notion that there is a point where federal jurisdiction ends and state jurisdiction begins. However, this newly finalized WOTUS rule would greatly expand the federal government's role, effectively cutting against Congressional intent under the CWA. It is our belief that the states should retain the authority to protect ephemeral features, not the federal government. This division of responsibility would respect a state's specific knowledge of the waters within that state that are outside federal jurisdiction, but of importance to that state and its people and environment.

No WOTUS Before SCOTUS

One of the most important factors in the WOTUS debate centers around a highly consequential legal case that is currently before the Supreme Court: *Sackett v. EPA*. It is undeniable that this case has the potential to inject greater clarity and certainty into the new WOTUS definition. The question before the High Court is whether the Army Corps can use the significant nexus test to assert jurisdiction. Given all the legitimate legal concerns associated with this regulatory test, there is a strong likelihood that the Court's decision will substantially impact the Agencies' use of the significant nexus test. It defies logic that the Agencies would go ahead with the development and adoption of this rule, knowing that the Supreme Court will hand down a decision, in its current session, which will have significant impact on the law on which the Agencies' based their "durable" rule. Considerable government resources have been expended to craft and adopt this rule, knowing that the work will very likely be revisited when the Agencies have to return to the rule after a decision is handed down. Additionally, introducing a new regulatory definition, which is highly subjective, into an already convoluted and time consuming compliance process, is harmful to the regulated community. As farmers and ranchers plan for each season, we must factor in the costs and delays of the continuing uncertainty caused by this rule and its revisions. Simply put, the Agencies should have waited until a decision was handed down before finalizing this rule.

Conclusion

Our nation's farmers and ranchers are very frustrated that our concerns were not recognized in the finalized rule. Retaining the NWPR would have been a far preferable alternative, given the

certainty and clarity it provided. This new rule only creates more confusion for landowners and will inevitably slow down many of the important decisions driving our economic and environmental sustainability and benefitting our rural communities. This unnecessary regulatory red-tape places a burden on our nation's farmers and ranchers while stripping the states of their historic regulatory role over waters outside federal jurisdiction. Farmers and ranchers want clean water and clear rules, so we can remain focused on what we do best: providing food, fiber and renewable fuel for our nation and the world.